COMPETITION TRIBUNAL
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OTTAWA, ONT. # 132

PUBLIC

CT-2024-010

THE COMPETITION TRIBUNAL

IN THE MATTER OF the *Competition Act*, R.S.C. 1985, c. C-34;

AND IN THE MATTER OF certain conduct of Google Canada Corporation and Google LLC relating to the supply of online advertising technology services in Canada;

AND IN THE MATTER OF an application by the Commissioner of Competition for one or more orders pursuant to section 79 of the *Competition Act*.

B E T W E E N:

COMMISSIONER OF COMPETITION

Applicant

and

GOOGLE CANADA CORPORATION AND GOOGLE LLC

Respondents

BOOK OF AUTHORITIES OF GOOGLE CANADA CORPORATION AND GOOGLE LLC
VOLUME 3 OF 20

August 22, 2025

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

Please see in particular paras. 546-558

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:	)	
THE COMMISSIONER OF COMPETITION Applicant	)	J. Thomas Curry, Jaan Lilles, Paul-Erik Veel, for the Applicant
– and –	)	
CHATR WIRELESS INC. AND ROGERS COMMUNICATIONS INC. Respondents	)	Kent E. Thomson, Anita Banicevic, James D. Bunting, Sean R. Campbell, Nicholas Van Exan, Andrew Carlson, for the 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.

<u>Wind Mobile, Public Mobile and Mobilicity respond to the Chatr launch</u>

[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.

<u>The abuse of dominance complaint</u>

[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.

<u>What is the relevant time period for the contentious ads?</u>

[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 <u>postpaid</u> zone-based unlimited talking and texting.

[190] Public Mobile, Wind Mobile, Chatr and Mobilicity offered <u>prepaid</u> 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 <u>prepaid</u> 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 <u>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</u> (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.

<u>Filtering out hard handoffs</u>

[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.

<u>Indoor dropped call rates</u>

[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.

<u>Does s. 74.01(1)(b) interfere as little as possible with the right to freedom of expression?</u>

[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

Please see in particular para. 87

Attorney General of Canada *Appellant*

v.

Federation of Law Societies of Canada *Respondent*

and

Criminal Lawyers' Association (Ontario), Canadian Civil Liberties Association, Law Society of British Columbia, Canadian Bar Association, Advocates' Society, Barreau du Québec and Chambre des notaires du Québec *Interveners*

Indexed as: Canada (Attorney General) *v.* Federation of Law Societies of Canada

2015 SCC 7

File No.: 35399.

2014: May 13; 2015: February 13.

Present: McLachlin C.J. and LeBel, Abella, Cromwell, Moldaver, Karakatsanis and Wagner JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Constitutional law — Charter of Rights — Right to liberty — Fundamental justice — Search and seizure — Solicitor-client privilege — Lawyer's duty of commitment to client's cause — Whether Canada's anti-money laundering and anti-terrorist financing legislation, as it applies to legal profession, infringes right to be free of unreasonable searches and seizures — Whether legislation infringes right not to be deprived of liberty otherwise than in accordance with principles of fundamental justice — If so, whether infringements justifiable — Canadian Charter of Rights and Freedoms, ss. 1, 7, 8 — Proceeds of Crime (Money Laundering) and Terrorist Financing Act, S.C. 2000, c. 17, ss. 5(i), 5(j), 62, 63, 63.1, 64 — Proceeds of Crime (Money Laundering) and Terrorist Financing Regulations, SOR/2002-184, ss. 11.1, 33.3, 33.4, 33.5, 59.4.

Fédération des ordres professionnels de juristes du Canada *Intimée*

et

Criminal Lawyers' Association (Ontario), Association canadienne des libertés civiles, Law Society of British Columbia, Association du Barreau canadien, Advocates' Society, Barreau du Québec et Chambre des notaires du Québec *Intervenants*

Répertorié : Canada (Procureur général) *c.* Fédération des ordres professionnels de juristes du Canada

2015 CSC 7

N° du greffe : 35399.

2014 : 13 mai; 2015 : 13 février.

Présents : La juge en chef McLachlin et les juges LeBel, Abella, Cromwell, Moldaver, Karakatsanis et Wagner.

EN APPEL DE LA COUR D'APPEL DE LA COLOMBIE-BRITANNIQUE

Droit constitutionnel — Charte des droits — Droit à la liberté — Justice fondamentale — Fouilles, perquisitions et saisies — Secret professionnel de l'avocat — Devoir de l'avocat de se dévouer à la cause du client — Les dispositions de la législation canadienne visant à lutter contre le recyclage des produits de la criminalité et le financement des activités terroristes qui s'appliquent aux avocats portent-elles atteinte au droit à la protection contre les fouilles, les perquisitions et les saisies abusives? — La législation porte-t-elle atteinte au droit de ne pas être privé de sa liberté, sauf en conformité avec les principes de justice fondamentale? — Dans l'affirmative, les atteintes sont-elles justifiables? — Charte canadienne des droits et libertés, art. 1, 7, 8 — Loi sur le recyclage des produits de la criminalité et le financement des activités terroristes, L.C. 2000, c. 17, art. 5i), 5j), 62, 63, 63.1, 64 — Règlement sur le recyclage des produits de la criminalité et le financement des activités terroristes, DORS/2002-184, art. 11.1, 33.3, 33.4, 33.5, 59.4.

To reduce the risk that financial intermediaries may facilitate money laundering or terrorist financing, the *Proceeds of Crime (Money Laundering) and Terrorist Financing Act*, S.C. 2000, c. 17, and the *Proceeds of Crime (Money Laundering) and Terrorist Financing Regulations*, SOR/2002-184, impose duties on financial intermediaries, including advocates and notaries in Quebec and barristers and solicitors in all other provinces. The legislation requires financial intermediaries to collect, record and retain material, including information verifying the identity of those on whose behalf they pay or receive money. It puts in place an agency to oversee compliance, the Financial Transactions and Reports Analysis Centre of Canada, and allows that agency to search for and seize that material. It imposes fines and penal consequences for non-compliance. Sections 5(*i*) and 5(*j*) of the Act make professions specified in the Regulations subject to the record keeping and verification requirements. Section 33.3 of the Regulations makes legal counsel subject to the Act when receiving or paying funds or giving instructions to pay funds other than in respect of professional fees, disbursements, expenses or bail or when doing so on behalf of their employer. Sections 33.4 and 33.5 of the Regulations impose record keeping requirements. Section 59.4 of the Regulations imposes identification requirements. Section 11.1 of the Regulations sets out the information that must be collected and retained in the course of verifying identity. Sections 62, 63 and 63.1 of the Act provide for search and seizure powers. Section 64 provides limitations on the search and seizure powers in relation to material for which solicitor-client privilege is claimed.

Pour réduire le risque que les intermédiaires financiers facilitent le recyclage des produits de la criminalité ou le financement des activités terroristes, la *Loi sur le recyclage des produits de la criminalité et le financement des activités terroristes*, L.C. 2000, c. 17, et le *Règlement sur le recyclage des produits de la criminalité et le financement des activités terroristes*, DORS/2002-184, imposent des obligations aux intermédiaires financiers, notamment aux avocats et aux notaires du Québec et aux avocats de toutes les autres provinces. Selon la législation, les intermédiaires financiers doivent recueillir et conserver des documents et des renseignements afin de vérifier l'identité des personnes pour le compte desquelles ils paient ou reçoivent de l'argent. La législation constitue un organisme chargé de contrôler le respect de la Loi, en l'occurrence le Centre d'analyse des opérations et déclarations financières du Canada, et lui permet de chercher ces documents et de les saisir. Elle impose des amendes et des sanctions pénales en cas de non-respect de la loi. Les alinéas 5*i*) et 5*j*) soumettent les professions mentionnées dans le Règlement aux obligations de tenue de documents et de vérification. L'article 33.3 du Règlement assujettit les conseillers juridiques à la Loi lorsqu'ils reçoivent ou paient des fonds ou donnent des instructions pour le paiement de fonds (autres que ceux reçus ou payés à titre d'honoraires, de débours, de dépenses ou de cautionnement ou lorsque le conseiller juridique exerce une de ces activités pour le compte de son employeur). Les articles 33.4 et 33.5 du Règlement imposent des obligations en matière de tenue de documents. L'article 59.4 du Règlement impose des obligations d'identification. L'article 11.1 du Règlement énumère les renseignements qui doivent être recueillis et conservés au cours de la vérification de l'identité. Les articles 62, 63 et 63.1 de la Loi confèrent des pouvoirs de fouille, de perquisition et de saisie. L'article 64, quant à lui, prévoit certaines restrictions à ces pouvoirs dans le cas de documents à l'égard desquels le secret professionnel de l'avocat est revendiqué.

The Federation of Law Societies commenced a constitutional challenge to the legislation as it applies to the legal profession. The application judge of the Supreme Court of British Columbia held that the challenged provisions violate s. 7 of the *Charter* and the infringement is not saved under s. 1 of the *Charter*. She did not address whether the provisions infringe s. 8 of the *Charter*. She read down ss. 5(*i*), 5(*j*), 62, 63 and 63.1 of the Act and s. 11.1 of the Regulations to exclude legal counsel and legal firms. She struck down s. 64 of the Act, and ss. 33.3, 33.4, 33.5 and 59.4 of the Regulations. The British Columbia Court of Appeal dismissed an appeal.

La Fédération des ordres professionnels de juristes a attaqué la constitutionnalité des dispositions de la législation qui s'appliquent aux avocats. La juge de première instance de la Cour suprême de la Colombie-Britannique a conclu que les dispositions contestées violent l'art. 7 de la *Charte* et que cette violation n'est pas sauvegardée par l'article premier de la *Charte*. Elle n'a pas décidé si les dispositions contreviennent à l'art. 8 de la *Charte*. Elle a donné une interprétation atténuée des al. 5*i*) et 5*j*) et des art. 62, 63 et 63.1 de la Loi ainsi que de l'art. 11.1 du Règlement pour exclure les conseillers juridiques et les cabinets d'avocats. Elle a invalidé l'art. 64 de la Loi de même que les art. 33.3, 33.4, 33.5 et 59.4 du Règlement. La Cour d'appel de la Colombie-Britannique a rejeté l'appel.

Held: The appeal should be allowed in part. That part of the application judge's order declaring that ss. 5(*i*) and 5(*j*) of the Act are inconsistent with the Constitution of Canada and are of no force and effect to the extent that the reference in those subsections to "persons and entities" includes legal counsel and law firms should be set aside. Sections 5(*i*) and 5(*j*) should be struck from that part of the application judge's order declaring that ss. 5(*i*), 5(*j*), 62, 63 and 63.1 of the Act are read down to exclude legal counsel and law firms from the operation of those sections. The appeal should otherwise be dismissed.

Per LeBel, Abella, Cromwell, Karakatsanis and Wagner JJ.: Sections 5(*i*) and 5(*j*) of the Act simply authorize the making of regulations and do not on their own infringe the *Charter*.

Sections 62, 63 and 63.1 of the Act, to the extent that they apply to documents in the possession of legal counsel and legal firms, and s. 64 of the Act infringe s. 8 of the *Charter*. These provisions have a predominantly criminal law character rather than an administrative law character. They facilitate detecting and deterring criminal offences, and investigating and prosecuting criminal offences. There are penal sanctions for non-compliance. These provisions authorize sweeping searches of law offices which inherently risks breaching solicitor-client privilege. The expectation of privacy in solicitor-client privileged communications is invariably high regardless of the context and nothing about the regulatory context of the Act or the fact that a regulatory agency undertakes the searches diminishes that expectation. The principles governing searches of law offices set out in *Lavallee, Rackel & Heintz v. Canada (Attorney General)*, 2002 SCC 61, [2002] 3 S.C.R. 209, apply and these provisions do not comply with those standards. Solicitor-client privilege must remain as close to absolute as possible. There must be a stringent norm to ensure protection and legislative provisions must interfere with the privilege no more than absolutely necessary. These provisions wrongly transfer the burden of protecting solicitor-client privilege to lawyers. Nothing requires notice to clients and a client may not be aware that his or her privilege is threatened. There is no protocol for independent legal intervention when it is not feasible to notify a client. A judge has no discretion to assess a claim of privilege on his or her own motion. Unless the search is of a lawyer's home office, nothing requires prior judicial authorization. Searches are not contingent upon proof that there are no reasonable alternatives. The provisions allow warrantless searches, which are presumptively unreasonable. Examining and copying documents proceeds until privilege is asserted — an approach that greatly elevates the risk of a breach of privilege. Claiming privilege requires revealing a client's name

Arrêt : Le pourvoi est accueilli en partie. Est annulée la partie de l'ordonnance où la juge de première instance déclare les al. 5*i*) et 5*j*) de la Loi incompatibles avec la Constitution du Canada et inopérants dans la mesure où les « personnes et les entités » mentionnées à ces alinéas comprennent les conseillers juridiques et les cabinets d'avocats. Les alinéas 5*i*) et 5*j*) sont supprimés de la partie de l'ordonnance donnant à ces alinéas de même qu'aux art. 62, 63 et 63.1 de la Loi une interprétation atténuée pour soustraire à leur application les conseillers juridiques et les cabinets d'avocats. Pour le reste, le pourvoi est rejeté.

Les juges LeBel, Abella, Cromwell, Karakatsanis et Wagner : Les alinéas 5*i*) et 5*j*) de la Loi ne font qu'autoriser la prise de règlements et ne violent pas à eux seuls la *Charte*.

Les articles 62, 63 et 63.1 de la Loi, dans la mesure où ils s'appliquent aux documents en la possession d'un conseiller juridique ou d'un cabinet d'avocats, et l'art. 64 de la Loi contreviennent à l'art. 8 de la *Charte*. Ces dispositions ont un caractère principalement pénal plutôt qu'administratif. Elles aident à détecter et à décourager les infractions criminelles et facilitent les enquêtes et les poursuites relatives à ces infractions. Des sanctions pénales sont imposées en cas de non-respect de la loi. Ces dispositions autorisent une perquisition approfondie du cabinet d'avocats qui risque, de par sa nature, de violer le secret professionnel de l'avocat. L'attente à l'égard de la confidentialité des communications protégées par le secret professionnel de l'avocat est invariablement élevée, peu importe le contexte, et aucun élément du contexte réglementaire de la Loi ni le fait qu'un organisme de réglementation procède aux perquisitions n'a pour effet de diminuer cette attente. Les principes en matière de perquisition d'un cabinet d'avocats qui sont énoncés dans *Lavallee, Rackel & Heintz c. Canada (Procureur général)*, 2002 CSC 61, [2002] 3 R.C.S. 209, s'appliquent et les dispositions en cause ne respectent pas ces normes. Le secret professionnel de l'avocat doit demeurer aussi absolu que possible. Il doit exister une norme rigoureuse pour assurer sa protection et les dispositions législatives ne doivent pas porter atteinte au secret professionnel plus que ce qui est absolument nécessaire. Ces dispositions déplacent à tort aux avocats le fardeau de protéger le privilège. Rien n'exige qu'un avis soit donné au client et il est possible que le client ne sache même pas que son privilège est menacé. Aucun protocole n'est prévu pour permettre une intervention légale indépendante lorsqu'il est impossible d'aviser le client. Le juge n'a pas le pouvoir discrétionnaire d'apprécier de son propre chef le secret professionnel revendiqué. Rien n'exige qu'on obtienne une autorisation judiciaire avant de perquisitionner, sauf and address even though this information may be subject to privilege. The search powers in ss. 62, 63 and 63.1 as applied to lawyers, along with the inadequate protection of solicitor-client privilege provided by s. 64, constitute a very significant limitation of the right to be free of unreasonable searches and seizures.

Section 11.1 of the Regulations, to the extent that it applies to legal counsel and legal firms, and the other provisions of the Regulations in issue in this appeal infringe s. 7 of the *Charter*. The liberty interests of lawyers are infringed because lawyers are liable to imprisonment if they do not comply with the requirements of the Act and Regulations. It is not necessary to determine whether the liberty interests of clients are infringed.

It should be recognized as a principle of fundamental justice that the state cannot impose duties on lawyers that undermine their duty of commitment to their clients' causes. Principles of fundamental justice have three characteristics. They must be a legal principle; there must be significant societal consensus that they are fundamental to the way in which the legal system ought fairly to operate; and, they must be sufficiently precise so as to yield a manageable standard against which to measure deprivations of life, liberty or security of the person. The lawyer's duty of commitment to the client's cause meets this test. First, it is a normative legal principle and a basic tenet of our legal system. It has been recognized as a distinct element of a lawyer's broader common law duty of loyalty. Second, jurisprudence demonstrates that the principle is sufficiently precise to provide a workable standard. It does not countenance a lawyer's involvement in, or facilitation of, illegal activities and it is consistent with a lawyer taking appropriate steps to ensure that his or her services are not used for improper ends. Third, there is overwhelming evidence of a strong and wide-spread consensus concerning the fundamental importance in democratic states of protection against state interference with

si la perquisition a lieu dans un cabinet à domicile. Les perquisitions ne sont pas subordonnées à la preuve qu'il n'existe aucune solution de rechange raisonnable. Les dispositions autorisent les perquisitions sans mandat, qui sont présumées abusives. L'examen et la reproduction des documents se poursuivent jusqu'à ce que le secret professionnel soit invoqué, ce qui augmente considérablement le risque que le secret professionnel soit violé. Pour revendiquer le secret professionnel, il faut révéler les nom et adresse du client même s'il se peut que ces renseignements soient protégés par le secret professionnel. Les pouvoirs de perquisition et de fouille qui sont prévus aux art. 62, 63 et 63.1 et qui sont exercés à l'endroit des avocats, conjugués à la protection insuffisante que l'art. 64 accorde au secret professionnel de l'avocat, constituent une restriction considérable du droit d'être protégé contre les fouilles, les perquisitions et les saisies abusives.

L'article 11.1 du Règlement, dans la mesure où il s'applique aux conseillers juridiques et aux cabinets d'avocats, ainsi que les autres dispositions du Règlement en litige dans le présent pourvoi violent l'art. 7 de la *Charte*. Il y a atteinte au droit à la liberté de l'avocat parce que ce dernier s'expose à l'emprisonnement s'il ne se conforme pas aux exigences de la Loi et du Règlement. Point n'est besoin de décider s'il y a atteinte au droit à la liberté des clients.

L'impossibilité pour l'État d'imposer aux avocats des obligations qui minent leur devoir de se dévouer à la cause de leurs clients devrait être reconnue comme principe de justice fondamentale. Le principe de justice fondamentale présente trois caractéristiques. Il doit s'agir d'un principe juridique à l'égard duquel il existe un consensus substantiel dans la société sur le fait que ce principe est essentiel au bon fonctionnement du système de justice, et ce principe doit être suffisamment précis pour constituer une norme fonctionnelle permettant d'évaluer l'atteinte à la vie, à la liberté ou à la sécurité de la personne. Le devoir de l'avocat de se dévouer à la cause du client satisfait à ce critère. Premièrement, c'est un principe juridique normatif et un précepte fondamental de notre système juridique. Il a été reconnu comme un élément distinct du devoir général de loyauté incombant à l'avocat en common law. Deuxièmement, la jurisprudence démontre que ce principe est assez précis pour constituer une norme pratique. Il ne permet pas à l'avocat de participer à des activités illégales ou de les faciliter et il s'accorde parfaitement avec la prise, par l'avocat, des mesures qui s'imposent pour éviter que ses services soient utilisés à des fins illégitimes. Troisièmement, une preuve the lawyer's commitment to his or her client's cause. The duty is fundamental to the solicitor-client relationship and how the state and the citizen interact in legal matters. The lawyer's duty of commitment to the client's cause is essential to maintaining confidence in the integrity of the administration of justice.

Subject to justification, the state cannot impose obligations on lawyers that undermine their compliance with the duty, either in fact or in the perception of a reasonable person. The legal profession has developed practice standards relating to the subjects addressed by the Act and Regulations that are narrower in scope. Although these standards cannot set the constitutional parameters for legislation, they are evidence of a strong consensus in the profession as to what ethical practice in relation to these issues requires. Viewed in this light, the legislation requires lawyers to gather and retain considerably more information than the profession thinks is needed for ethical and effective client representation. This, coupled with the inadequate protection of solicitor-client privilege, undermines a lawyer's ability to comply with the duty of commitment to the client's cause. The lawyer is required to create and preserve records not required for ethical and effective representation, in the knowledge that solicitor-client confidences contained in these records are not adequately protected against searches and seizures authorized by the legislation. A reasonable and informed person, thinking the matter through, would perceive that these provisions are inconsistent with the lawyer's duty of commitment to the client's cause. The scheme taken as a whole limits the liberty of lawyers in a manner that is not in accordance with the principle of fundamental justice relating to the lawyer's duty of committed representation.

The infringements of ss. 7 and 8 of the *Charter* are not justified under s. 1 of the *Charter*. Sections 62, 63, 63.1 and 64 of the Act fail the minimal impairment test. There are other less drastic means to pursue the objectives of combating money laundering and terrorist financing. The provisions of the Regulations in issue in this appeal fail the proportionality test.

Per McLachlin C.J. and Moldaver J.: There is agreement with Cromwell J.'s reasons insofar as they relate to

abondante établit l'existence d'un vaste et solide consensus au sujet de l'importance fondamentale, dans les États démocratiques, d'empêcher que l'État nuise au dévouement de l'avocat à la cause de son client. Ce devoir est un aspect fondamental de la relation avocat-client et de l'interaction entre l'État et le citoyen dans des dossiers juridiques. Le devoir de l'avocat de se dévouer à la cause du client est nécessaire pour préserver la confiance dans l'intégrité de l'administration de la justice.

L'État ne peut, sous réserve d'une justification, imposer aux avocats des obligations qui entravent leur respect de ce devoir, soit dans les faits, soit aux yeux d'une personne raisonnable. La profession juridique a établi des normes de pratique plus restreintes relativement aux thèmes visés par la Loi et le Règlement. Ces normes ne sauraient fixer les paramètres constitutionnels d'une loi, mais elles témoignent d'un solide consensus au sein de la profession en ce qui a trait aux normes déontologiques que commandent ces enjeux. Vue sous cet angle, la législation oblige les avocats à recueillir et à conserver beaucoup plus de renseignements que ce que la profession estime nécessaire pour la représentation éthique et efficace du client. Ce fait, conjugué à la protection insuffisante du secret professionnel de l'avocat, mine la capacité de ce dernier à respecter son devoir de se dévouer à la cause du client. L'avocat est tenu de créer et de conserver des documents qui ne sont pas nécessaires à une représentation éthique et efficace tout en sachant que les renseignements visés par son secret professionnel qui figurent dans ces documents ne bénéficient pas d'une protection convenable contre les perquisitions et saisies autorisées par la législation. La personne raisonnable et bien informée examinant la question en profondeur estimerait que ces dispositions sont incompatibles avec le devoir de l'avocat de se dévouer à la cause du client. Pris dans son ensemble, le régime restreint la liberté des avocats d'une manière qui n'est pas conforme au principe de justice fondamentale concernant le devoir de représentation dévouée de l'avocat.

Les atteintes aux art. 7 et 8 de la *Charte* ne sont pas justifiées au sens de l'article premier de la *Charte*. Les articles 62, 63, 63.1 et 64 de la Loi ne satisfont pas au critère de l'atteinte minimale. Il existe d'autres moyens moins radicaux de poursuivre les objectifs de la lutte contre le recyclage des produits de la criminalité et le financement des activités terroristes. Les dispositions du Règlement en litige dans le présent pourvoi ne satisfont pas au critère de proportionnalité.

La juge en chef McLachlin et le juge Moldaver : Il y a accord avec les motifs du juge Cromwell portant sur

s. 8 of the *Charter*. However, to the extent that the s. 7 interests of the lawyer are engaged, the lawyer's duty of commitment to the client's cause lacks sufficient certainty to constitute a principle of fundamental justice. The lawyer's commitment does not provide a workable constitutional standard because it will vary with the nature of the retainer and other circumstances. Solicitor-client privilege has already been recognized as a constitutional norm and breach of this principle of fundamental justice is sufficient to establish the potential deprivation of liberty that violates s. 7 of the *Charter*.

l'art. 8 de la *Charte*. Toutefois, dans la mesure où les droits garantis à l'avocat par l'art. 7 entrent en jeu, le devoir de l'avocat de se dévouer à la cause du client n'est pas suffisamment certain pour constituer un principe de justice fondamentale. Le dévouement de l'avocat ne fournit pas une norme constitutionnelle pratique parce qu'il varie selon la nature du mandat ainsi que d'autres facteurs. Le secret professionnel de l'avocat a déjà été reconnu comme une norme constitutionnelle et la transgression de ce principe de justice fondamentale suffit pour établir la privation potentielle de liberté qui viole l'art. 7 de la *Charte*.

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By Cromwell J.

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181, 297 C.C.C. (3d) 429, 2 C.R. (7th) 324, 278 C.R.R. (2d) 273, [2013] 5 W.W.R. 1, [2013] B.C.J. No. 632 (QL), 2013 CarswellBC 812 (WL Can.), affirming a decision of Gerow J., 2011 BCSC 1270, 25 B.C.L.R. (5th) 265, 339 D.L.R. (4th) 48, 48 Admin. L.R. (5th) 285, 89 C.R. (6th) 80, 244 C.R.R. (2d) 129, [2012] 2 W.W.R. 758, [2011] B.C.J. No. 1779 (QL), 2011 CarswellBC 2436 (WL Can.). Appeal allowed in part.

Christopher Rupar and *Jan Brongers*, for the appellant.

John J. L. Hunter, *Q.C.*, and *Roy W. Millen*, for the respondent.

Michal Fairburn and *Justin Safayeni*, for the intervener the Criminal Lawyers' Association (Ontario).

Mahmud Jamal, *David Rankin* and *Pierre-Alexandre Henri*, for the intervener the Canadian Civil Liberties Association.

Leonard T. Doust, *Q.C.*, and *Michael A. Feder*, for the intervener the Law Society of British Columbia.

Craig A. B. Ferris and *Laura Bevan*, for the intervener the Canadian Bar Association.

Paul D. Stern and *Robert A. Centa*, for the intervener the Advocates' Society.

Raymond Doray and *Loïc Berdnikoff*, for the interveners Barreau du Québec and Chambre des notaires du Québec.

The judgment of LeBel, Abella, Cromwell, Karakatsanis and Wagner JJ. was delivered by

CROMWELL J. —

I. Introduction

[1] Lawyers must keep their clients' confidences and act with commitment to serving and protecting

L.R. (5th) 181, 297 C.C.C. (3d) 429, 2 C.R. (7th) 324, 278 C.R.R. (2d) 273, [2013] 5 W.W.R. 1, [2013] B.C.J. No. 632 (QL), 2013 CarswellBC 812 (WL Can.), qui a confirmé une décision de la juge Gerow, 2011 BCSC 1270, 25 B.C.L.R. (5th) 265, 339 D.L.R. (4th) 48, 48 Admin. L.R. (5th) 285, 89 C.R. (6th) 80, 244 C.R.R. (2d) 129, [2012] 2 W.W.R. 758, [2011] B.C.J. No. 1779 (QL), 2011 CarswellBC 2436 (WL Can.). Pourvoi accueilli en partie.

Christopher Rupar et *Jan Brongers*, pour l'appelant.

John J. L. Hunter, *c.r.*, et *Roy W. Millen*, pour l'intimée.

Michal Fairburn et *Justin Safayeni*, pour l'intervenante Criminal Lawyers' Association (Ontario).

Mahmud Jamal, *David Rankin* et *Pierre-Alexandre Henri*, pour l'intervenante l'Association canadienne des libertés civiles.

Leonard T. Doust, *c.r.*, et *Michael A. Feder*, pour l'intervenante Law Society of British Columbia.

Craig A. B. Ferris et *Laura Bevan*, pour l'intervenante l'Association du Barreau canadien.

Paul D. Stern et *Robert A. Centa*, pour l'intervenante Advocates' Society.

Raymond Doray et *Loïc Berdnikoff*, pour les intervenants le Barreau du Québec et la Chambre des notaires du Québec.

Version française du jugement des juges LeBel, Abella, Cromwell, Karakatsanis et Wagner rendu par

LE JUGE CROMWELL —

I. Introduction

[1] Les avocats doivent garder secrètes les confidences de leurs clients et se dévouer au service et

their clients' legitimate interests. Both of these duties are essential to the due administration of justice. However, some provisions of Canada's anti-money laundering and anti-terrorist financing legislation are repugnant to these duties. They require lawyers, on pain of imprisonment, to obtain and retain information that is not necessary for ethical legal representation and provide inadequate protection for the client's confidences subject to solicitor-client privilege. I agree with the British Columbia courts that these provisions are therefore unconstitutional. They unjustifiably limit the right to be free of unreasonable searches and seizures under s. 8 of the *Canadian Charter of Rights and Freedoms* and the right under s. 7 of the *Charter* not to be deprived of liberty otherwise than in accordance with the principles of fundamental justice.

à la défense de leurs intérêts légitimes. Ces deux obligations sont essentielles à la bonne administration de la justice. Toutefois, certaines dispositions de la législation canadienne visant à lutter contre le recyclage des produits de la criminalité et le financement des activités terroristes sont incompatibles avec ces obligations. Elles obligent les avocats, sous peine d'emprisonnement, à recueillir et à conserver des renseignements qui ne sont pas nécessaires à la représentation éthique de leur client et elles ne protègent pas suffisamment ses confidences visées par le secret professionnel. Je souscris à l'opinion des tribunaux de la Colombie-Britannique que ces dispositions sont de ce fait inconstitutionnelles. Elles limitent de façon injustifiable le droit à la protection contre les fouilles, les perquisitions et les saisies abusives garanti par l'art. 8 de la *Charte canadienne des droits et libertés* ainsi que le droit, reconnu à l'art. 7 de la *Charte*, de ne pas être privé de sa liberté, sauf en conformité avec les principes de justice fondamentale.

II. Overview and Background

A. *Overview*

[2] There is a risk that financial intermediaries — those who handle funds on behalf of others — may facilitate money laundering or terrorist financing. To reduce that risk, Canada's anti-money laundering and anti-terrorist financing legislation imposes duties on financial intermediaries, including lawyers, accountants, life insurance brokers, securities dealers and others. They must collect information in order to verify the identity of those on whose behalf they pay or receive money, keep records of the transactions, and establish internal programs to ensure compliance. The legislation also subjects financial intermediaries, including lawyers, to searches and seizures of the material that they are required to collect, record and retain.

II. Survol et contexte

A. *Survol*

[2] Il existe un risque que les intermédiaires financiers — ceux qui manipulent des fonds pour le compte d'autrui — facilitent le recyclage des produits de la criminalité ou le financement des activités terroristes. Pour réduire ce risque, la législation canadienne visant à lutter contre le recyclage des produits de la criminalité et le financement des activités terroristes impose des obligations aux intermédiaires financiers, notamment aux avocats, comptables, courtiers d'assurance-vie et courtiers en valeurs mobilières. Ils doivent recueillir des renseignements afin de vérifier l'identité des personnes pour le compte desquelles ils paient ou reçoivent de l'argent, tenir des relevés des opérations et établir des programmes internes pour assurer le respect de la loi. La législation assujettit également les intermédiaires financiers, y compris les avocats, à la perquisition et à la saisie des documents qu'ils sont tenus de recueillir et de conserver.

[3] Lawyers object to these provisions and the Federation of Law Societies of Canada ("Federation"),

[3] Les avocats s'opposent à ces dispositions et la Fédération des ordres professionnels de juristes du

supported by several interveners, challenges them on constitutional grounds. The Federation says that the scheme makes lawyers unwilling state agents. They are required to obtain and retain information about their clients. They must do this within a scheme that authorizes unreasonable searches and seizures and provides inadequate protections for solicitor-client privilege. This, the Federation argues, turns law offices into archives for use by the police and prosecution. The provisions therefore violate both s. 7 and s. 8 of the *Charter*.

Canada (« Fédération »), avec l'appui de plusieurs intervenants, les attaque en invoquant des motifs d'ordre constitutionnel. La Fédération affirme que le régime fait des avocats des agents de l'État contre leur gré. Ils sont tenus de recueillir et de conserver des renseignements sur leurs clients, et ce, dans le cadre d'un régime qui autorise des fouilles, perquisitions et saisies abusives et qui ne protège pas suffisamment le secret professionnel de l'avocat. Selon la Fédération, les cabinets d'avocats deviennent ainsi des dépôts d'archives à la disposition de la police et de la poursuite. Les dispositions en cause violent donc à la fois l'art. 7 et l'art. 8 de la *Charte*.

[4] The British Columbia courts agreed with the Federation that the provisions violate s. 7 of the *Charter* but they did not address the s. 8 challenge.

[4] Les tribunaux de la Colombie-Britannique ont convenu avec la Fédération que les dispositions violent l'art. 7 de la *Charte*, mais ils n'ont pas tranché la contestation fondée sur l'art. 8.

[5] The Attorney General of Canada appeals and the Chief Justice has stated constitutional questions which I have reproduced at the conclusion of my reasons. The issues raised by the appeal and my resolution of them are as follows:

1. Do the provisions infringe the s. 8 *Charter* right to be free of unreasonable searches and seizures?

[5] Le procureur général du Canada a formé le présent pourvoi et la Juge en chef a formulé une liste de questions constitutionnelles que j'ai reproduites à la fin de mes motifs. Voici les questions soulevées par le pourvoi et mes réponses à ces questions :

1. Les dispositions portent-elles atteinte au droit à la protection contre les fouilles, les perquisitions et les saisies abusives garanti par l'art. 8 de la *Charte*?

[6] In my opinion, the search provisions in the legislation do not provide the constitutionally required protection for solicitor-client privilege and, as a result, infringe the s. 8 *Charter* right to be free of unreasonable searches and seizures.

[6] À mon avis, les dispositions de la législation relatives aux fouilles et aux perquisitions n'assurent pas la protection exigée par la Constitution en ce qui concerne le secret professionnel de l'avocat et, par conséquent, elles portent atteinte au droit à la protection contre les fouilles, les perquisitions et les saisies abusives garanti par l'art. 8 de la *Charte*.

2(a). With respect to s. 7 of the *Charter*, do the provisions limit lawyers' and/or clients' right to liberty?

2a). En ce qui concerne l'art. 7 de la *Charte*, les dispositions limitent-elles le droit à la liberté des avocats et/ou des clients?

[7] The provisions limit the liberty interests of lawyers. It is not necessary to decide whether clients' liberty interests are also engaged.

[7] Les dispositions limitent le droit à la liberté des avocats. Il n'est pas nécessaire de décider si celui des clients entre aussi en jeu.

2(b). Is that limitation in accordance with the principles of fundamental justice in relation to (i) solicitor-client privilege or (ii) the independence of the bar?

[8] The provisions, taken as a whole, interfere with the lawyer's duty of commitment to the client's cause, which, I conclude, is a principle of fundamental justice. Given my conclusion concerning s. 8, there is no need to conduct a separate analysis relating to the proposed principle of fundamental justice relating to solicitor-client privilege.

3. Are any limitations of rights under ss. 7 or 8 demonstrably justified as required by s. 1 of the *Charter*?

[9] The Attorney General failed to demonstrate that these limitations of *Charter* rights are demonstrably justified in a free and democratic society and they are therefore not saved by s. 1 of the *Charter*.

B. *The Legislation*

[10] The legislative scheme out of which this appeal arises is complex and a good grasp of how its provisions affect lawyers and clients is necessary in order to understand the issues on appeal.

[11] Laundering the proceeds of crime and financing terrorist activity are serious crimes: *Criminal Code*, R.S.C. 1985, c. C-46, ss. 462.31, 83.02 and 83.03. The *Proceeds of Crime (Money Laundering) and Terrorist Financing Act*, S.C. 2000, c. 17, seeks to detect and deter these crimes and to facilitate their investigation and prosecution: s. 3. The Act pursues these objectives in three main ways: by establishing record keeping and client identification standards, by requiring reporting from financial intermediaries, and by putting in place an agency to oversee compliance — the Financial Transactions and Reports Analysis Centre of Canada ("FINTRAC").

2b). Cette restriction est-elle conforme aux principes de justice fondamentale en ce qui concerne (i) le secret professionnel de l'avocat ou (ii) l'indépendance du barreau?

[8] Considérées dans leur ensemble, ces dispositions nuisent à l'accomplissement du devoir de l'avocat de se dévouer à la cause du client, devoir qui, à mon sens, constitue un principe de justice fondamentale. Vu ma conclusion concernant l'art. 8, point n'est besoin d'analyser séparément le principe proposé de justice fondamentale qui a trait au secret professionnel de l'avocat.

3. Peut-on démontrer la justification de restrictions aux droits reconnus par les art. 7 ou 8, comme l'exige l'article premier de la *Charte*?

[9] Le procureur général n'a pas démontré la justification des restrictions ainsi apportées à des droits garantis par la *Charte* dans le cadre d'une société libre et démocratique, et elles ne sont donc pas sauvegardées par l'article premier de la *Charte*.

B. *La législation*

[10] Le régime législatif à l'origine du présent pourvoi est complexe et il faut bien saisir l'incidence de ses dispositions sur les avocats et les clients pour comprendre les questions portées en appel.

[11] Le recyclage des produits de la criminalité et le financement des activités terroristes sont des crimes graves (*Code criminel*, L.R.C. 1985, c. C-46, art. 462.31, 83.02 et 83.03). La *Loi sur le recyclage des produits de la criminalité et le financement des activités terroristes*, L.C. 2000, c. 17, a pour objet de détecter et de décourager ces crimes en plus de faciliter les enquêtes et les poursuites relatives à ceux-ci (art. 3). La Loi poursuit ces objectifs de trois principales manières : en fixant des normes de tenue de documents et d'identification des clients, en soumettant les intermédiaires financiers à des obligations de déclaration et en constituant un organisme chargé de contrôler le respect de la Loi, en l'occurrence le Centre d'analyse des opérations et déclarations financières du Canada (« CANAFE »).

[12] Regulations made under the Act particularize how the legislative scheme applies to legal counsel: the *Proceeds of Crime (Money Laundering) and Terrorist Financing Regulations*, SOR/2002-184. The Act defines "legal counsel" to mean an advocate or a notary in the province of Quebec and in every other province a barrister or solicitor: s. 2. I will use the term "lawyer" to refer to all legal professionals who are subject to the regime. The relevant provisions of the Act and the Regulations are set out in the Appendix. The rationale for requiring lawyers to comply with client identification and record keeping requirements, according to the Attorney General's submissions, is to deter illicit transactions and, if such transactions occur, to help establish a paper trail that, with the proper judicial authorization, could be accessed by law enforcement: A.F., at para. 17. The record keeping requirements deter illicit transactions in at least two ways. They help ensure that lawyers do not become unwitting dupes of clients who wish to use them to facilitate illicit transactions and make it harder for clients to engage in such activities through their lawyers.

[12] Les règlements pris en application de la Loi exposent en détail la façon dont le régime législatif s'applique aux conseillers juridiques (*Règlement sur le recyclage des produits de la criminalité et le financement des activités terroristes*, DORS/2002-184). La Loi définit comme suit le « conseiller juridique » : dans la province de Québec, un avocat ou un notaire et, dans les autres provinces, un *barrister* ou un *solicitor* (art. 2). Je vais employer le mot « avocat » pour désigner tous les professionnels du droit assujettis à ce régime. Les dispositions applicables de la Loi et du Règlement sont reproduites en annexe. D'après les observations du procureur général, on exige des avocats qu'ils se conforment aux obligations d'identifier leur client et de tenir des documents pour décourager les opérations illicites et, si une telle opération a lieu, pour aider à créer une piste documentaire à laquelle auraient accès les forces de l'ordre après avoir obtenu en bonne et due forme l'autorisation d'un juge (m.a., par. 17). Les obligations de tenue de documents découragent les opérations illicites d'au moins deux façons : elles contribuent à empêcher que les avocats ne soient dupés par des clients qui veulent se servir d'eux pour faciliter ces opérations et font en sorte qu'il est plus difficile pour les clients de se livrer à pareilles activités par l'entremise de leurs avocats.

[13] Here is an overview of the most relevant provisions of the Act and Regulations affecting lawyers.

[13] Voici un survol des dispositions les plus pertinentes de la Loi et du Règlement qui touchent les avocats.

(1) <u>Gathering Information to Verify Identity</u>

(1) <u>Cueillette de renseignements en vue de vérifier l'identité</u>

[14] Turning first to verification, the Act requires lawyers to identify persons and entities on whose behalf they act as financial intermediaries: s. 6.1; Regulations, s. 33.3. In summary, a lawyer must verify the identity of persons or entities on whose behalf the lawyer receives or pays funds other than in respect of professional fees, disbursements, expenses or bail. There are detailed rules about how to do this verification upon receipt of $3,000 or more. Briefly, verification requires presentation of government-issued documents. Individuals must present proof of identity such as passports or drivers' licences. In the case of corporations, the lawyer must obtain the corporation's name and address, as well as the names of

[14] En ce qui concerne tout d'abord la vérification, la Loi oblige les avocats à identifier les personnes ou entités pour le compte desquelles ils agissent à titre d'intermédiaires financiers (art. 6.1; Règlement, art. 33.3). En résumé, l'avocat doit vérifier l'identité des personnes ou des entités pour lesquelles il reçoit ou paie des fonds qui ne sont pas des honoraires, des débours, des dépenses ou un cautionnement. Des règles détaillées prévoient la façon de procéder à cette vérification lorsque l'avocat reçoit 3 000 $ ou plus. En bref, la vérification implique la présentation de documents délivrés par un gouvernement. Les personnes physiques doivent présenter une pièce d'identité comme leur passeport ou leur

its directors, by means of a record that confirms the corporation's existence: Regulations, s. 65. Other entities, such as partnerships, are identified by records confirming their existence: Regulations, ss. 33.3, 33.4, 59.4 and 64 to 67.

[15] This verification scheme also requires lawyers to collect information which varies according to whether the transaction is being conducted on behalf of a person, a corporation or some other entity: Regulations, s. 11.1. For a corporation, this includes the names of all directors and the names and addresses of certain shareholders: Regulations, s. 11.1(1)(*a*). With respect to trusts, the names and addresses of all trustees, beneficiaries and settlors are required: Regulations, s. 11.1(1)(*b*). The lawyer must obtain "information establishing the ownership, control and structure of the entity": Regulations, s. 11.1(1)(*d*). The lawyer is required to ensure accuracy of the information obtained (Regulations, s. 11.1(3)), and if he or she is unable to either obtain or confirm the information sought, he or she will be subject to other requirements: Regulations, s. 11.1(4).

(2) Record Keeping

[16] Section 33.4 of the Regulations provides that a "receipt of funds record" must be created by a lawyer when $3,000 or more in funds are received in a transaction, unless the amount is received from a financial entity or public body. ("Funds" include cash, currency or securities, or negotiable instruments or other financial instruments, in any form: Regulations, s. 1(2).) The information required in the "receipt of funds record" includes the name, address, date of birth, and nature of the principal business or occupation of the person or entity from whom the amount is received; the date of the transaction; the number of any account that is affected by the transaction; the type of that account; the name of the account holder and the currency in which the transaction is conducted; the purpose and details of the transaction;

permis de conduire. Dans le cas des personnes morales, l'avocat doit obtenir leur dénomination sociale et leur adresse ainsi que le nom de leurs administrateurs au moyen d'un document attestant l'existence de ces personnes morales (Règlement, art. 65). L'identité des autres entités, telles que les sociétés de personnes, est établie par tout document attestant leur existence (Règlement, art. 33.3, 33.4, 59.4 et 64 à 67).

[15] Ce système de vérification oblige également les avocats à recueillir des renseignements qui varient selon que l'opération est effectuée au nom d'une personne physique, d'une personne morale ou d'une autre entité (Règlement, art. 11.1). Dans le cas d'une personne morale, le nom de tous ses administrateurs, de même que le nom et l'adresse de certains de ses actionnaires, doivent être communiqués (Règlement, al. 11.1(1)*a*)). S'il s'agit d'une fiducie, le nom et l'adresse de tous ses fiduciaires, bénéficiaires et constituants doivent être communiqués (Règlement, al. 11.1(1)*b*)). L'avocat doit obtenir « les renseignements permettant d'établir la propriété, le contrôle et la structure de l'entité » (Règlement, al. 11.1(1)*d*)). L'avocat est tenu de veiller à l'exactitude des renseignements obtenus (Règlement, par. 11.1(3)), et, s'il n'est pas en mesure d'obtenir les renseignements demandés ou d'en confirmer l'exactitude, il est assujetti à d'autres obligations (Règlement, par. 11.1(4)).

(2) Tenue de documents

[16] Selon l'art. 33.4 du Règlement, l'avocat doit établir un « relevé de réception de fonds » à l'égard de chaque somme de 3 000 $ ou plus qu'il reçoit au cours d'une opération, à moins que cette somme ne soit reçue d'une entité financière ou d'un organisme public. (Les « fonds » s'entendent notamment des espèces, devises ou valeurs mobilières, ou titres négociables ou autres instruments financiers, quelle que soit leur forme (Règlement, par. 1(2)).) Parmi les renseignements qui doivent être consignés dans le « relevé de réception de fonds », mentionnons : le nom, l'adresse, la date de naissance et la nature de l'entreprise principale ou de la profession de la personne ou de l'entité qui remet la somme; la date de l'opération; le numéro de chaque compte touché par l'opération; le type de ce compte; le nom

the manner in which the funds were delivered if they were delivered in cash (armoured car, in person, by mail, etc.); and the amount and currency of funds received: Regulations, s. 1(2). Some information does not have to be included where the funds are received from another lawyer's trust account: Regulations, s. 33.5. Section 33.4 also requires, where the person or entity is a corporation, the lawyer to keep a copy of corporate records relating to the power to bind a corporation in respect of transactions with the lawyer.

du titulaire du compte et la devise dans laquelle l'opération est effectuée; le détail de l'opération et son objet; la manière dont les fonds ont été reçus s'il s'agit de fonds reçus en espèces (véhicule blindé, en personne, par courrier, etc.); la somme reçue et la devise en cause (Règlement, par. 1(2)). Certains renseignements n'ont pas à être consignés dans ce relevé lorsque les fonds proviennent du compte en fiducie d'un autre avocat (Règlement, art. 33.5). L'article 33.4 exige également, dans le cas d'une personne morale, que l'avocat conserve une copie de l'extrait des registres officiels portant sur le pouvoir de lier la personne morale quant aux opérations effectuées avec l'avocat.

[17] The records must be kept for at least five years after the completion of the transaction (Regulations, ss. 68 and 69) and the Regulations mandate that they can be produced to FINTRAC within 30 days of a request: s. 70.

[17] Les documents doivent être conservés pendant au moins cinq ans suivant la conclusion de l'opération (Règlement, art. 68 et 69) et, selon le Règlement, ils doivent l'être de manière à pouvoir être remis au CANAFE dans les 30 jours d'une demande à cet effet (art. 70).

(3) Search and Seizure

(3) Fouilles, perquisitions et saisies

[18] FINTRAC has broad access to the information which lawyers (and others) are required to collect, record and retain. Section 62(1) of the Act authorizes FINTRAC to "examine the records and inquire into the business and affairs" of any lawyer. This includes the power to search through computers (s. 62(1)(*b*)) and to print or copy records (s. 62(1)(*c*)). Section 63.1 empowers FINTRAC to make requests for information to lawyers and obliges lawyers to comply.

[18] Le CANAFE jouit d'un accès étendu aux renseignements que les avocats (et d'autres personnes) ont l'obligation de recueillir, de consigner et de conserver. Le paragraphe 62(1) de la Loi autorise le CANAFE à « examiner les documents et les activités » de tout avocat, ce qui lui permet notamment de vérifier le contenu des ordinateurs (al. 62(1)*b*)) et d'imprimer ou de reproduire des documents (al. 62(1)*c*)). L'article 63.1 habilite le CANAFE à demander aux avocats de lui fournir des renseignements et il oblige les avocats à obtempérer à cette demande.

[19] There are some protections for solicitor-client privilege. Lawyers, when they are providing legal services, are not subject to the reporting requirements that apply to other professions: Act, s. 10.1. Nothing in the Act requires legal counsel to disclose any communication subject to solicitor-client privilege: s. 11. Most significantly, s. 64 of the Act sets up a procedure to protect against disclosure of privileged material in the course of a search. It provides that where a lawyer claims a document in his or her

[19] Le secret professionnel de l'avocat bénéficie de certaines protections. Lorsqu'ils fournissent des services juridiques, les avocats ne sont pas assujettis aux obligations de déclaration applicables aux autres professions (Loi, art. 10.1). La Loi n'exige aucunement du conseiller juridique qu'il divulgue une communication protégée par le secret professionnel de l'avocat (art. 11). Mais surtout, l'art. 64 de la Loi prévoit un mécanisme empêchant la divulgation de documents protégés au cours d'une

possession is subject to solicitor-client privilege it cannot be examined or copied. However, this provision requires the lawyer to seal, identify and retain the document and to claim privilege in court within 14 days. FINTRAC has the authority under the regime to disclose to law enforcement information of which it becomes aware under the search provisions if it suspects that it would be relevant to investigating or prosecuting an offence arising out of a contravention of the verification or record keeping obligations: Act, s. 65. Under very recently amended provisions, law enforcement may only use this information as evidence of a contravention of the verification, retention and reporting obligations in Part 1 of the Act or for purposes related to compliance with those provisions: s. 65(3). Finally, s. 65.1 of the Act allows FINTRAC to disclose information to foreign state agencies analogous to FINTRAC for the purposes of ensuring compliance with verification and record keeping obligations.

fouille ou d'une perquisition. Il interdit d'examiner ou de reproduire un document à l'égard duquel l'avocat qui en a possession fait valoir le secret professionnel. Cette disposition oblige toutefois l'avocat à mettre ce document sous scellés, à le marquer, à le conserver et à revendiquer le secret professionnel devant le tribunal dans un délai de 14 jours. Le CANAFE est habilité par le régime à communiquer aux forces de l'ordre tout renseignement dont il prend connaissance en vertu des dispositions relatives aux fouilles et aux perquisitions s'il soupçonne que ces renseignements pourraient être utiles aux fins d'enquête ou de poursuite relativement à une infraction découlant d'un manquement aux obligations de vérification ou de tenue de documents (Loi, art. 65). Aux termes de dispositions modifiées tout récemment, les forces de l'ordre ne peuvent utiliser ces renseignements que comme preuve d'un manquement aux obligations de vérification, de conservation et de déclaration prévues à la partie 1 de la Loi ou pour des fins relatives à l'observation de ces dispositions (par. 65(3)). Enfin, l'art. 65.1 de la Loi permet au CANAFE de divulguer à l'organisme d'un État étranger semblable au CANAFE des renseignements permettant d'assurer la conformité aux obligations de tenue de documents et de vérification.

(4) The Challenged Provisions

[20] It will be helpful to list and describe the provisions that are challenged. The provisions fall into two groups, those relating to verifying identity and record keeping and those relating to search and seizure.

[21] Sections 5(*i*) and 5(*j*) of the Act make the professions specified in the Regulations subject to the verification and record keeping requirements in Part 1 of the Act. Section 33.3 of the Regulations makes legal counsel subject to Part 1 of the Act when receiving or paying funds or giving instructions to pay funds (other than those received or paid in respect of professional fees, disbursements, expenses or bail or when doing so on behalf of their employer). Section 33.4 of the Regulations sets out the record keeping requirements. Section 33.5 of the Regulations relaxes these requirements where funds are received from the trust account of a legal

(4) Les dispositions contestées

[20] Il sera utile d'énumérer et de décrire les dispositions contestées. Elles se divisent en deux catégories, la première portant sur la vérification de l'identité et la tenue de documents et la seconde, sur les fouilles, les perquisitions et les saisies.

[21] Les alinéas 5*i*) et 5*j*) de la Loi soumettent les professions mentionnées dans le Règlement aux obligations de tenue de documents et de vérification prévues à la partie 1 de la Loi. L'article 33.3 du Règlement assujettit les conseillers juridiques à la partie 1 de la Loi lorsqu'ils reçoivent ou paient des fonds ou donnent des instructions pour le paiement de fonds (autres que ceux reçus ou payés à titre d'honoraires, de débours, de dépenses ou de cautionnement ou lorsque le conseiller juridique exerce une de ces activités pour le compte de son employeur). L'article 33.4 du Règlement précise les obligations en matière de tenue de documents.

firm or legal counsel. Section 59.4 of the Regulations imposes the identification requirements. Section 11.1 of the Regulations sets out the information that must be collected and retained in the course of verifying identity.

[22] Sections 62, 63 and 63.1 of the Act provide for search and seizure powers. Section 64 provides limitations on the search and seizure powers in relation to material for which solicitor-client privilege is claimed.

C. *Judicial History*

(1) The Proceedings

(a) *Background*

[23] Lawyers first became subject to the Act in 2001 when they were required to report to FINTRAC "suspicious transactions" involving their clients: s. 7. The Federation, as well as several law societies, launched constitutional challenges to the Act as a result. In 2002, the Attorney General reached an agreement with the Federation to facilitate the constitutional challenges by way of a national "binding test case" before the courts in British Columbia. Interlocutory injunctions currently preclude the Act from applying to lawyers. As a result, none of the regime's anti-money laundering requirements have been enforced against lawyers pending the outcome of the case. In the interim, the Federation has encouraged Canadian provincial and territorial law societies to adopt rules prohibiting lawyers from conducting large cash transactions and requiring client identification, verification, and record keeping measures when lawyers effect certain financial transactions on behalf of clients.

L'article 33.5 du Règlement assouplit ces obligations lorsque les fonds proviennent du compte en fiducie d'un cabinet d'avocats ou d'un conseiller juridique. L'article 59.4 du Règlement impose les obligations d'identification. L'article 11.1 du Règlement énumère les renseignements qui doivent être recueillis et conservés au cours de la vérification de l'identité.

[22] Les articles 62, 63 et 63.1 de la Loi confèrent des pouvoirs de fouille, de perquisition et de saisie. L'article 64, quant à lui, prévoit certaines restrictions à ces pouvoirs dans le cas de documents à l'égard desquels le secret professionnel de l'avocat est revendiqué.

C. *Historique judiciaire*

(1) La procédure

a) *Contexte*

[23] Les avocats sont assujettis à la Loi depuis 2001, lorsqu'on leur a imposé l'obligation de déclarer au CANAFE toute « opération douteuse » impliquant leurs clients (art. 7). La Fédération de même que plusieurs barreaux ont donc attaqué la constitutionnalité de la Loi. En 2002, le procureur général a conclu avec la Fédération une entente facilitant les contestations constitutionnelles au moyen d'une [TRADUCTION] « cause type [nationale] devant avoir force obligatoire » devant les tribunaux de la Colombie-Britannique. Des injonctions interlocutoires empêchent présentement la Loi de s'appliquer aux avocats. Par conséquent, en attendant l'issue de l'affaire, aucune des dispositions du régime réprimant le recyclage des produits de la criminalité n'a été appliquée à l'encontre des avocats. Dans l'intervalle, la Fédération a encouragé les barreaux des provinces et des territoires canadiens à adopter des règles interdisant aux avocats de procéder à des opérations impliquant d'importantes sommes d'argent et les obligeant à prendre des mesures pour identifier leurs clients, vérifier leur identité et tenir des documents lorsqu'ils effectuent certaines opérations financières pour le compte de leurs clients.

[24] The Attorney General contends that these measures are insufficient to combat money laundering and terrorist financing. He argues that criminal sanctions are needed to back up these requirements in the case of non-compliance and that leaving enforcement to the law societies risks a lack of uniformity.

(b) *British Columbia Supreme Court, 2011 BCSC 1270, 25 B.C.L.R. (5th) 265 (Gerow J.)*

[25] The application judge held that the challenged provisions are contrary to s. 7 of the *Charter*. She concluded that both lawyers' and clients' liberty interests are engaged by the Act because it places both lawyers and their clients in jeopardy of potential incarceration. She was of the view that solicitor-client privilege is a principle of fundamental justice and that the recording and retention requirements are contrary to this principle because they "result in having lawyers' offices turned into archives for the use of the prosecution" (para. 144).

[26] Turning to whether this *Charter* infringement could be justified under s. 1, the judge concluded that the means chosen were not proportionate to the objectives because regulation of lawyers by law societies already provides effective and constitutional anti-money laundering and anti-terrorist financing regimes. She found no proof that there is a rational connection between the legislative objective and the infringement of s. 7, that the statutory regime interferes as little as possible with s. 7 rights, or that the salutary effects of the measures outweigh their deleterious effects.

[27] As a remedy, the application judge read down ss. 5(*i*), 5(*j*), 62, 63 and 63.1 of the Act and s. 11.1 of the Regulations to exclude legal counsel and legal firms, and struck down s. 64 of the Act and ss. 33.3, 33.4, 33.5 and 59.4(1) of the Regulations.

[24] Le procureur général affirme que ces mesures sont insuffisantes pour contrer le recyclage des produits de la criminalité et le financement des activités terroristes. Selon lui, il est nécessaire de prévoir des sanctions criminelles pour renforcer ces exigences en cas de non-conformité et il risque d'y avoir un manque d'uniformité si on laisse aux barreaux le soin de les faire respecter.

b) *Cour suprême de la Colombie-Britannique, 2011 BCSC 1270, 25 B.C.L.R. (5th) 265 (la juge Gerow)*

[25] La juge de première instance a décidé que les dispositions contestées étaient contraires à l'art. 7 de la *Charte*. Selon elle, la Loi met en jeu tant le droit à la liberté des avocats que celui de leurs clients car elle fait courir tant aux uns qu'aux autres le risque d'être incarcérés. À son avis, le secret professionnel de l'avocat est un principe de justice fondamentale, et les obligations de consignation et de conservation de renseignements sont contraires à ce principe parce qu'elles [TRADUCTION] « ont pour effet de transformer les cabinets d'avocats en dépôts d'archives à la disposition de la poursuite » (par. 144).

[26] S'agissant de savoir si cette violation de la *Charte* pouvait se justifier en vertu de l'article premier, la juge a conclu que les moyens choisis n'étaient pas proportionnés aux objectifs visés, étant donné que la réglementation des avocats par les barreaux prévoyait déjà des régimes efficaces et constitutionnels de lutte contre le recyclage des produits de criminalité et le financement des activités terroristes. D'après elle, rien ne prouve qu'il existe un lien rationnel entre l'objectif poursuivi par le législateur et la violation de l'art. 7, que le régime législatif porte le moins possible atteinte aux droits prévus à l'art. 7 et que les effets bénéfiques des mesures en question l'emportent sur leurs effets préjudiciables.

[27] En guise de réparation, la juge de première instance a donné une interprétation atténuée des al. 5*i*) et 5*j*) et des art. 62, 63 et 63.1 de la Loi ainsi que de l'art. 11.1 du Règlement pour exclure les conseillers juridiques et les cabinets d'avocats, et invalidé l'art. 64 de la Loi et les art. 33.3, 33.4, 33.5 de même que le par. 59.4(1) du Règlement.

(c) *British Columbia Court of Appeal, 2013 BCCA 147, 41 B.C.L.R. (5th) 283 (Hinkson J.A., Finch C.J.B.C. and Neilson J.A. Concurring; Concurring in the Result, Frankel J.A., Garson J.A. Concurring)*

[28] The Court of Appeal unanimously held that the obligations imposed on lawyers by the provisions breach s. 7 of the *Charter* and that they are not saved by s. 1. Although the court found that the provisions sufficiently protect solicitor-client privilege, it concluded that "independence of the Bar" is a principle of fundamental justice and that the provisions are not consistent with it. The Court of Appeal held that legal advisors are placed in an unacceptable conflict of interest between clients' interests, the state's interests, and their own liberty interests, and that the provisions turn some lawyers into agents of the state.

[29] On the question of whether clients' liberty interests are engaged by the provisions, the Court of Appeal divided. Hinkson J.A. (as he then was) (writing for a majority of the court on this point) held that the clients' liberty interests are engaged because the provisions facilitate access to confidential information that may be disclosed to law enforcement for any purpose including pursuing criminal charges. Frankel J.A. (Garson J.A. concurring) held that clients' liberty interests are not engaged by these provisions because the causal connection between the provisions and any potential loss of clients' liberty is too remote.

[30] The Court of Appeal unanimously held that the limitation of s. 7 rights was not justified under s. 1 of the *Charter* because the Attorney General failed to prove that the provisions are minimally impairing. The rules of the professional governing bodies already provide effective and constitutional

c) *Cour d'appel de la Colombie-Britannique, 2013 BCCA 147, 41 B.C.L.R. (5th) 283 (le juge Hinkson, avec l'appui du juge en chef Finch et de la juge Neilson; le juge Frankel, souscrivant au résultat, avec l'appui de la juge Garson)*

[28] La Cour d'appel a jugé à l'unanimité que les obligations imposées aux avocats par les dispositions en cause violaient l'art. 7 de la *Charte* et qu'elles n'étaient pas sauvegardées par l'article premier. Bien que la Cour d'appel ait conclu que les dispositions protégeaient suffisamment le secret professionnel de l'avocat, elle a estimé que [TRADUCTION] « l'indépendance du barreau » était un principe de justice fondamentale et que les dispositions en question étaient incompatibles avec ce principe. Toujours selon la Cour d'appel, les conseillers juridiques sont placés dans une situation inacceptable de conflit d'intérêts puisqu'ils doivent choisir entre les intérêts de leurs clients, ceux de l'État et leur propre droit à la liberté, et les dispositions font de certains avocats des agents de l'État.

[29] La Cour d'appel était partagée sur la question de savoir si les dispositions en question mettaient en jeu le droit à la liberté des clients. Le juge Hinkson (maintenant Juge en chef) (s'exprimant sur ce point au nom des juges majoritaires) a estimé que le droit à la liberté des clients était en jeu, puisque les dispositions facilitaient l'accès à des renseignements confidentiels qui pouvaient être communiqués aux forces de l'ordre pour n'importe quelle fin, notamment le dépôt d'accusations criminelles. Le juge Frankel (avec l'appui de la juge Garson) a estimé que ces dispositions ne mettaient pas en jeu le droit à la liberté des clients parce que le lien de causalité entre les dispositions et toute perte possible de liberté des clients était trop ténu.

[30] La Cour d'appel a jugé à l'unanimité que la restriction des droits prévus à l'art. 7 n'était pas justifiée au sens de l'article premier de la *Charte* car le procureur général n'avait pas démontré que l'atteinte causée par les dispositions en question était minimale. Les règles des ordres professionnels

anti-money laundering and anti-terrorist financing regimes in relation to lawyers, law firms and notaries across Canada.

prévoient déjà des régimes efficaces et constitutionnels de lutte contre le recyclage des produits de la criminalité et le financement des activités terroristes dans le cas des avocats, des cabinets d'avocats et des notaires, et ce, partout au Canada.

III. Analysis

A. *Do the Provisions Infringe Section 8 of the Charter?*

(1) Introduction

[31] The issue here is whether the search and production provisions of the scheme infringe the right to be free from unreasonable searches and seizures guaranteed by s. 8 of the *Charter*. The relevant provisions are these. Section 62 provides that a person authorized by the Director of FINTRAC may enter premises other than a dwelling-house, examine the records required under the Act and, for that purpose, use any computer system and reproduce any record. There is no warrant requirement. Section 63 gives the same powers with respect to rooms in a dwelling-house which the authorized person reasonably believes are being used to carry on a business, profession or activity which is subject to the Act, but a warrant is required. This provision implicates lawyers who have home offices. Section 63.1 permits the authorized person to serve a notice that requires the person or entity which is the subject of the inspection to provide information relevant to the administration of the Act in the form of electronic data, a printout or other intelligible output. Finally, s. 64 provides some protection of solicitor-client privilege in the course of exercising these powers.

[32] The Attorney General concedes that s. 62 and s. 63.1 authorize searches and seizures within the meaning of s. 8. It is self-evident that the same must be said about s. 63. These provisions do not simply require production of a particular type of document but permit an authorized person to "examine the

III. Analyse

A. *Les dispositions violent-elles l'art. 8 de la Charte?*

(1) Introduction

[31] La question qui se pose ici est de savoir si les dispositions du régime relatives à la perquisition et à la production de documents portent atteinte au droit à la protection contre les fouilles, les perquisitions et les saisies abusives garanti par l'art. 8 de la *Charte*. Les dispositions pertinentes sont les suivantes. Selon l'art. 62, la personne autorisée par le directeur du CANAFE peut pénétrer dans tout local autre qu'une habitation pour examiner les documents exigés par la Loi et, à cette fin, avoir recours à tout système informatique et reproduire tout document. Il n'est pas nécessaire d'obtenir un mandat pour ce faire. L'article 63 confère les mêmes pouvoirs en ce qui concerne les pièces d'une habitation dont la personne autorisée a des motifs raisonnables de croire qu'elles servent à exploiter une entreprise ou à exercer une profession ou une activité visée par la Loi, mais il faut alors obtenir un mandat. Cette disposition vise les avocats qui exercent à domicile. L'article 63.1 permet à la personne autorisée de signifier un avis qui oblige la personne ou l'entité faisant l'objet de l'inspection à fournir toute information utile à l'application de la Loi sous forme de données électroniques ou d'imprimé, ou sous toute autre forme intelligible. Enfin, l'art. 64 offre une certaine protection au secret professionnel de l'avocat durant l'exercice de ces pouvoirs.

[32] Le procureur général admet que les art. 62 et 63.1 autorisent les fouilles, les perquisitions et les saisies au sens de l'art. 8. De toute évidence, il en va de même de l'art. 63. Ces dispositions n'exigent pas seulement que l'on produise un type de document en particulier : elles permettent à la personne

records and inquire into the business and affairs of any person or entity [subject to the Act] for the purpose of ensuring compliance with Part 1" (s. 62(1)), as well as to make and take away copies (s. 62(1)(*c*)).

autorisée d'« examiner les documents et les activités des personnes ou entités [assujetties à la Loi] afin de procéder à des contrôles d'application de la partie 1 » (par. 62(1)), en plus de leur permettre de faire des copies des documents en question et de les emporter (al. 62(1)*c*)).

[33] Neither of the British Columbia courts addressed the s. 8 issue, but I have found it helpful to address it first. This is the better approach to considering the constitutionality of the law office inspection provisions, in my view. If these procedures constitute unjustified and unreasonable searches and seizures, they are unconstitutional by virtue of s. 8 and there is no need to undertake an independent s. 7 analysis depending on a proposed principle of fundamental justice in relation to solicitor-client privilege: *Lavallee, Rackel & Heintz v. Canada (Attorney General)*, 2002 SCC 61, [2002] 3 S.C.R. 209, at paras. 34-35.

[33] Ni l'un ni l'autre des tribunaux de la Colombie-Britannique n'a examiné la question de l'art. 8, mais j'ai trouvé utile de l'aborder en premier. Cela me paraît la meilleure façon d'analyser la constitutionnalité des dispositions relatives à l'inspection des cabinets d'avocats. Dès lors que les mesures en question constituent des fouilles, des perquisitions ou des saisies injustifiées et abusives, elles sont inconstitutionnelles par application de l'art. 8 et il n'est pas nécessaire de procéder à une analyse distincte sur la base de l'art. 7 selon un principe proposé de justice fondamentale qui se rapporte au secret professionnel de l'avocat (*Lavallee, Rackel & Heintz c. Canada (Procureur général)*, 2002 CSC 61, [2002] 3 R.C.S. 209, par. 34-35).

[34] The Federation says that these provisions violate s. 8 of the *Charter*, mainly because they permit the search of law offices in ways that are not consistent with the principles set out by the Court in *Lavallee*. The Attorney General, on the other hand, argues that the searches and seizures authorized by the scheme are reasonable: they relate to a limited class of documents for a narrow, regulatory purpose and there are appropriate safeguards to protect solicitor-client privilege.

[34] La Fédération affirme que ces dispositions violent l'art. 8 de la *Charte*, surtout parce qu'elles permettent de perquisitionner dans des cabinets d'avocats d'une façon incompatible avec les principes énoncés par la Cour dans l'arrêt *Lavallee*. Le procureur général prétend pour sa part que les fouilles, les perquisitions et les saisies autorisées par le régime sont raisonnables : elles concernent une catégorie restreinte de documents et ne visent qu'un objectif réglementaire précis, et des garanties appropriées protègent le secret professionnel de l'avocat.

[35] I respectfully do not accept the Attorney General's position. The regime authorizes sweeping law office searches which inherently risk breaching solicitor-client privilege. It does so in a criminal law setting and for criminal law purposes. In my view, the constitutional principles governing these searches are set out in the Court's decision in *Lavallee*, and this scheme does not comply with them.

[35] Avec égards, je ne retiens pas la thèse du procureur général. Le régime autorise une perquisition approfondie du cabinet d'avocats qui risque, de par sa nature, de violer le secret professionnel de l'avocat. Le régime le fait dans un contexte de droit criminel et aux fins d'application du droit criminel. À mon avis, les principes constitutionnels qui régissent cette perquisition sont exposés dans l'arrêt *Lavallee* de la Cour et le régime en cause ne les respecte pas.

(2) Protection of Solicitor-Client Privilege

[36] A law office search power is unreasonable unless it provides a high level of protection for material subject to solicitor-client privilege: *Lavallee*. The Attorney General submits, however, that *Lavallee* does not dictate the outcome here: the Court in that case was only considering the question of what safeguards are constitutionally required in situations where law enforcement officials are seeking evidence of criminal wrongdoing, not as here, in connection with an administrative law regulatory compliance regime.

[37] I accept, of course, that when a search provision is part of a regulatory scheme, the target's reasonable expectation of privacy may be reduced: *Thomson Newspapers Ltd. v. Canada (Director of Investigation and Research, Restrictive Trade Practices Commission)*, [1990] 1 S.C.R. 425, at p. 507; *R. v. Fitzpatrick*, [1995] 4 S.C.R. 154, at para. 49. However, I do not accept the Attorney General's contention that this scheme may be properly characterized as "an administrative law regulatory compliance regime": A.F., at para. 111. Its purposes, as stated in the Act and indeed as described by the Attorney General in his submissions, are to detect and deter the criminal offences of money laundering and terrorist financing and to facilitate the investigation and prosecution of these serious offences: s. 3(*a*). The regime imposes penal sanctions on lawyers for non-compliance. It therefore has a predominantly criminal law character and its regulatory aspects serve criminal law purposes.

[38] I also accept that, as Arbour J. noted in *Lavallee*, "the need for the full protection of the privilege is activated" in the context of a criminal investigation: para. 23. However, the reasonable expectation of privacy in relation to communications subject to solicitor-client privilege is invariably high, regardless of the context. The main driver of that

(2) Protection du secret professionnel de l'avocat

[36] Le pouvoir de perquisitionner dans un cabinet d'avocats est abusif, sauf s'il accorde une grande protection au document visé par le secret professionnel de l'avocat (*Lavallee*). Le procureur général soutient toutefois que l'arrêt *Lavallee* ne dicte pas l'issue du présent pourvoi : dans cette affaire, la Cour examinait seulement la question des garanties exigées par la Constitution lorsque les responsables de l'application de la loi recherchent la preuve d'agissements criminels, ce qui n'est pas le cas en l'espèce, à l'égard d'un régime visant à assurer le respect d'une réglementation administrative.

[37] Je reconnais évidemment que, lorsqu'une disposition en matière de fouille ou de perquisition fait partie d'un régime réglementaire, l'attente raisonnable de l'intéressé au respect de sa vie privée peut être moindre (*Thomson Newspapers Ltd. c. Canada (Directeur des enquêtes et recherches*, *Commission sur les pratiques restrictives du commerce)*, [1990] 1 R.C.S. 425, p. 507; *R. c. Fitzpatrick*, [1995] 4 R.C.S. 154, par. 49). Je n'accepte cependant pas la prétention du procureur général voulant que le présent régime puisse être qualifié à bon droit de [TRADUCTION] « régime visant à assurer le respect d'une réglementation administrative » (m.a., par. 111). Tel que l'indique la Loi et, de fait, comme l'explique le procureur général dans ses observations, le régime a pour objet de détecter et de décourager les infractions criminelles de recyclage des produits de la criminalité et de financement des activités terroristes, et de faciliter les enquêtes et les poursuites relatives à ces infractions graves (al. 3*a*)). Le régime impose des sanctions pénales aux avocats en cas de non-respect de la loi. Par conséquent, il a un caractère principalement pénal et ses éléments réglementaires visent des objectifs du droit criminel.

[38] Je reconnais en outre que, comme l'a fait observer la juge Arbour dans *Lavallee*, « le besoin de la protection entière du privilège se fait sentir » dans le cadre d'une enquête criminelle (par. 23). Toutefois, l'attente raisonnable à l'égard de la confidentialité des communications protégées par le secret professionnel de l'avocat est invariablement

elevated expectation of privacy is the specially protected nature of the solicitor-client relationship, not the context in which the state seeks to intrude into that specially protected zone. I do not accept the proposition that there is a reduced expectation of privacy in relation to solicitor-client privileged communication when a FINTRAC official searches a law office rather than when a police officer does so in the course of investigating a possible criminal offence. While Arbour J. placed her analysis in the context of criminal investigations (see, e.g., paras. 25 and 49), her reasons, as have many others before and since, strongly affirmed the fundamental importance of solicitor-client privilege. As Arbour J. put it:

> It is critical to emphasize here that <u>all information protected by the solicitor-client privilege is out of reach for the state</u>. . . . [A]ny privileged information acquired by the state without the consent of the privilege holder is information <u>that the state is not entitled to</u> as a rule of fundamental justice. [Emphasis added; para. 24.]

[39] I see no basis for thinking that solicitor-client communications should be more vulnerable to non-consensual disclosure in the course of a search and seizure by FINTRAC officials than they would be in the course of any other search by other law enforcement authorities.

[40] The Attorney General submits that the information here is sought in aid of monitoring the lawyer's activities, not the client's and that there is protection against derivative use. But these factors are entitled to little weight here. As discussed earlier, the overriding purposes of this scheme are the prevention and detection of serious, criminal offences. It has little in common with, for example, the competition legislation at issue in *Thomson Newspapers* or the fisheries legislation in *Fitzpatrick*. Moreover, I do not accept the Attorney General's submission that the broad scope of this search power

élevée, peu importe le contexte. Le principal élément moteur de cette attente élevée en matière de respect de la vie privée est la nature particulièrement protégée de la relation avocat-client, et non le contexte dans lequel l'État cherche à s'ingérer dans cette zone particulièrement protégée. Je n'accepte pas la proposition selon laquelle l'attente est moins élevée dans le cas des communications protégées par le secret professionnel de l'avocat lorsqu'un fonctionnaire du CANAFE perquisitionne dans un cabinet d'avocats que lorsqu'un policier perquisitionne au cours d'une enquête sur une éventuelle infraction criminelle. Bien que la juge Arbour ait situé son analyse dans le contexte des enquêtes criminelles (voir, p. ex., par. 25 et 49), elle a, comme beaucoup d'autres l'ont fait avant et après elle, confirmé avec vigueur l'importance fondamentale du secret professionnel de l'avocat. Comme elle l'a dit :

> Il est essentiel de souligner ici que <u>l'État ne peut avoir accès aux renseignements protégés par le secret professionnel de l'avocat</u>. [. . .] [I]l y a une règle de justice fondamentale voulant que tout renseignement privilégié obtenu par l'État sans le consentement de son détenteur est un renseignement <u>auquel l'État n'a pas droit</u>. [Je souligne; par. 24.]

[39] Je ne vois aucune raison de penser que les communications entre l'avocat et son client devraient être plus vulnérables à une divulgation non consensuelle au cours d'une fouille, d'une perquisition ou d'une saisie effectuée par des fonctionnaires du CANAFE qu'elles le seraient lors de toute autre perquisition effectuée par d'autres autorités chargées d'appliquer la loi.

[40] Le procureur général affirme que les renseignements recherchés en l'espèce visent à faciliter la surveillance des activités de l'avocat et non de celles de son client, et qu'il existe une protection contre les utilisations dérivées. Mais il faut accorder peu de poids à ces facteurs dans le cas qui nous occupe. Comme nous l'avons déjà vu, les objectifs primordiaux du présent régime sont la prévention et la détection d'infractions criminelles graves. Le régime a donc peu de points en commun avec, par exemple, la législation sur la concurrence qui était en litige dans *Thomson Newspapers* ou avec

is somehow limited by what the "regulator" is "interested in reviewing": A.F., at para. 107. The Act on its face purports to give the authorized person licence to troll through vast amounts of information in the possession of lawyers. As the intervener Criminal Lawyers' Association fairly put it, the Act gives authorized persons the power "to roam at large within law offices, and . . . to examine and seize any record or data found therein": factum, at para. 23. The exercise of these powers in relation to records in possession of lawyers creates a very high risk that solicitor-client privilege will be lost.

la législation sur les pêches dont il était question dans *Fitzpatrick*. De plus, je rejette l'argument du procureur général que la vaste portée de ce pouvoir de fouille et de perquisition est restreinte d'une quelconque façon par ce que [TRADUCTION] « l'organisme de réglementation souhaite examiner » (m.a., par. 107). La Loi vise à première vue à permettre à la personne autorisée de fouiller dans la masse de renseignements en la possession des avocats. Comme l'a dit avec justesse l'intervenante Criminal Lawyers' Association, la Loi confère aux personnes autorisées le pouvoir [TRADUCTION] « de fouiller partout dans les cabinets d'avocats et [. . .] d'examiner et de saisir tout document ou toute donnée qu'elles y trouvent » (mémoire, par. 23). L'exercice de ces pouvoirs à l'égard de documents se trouvant en la possession des avocats risque fortement d'entraîner la perte du secret professionnel.

[41] In short, there is nothing about the regulatory context here or the interests of the regulator which in any way takes this regime out of the field of criminal law or diminishes in any way the very high reasonable expectation of privacy in relation to material subject to solicitor-client privilege. In my view, the *Lavallee* standard applies to this regime.

[41] Bref, aucun élément du contexte réglementaire en cause ou des intérêts de l'organisme de réglementation n'a pour effet d'exclure d'une quelconque façon ce régime du domaine du droit criminel ou de diminuer de quelque manière que ce soit l'attente raisonnable très élevée quant au caractère confidentiel des documents protégés par le secret professionnel de l'avocat. J'estime que la norme établie dans *Lavallee* s'applique à ce régime.

[42] The *Lavallee* analysis does not assume, of course, that all records found in the possession of a lawyer are subject to privilege and I do not approach this case on the basis that all the materials that lawyers are required to obtain and retain by the Act are privileged. The *Lavallee* standard aims to prevent the significant risk that some privileged material will be among the records in a lawyer's office examined and seized pursuant to a search warrant. Similarly, in this case, there is a significant risk that at least some privileged material will be found among the documents that are the subject of the search powers in the Act.

[42] L'analyse formulée dans l'arrêt *Lavallee* ne présume pas, évidemment, que tous les documents en la possession d'un avocat sont visés par le secret professionnel et, en l'espèce, je ne pars pas du postulat que tous les documents que les avocats sont tenus de recueillir et de conserver aux termes de la Loi sont protégés. La norme énoncée dans *Lavallee* vise à prévenir le risque important que certains documents protégés se retrouvent parmi ceux d'un cabinet d'avocats qui sont examinés et saisis en vertu d'un mandat de perquisition. De même, dans le cas qui nous occupe, on risque fort de retrouver au moins certains documents protégés parmi ceux visés par les pouvoirs de fouille et de perquisition prévus par la Loi.

(3) The *Lavallee* Principles

[43] *Lavallee* and its two companion appeals concerned the constitutionality of s. 488.1 of the *Criminal Code*. That section sets out a procedure to be followed when an officer acting under the authority of any Act of Parliament is "about to examine, copy or seize a document in the possession of a lawyer who claims that a named client of his has a solicitor-client privilege" in respect of it. The Court concluded that the section was unconstitutional because it suffered from a number of deficiencies in relation to the constitutional level of protection required by s. 8 in relation to solicitor-client privilege.

[44] The core principle of the decision is that solicitor-client privilege "must remain as close to absolute as possible if it is to retain relevance": *Lavallee*, at para. 36. This means that there must be a "stringent" norm to ensure its protection, such that any legislative provisions that interfere with the privilege more than "absolutely necessary" will be found to be unreasonable: para. 36.

[45] *Lavallee* is an important authority because of the similarity of the schemes set up to protect solicitor-client privilege under s. 488.1 of the *Code*, which was in issue in that case, and s. 64 of the Act, which is in issue here. Section 64 of the Act, like s. 488.1, is engaged at the point at which the official is "about to examine" material "in the possession" of a lawyer. Under both provisions, the protective scheme applies at the point that the lawyer asserts that a "named client" (or in the case of s. 64, a "named client or former client") "has a solicitor-client privilege" in respect of the material sought. Once that claim is made, the material is sealed and preserved. (The mechanics of this part of the two schemes differ; under the *Code*, the official seals the documents and places the sealed package in possession of the sheriff for safekeeping, while under the Act, the lawyer does the sealing and safekeeping.)

(3) Les principes de l'arrêt *Lavallee*

[43] L'affaire *Lavallee* et ses deux pourvois connexes portaient sur la constitutionnalité de l'art. 488.1 du *Code criminel*. Cet article prévoit la procédure à suivre lorsqu'un fonctionnaire agissant sous le régime d'une loi fédérale est « sur le point d'examiner, de copier ou de saisir un document en la possession d'un avocat qui prétend qu'un de ses clients, nommément désigné, jouit du privilège des communications entre client et avocat » à l'égard de ce document. La Cour a conclu que cet article était inconstitutionnel parce qu'il comportait plusieurs lacunes touchant à la protection constitutionnelle exigée par l'art. 8 relativement au secret professionnel de l'avocat.

[44] Le principe fondamental de cet arrêt est que le secret professionnel de l'avocat « doit demeurer aussi absolu que possible pour conserver sa pertinence » (*Lavallee*, par. 36). Par conséquent, il doit exister une norme « rigoureuse » pour assurer sa protection, de sorte que toute disposition législative qui porte atteinte au secret professionnel plus que ce qui est « absolument nécessaire » sera qualifiée d'abusive (par. 36).

[45] L'arrêt *Lavallee* est un précédent important en raison de la similitude entre le régime de protection du secret professionnel de l'avocat prévu à l'art. 488.1 du *Code* qui était en cause dans cette affaire et celui établi à l'art. 64 de la Loi qui est en cause dans le cas présent. À l'instar de l'art. 488.1, l'art. 64 de la Loi entre en jeu au moment où le fonctionnaire est « sur le point d'examiner » des documents « en la possession » d'un avocat. Suivant ces deux dispositions, le régime de protection s'applique au moment où l'avocat fait valoir au nom d'« un client [. . .] nommément désigné » (ou, dans le cas de l'art. 64, un « client actuel ou antérieur, nommément désigné ») le « secret professionnel » en ce qui concerne le document demandé. Dès lors que le secret professionnel est revendiqué, le document est mis sous scellés et conservé. (Les modalités de ce volet des deux régimes sont différentes : suivant le *Code*, le fonctionnaire met sous scellés le document dont il confie la garde au shérif, tandis que, selon la Loi, c'est l'avocat qui s'occupe de la mise sous scellés et de la garde des documents.)

[46] Both schemes require the official to give a reasonable opportunity for a claim of solicitor-client privilege to be made before examining or copying the material. Section 64(9.1) of the Act enhances this protection somewhat by providing that the official is not to examine or make copies of a document in the possession of a non-lawyer who contends that a claim of solicitor-client privilege may be made by a lawyer without giving the person a reasonable opportunity to contact that lawyer.

[47] The processes under the two schemes for judicial determination of the privilege issue are also similar. Under both schemes, the lawyer may apply within 14 days to have a judge decide whether the material is privileged. If no application is made, the Attorney General may apply to a judge for an order directing the custodian of the material to deliver it to the official. Under both schemes, any material that the judge finds to be subject to solicitor-client privilege remains so. In the absence of an application, however, the judge is obliged to direct the material to be turned over to the official.

[48] To return to *Lavallee*, the Court identified specific constitutional infirmities in s. 488.1, all flowing from the fact that it failed to address directly the entitlement that the privilege holder, the client, should have to protect the privilege. The absence of provisions requiring notice to the holder of the privilege meant the client may not even be aware that his or her privilege is threatened: para. 40. This fundamental difficulty identified in s. 488.1 in *Lavallee* is not meaningfully addressed by s. 64.

[49] The Court in *Lavallee* found that two further constitutional infirmities resulted from this. The first was that the scheme wrongly transferred the burden of protecting the privilege from the state to the lawyer. This was so because under the scheme only the lawyer could assert the privilege and the client did not have to be given notice: para. 40. Where notification was not feasible, there ought at least to be

[46] Les deux régimes exigent du fonctionnaire qu'il permette raisonnablement la revendication du secret professionnel de l'avocat avant d'examiner ou de reproduire le document. Le paragraphe 64(9.1) de la Loi renforce quelque peu cette protection en interdisant au fonctionnaire d'examiner ou de reproduire un document en la possession d'une personne qui n'est pas un avocat mais qui soutient que le secret professionnel pourrait être revendiqué par un avocat sans donner à cette personne une occasion raisonnable de communiquer avec cet avocat.

[47] La procédure prévue par les deux régimes pour ce qui est de la décision que le tribunal doit rendre au sujet de l'existence du privilège est également semblable. Suivant les deux régimes, l'avocat peut, dans un délai de 14 jours, demander à un juge de décider si le document est protégé. À défaut de demande, le procureur général peut demander à un juge de rendre une ordonnance enjoignant à la personne qui a la garde du document de le remettre au fonctionnaire. Toujours selon les deux régimes, le document qui, de l'avis du juge, est visé par le secret professionnel de l'avocat le demeure. À défaut de demande, toutefois, le juge est obligé d'ordonner la remise du document au fonctionnaire.

[48] Pour revenir à l'arrêt *Lavallee*, rappelons que la Cour a décelé dans l'art. 488.1 certaines déficiences constitutionnelles qui découlaient toutes du fait que cette disposition ne traitait pas directement du droit que le détenteur du privilège, en l'occurrence le client, devrait avoir pour protéger celui-ci. Vu l'absence de disposition exigeant qu'un avis soit donné au titulaire du privilège, il était possible que le client ne sache même pas que son privilège était menacé (par. 40). Ce problème fondamental relevé à l'art. 488.1 par la Cour dans *Lavallee* n'est pas véritablement abordé à l'art. 64 de la Loi.

[49] Dans l'arrêt *Lavallee*, la Cour a estimé qu'il en résultait deux autres déficiences constitutionnelles. En premier lieu, le fardeau de protéger le privilège était déplacé à tort de l'État à l'avocat parce que, suivant le régime, seul l'avocat pouvait revendiquer le privilège et qu'il n'était pas nécessaire d'aviser le client (par. 40). Dans les cas où il n'est pas possible d'aviser le détenteur du privilège,

some independent legal intervention, for instance in the form of notification and involvement of the relevant Law Society: para. 41. As Arbour J. explained:

> . . . since the right of the state to access this information is, in law, conditional on the consent of the privilege holder, all efforts to notify that person, or an appropriate surrogate such as the Law Society, must be put in place in order for the section to conform to s. 8 of the *Charter*. [para. 42]

[50] Section 64 suffers from similar defects. The initial claim of privilege may only be made by legal counsel, as was the case under s. 488.1. While under s. 64, legal counsel is required to provide the client's last known address to enable the official to "endeavour to advise the client of the claim of privilege", there is no requirement for notice to the client, who is the holder of the privilege, and no protocol for independent legal intervention where it is not feasible to notify the client. Moreover, as we shall see, the lawyer's obligation to identify the client in order to claim the privilege is also problematic.

[51] A second constitutional failing identified in *Lavallee* relates to what happens when a claim of privilege has been made to the official, but no application to court has been made by the client or the lawyer. In those circumstances, the judge is required on the application of the Attorney General to order the lawyer to make the material available to the official. As Arbour J. explained:

> . . . this mandatory disclosure of potentially privileged information, in a case where the court has been alerted to the possibility of privilege by the fact that the documents were sealed at the point of search, cannot be said to minimally impair the privilege. It amounts to an unjustifiable vindication of form over substance, and it creates a real possibility that the state may obtain privileged information that a court could very well have recognized as such. [para. 43]

il devrait à tout le moins y avoir une intervention légale indépendante, par exemple sous forme d'avis et de participation du barreau compétent (par. 41). Ainsi que l'a expliqué la juge Arbour :

> . . . comme le droit de l'État d'obtenir ces renseignements est, en droit, conditionnel au consentement du détenteur du privilège, il faut que toutes les mesures nécessaires à la notification de cette personne ou d'un substitut convenable comme le Barreau soient mises en place pour que la disposition soit conforme à l'art. 8 de la *Charte*. [par. 42]

[50] L'article 64 souffre de lacunes semblables. Le privilège ne peut être revendiqué dans un premier temps que par un conseiller juridique, tout comme le prévoyait l'art. 488.1. Bien que, suivant l'art. 64, le conseiller juridique ait l'obligation de communiquer la dernière adresse connue du client au fonctionnaire pour permettre à ce dernier de « chercher à informer le client du secret professionnel » qui est invoqué en son nom, la Loi n'exige pas que l'on avise le client, qui détient le privilège, et aucun protocole n'est prévu pour permettre une intervention légale indépendante lorsqu'il est impossible d'aviser le client. De plus, comme nous le verrons, l'obligation de l'avocat d'identifier le client pour pouvoir revendiquer le privilège pose également problème.

[51] Une autre faille constitutionnelle signalée dans l'arrêt *Lavallee* concerne le sort réservé à la revendication du secret professionnel qui a été faite au fonctionnaire sans que le client ou son avocat n'ait présenté de demande à la cour. Dans ces circonstances, le juge doit, à la demande du procureur général, ordonner à l'avocat de mettre les documents à la disposition du fonctionnaire. Ainsi que l'a expliqué la juge Arbour :

> . . . on ne peut pas dire que cette communication obligatoire de renseignements potentiellement privilégiés porte atteinte le moins possible au privilège dans un cas où la cour a été mise au courant de la possibilité de l'existence de celui-ci par la mise sous scellés des documents au moment de la perquisition. Cette communication obligatoire revient à faire prédominer de façon injustifiable la forme sur le fond et crée la possibilité réelle que l'État obtienne des renseignements qu'un tribunal peut fort bien reconnaître comme étant privilégiés. [par. 43]

[52] Section 64(6) similarly denies discretion to the judge to assess the claim of privilege on his or her own motion and therefore has the same constitutional failing.

[52] Le paragraphe 64(6) nie pareillement au juge le pouvoir discrétionnaire d'apprécier de son propre chef le secret professionnel revendiqué, et il comporte donc la même faille constitutionnelle.

[53] The Court in *Lavallee* also set out a number of general principles that govern the legality of law office searches designed in part to guide the legislative options that Parliament may wish to address. These general principles, while not a checklist, were intended "to reflect the present-day constitutional imperatives for the protection of solicitor-client privilege": para. 49. Two of these general principles are particularly relevant here.

[53] Dans l'arrêt *Lavallee*, la Cour a également formulé un certain nombre de principes généraux régissant la légalité des perquisitions effectuées dans des cabinets d'avocats, en partie pour guider les choix législatifs que le législateur peut vouloir examiner à cet égard. Sans être une liste de contrôle, ces principes généraux visent « à refléter les impératifs constitutionnels actuels en matière de protection du secret professionnel de l'avocat » (par. 49). Deux de ces principes sont particulièrement à propos en l'espèce.

[54] One of these principles is that, before searching a law office, the authorities must satisfy a judicial officer that there exists no other reasonable alternative to the search. Sections 62 and 63.1 do not require prior judicial authorization, let alone impose a statutory requirement that there be no other reasonable alternative. However, s. 63 is less problematic in this respect. It requires judicial preauthorization to search a lawyer's home office, including demonstration that entry into the dwelling-house is necessary for any purpose that relates to ensuring compliance with Part 1 of the Act.

[54] L'un de ces principes veut qu'avant de perquisitionner dans un cabinet d'avocats, les autorités chargées de l'enquête doivent convaincre un officier de justice qu'il n'existe aucune solution de rechange raisonnable. Les articles 62 et 63.1 n'exigent pas d'autorisation judiciaire préalable, et requièrent encore moins l'absence de solution de rechange raisonnable. Toutefois, l'art. 63 est moins problématique à cet égard. Selon cet article, il faut obtenir une autorisation judiciaire avant de perquisitionner dans un cabinet à domicile, notamment par la démonstration que la visite de l'habitation en cause est nécessaire pour toute fin visant à faire respecter la partie 1 de la Loi.

[55] A second general principle in *Lavallee* is that "all documents in possession of a lawyer must be sealed before being examined or removed from the lawyer's possession" unless otherwise specifically authorized by a warrant: para. 49. In contrast, under s. 64, examining and copying in a law office by the official stops only at the point at which a claim of solicitor-client privilege is asserted by a lawyer on behalf of a named client. Thus, examining and copying proceeds until there is a specific assertion of privilege — an approach that greatly elevates the risk that privileged material will be examined. Moreover, the name of the client may itself be (although is not always) subject to solicitor-client privilege: para. 28. In a situation in which it is, the

[55] Selon un autre principe général formulé dans l'arrêt *Lavallee*, « tous les documents en la possession d'un avocat doivent être scellés avant d'être examinés ou de le lui être enlevés », sauf si un mandat l'autorise expressément (par. 49). En revanche, aux termes de l'art. 64, l'examen et la reproduction de documents dans un cabinet d'avocats par le fonctionnaire ne cessent qu'au moment où l'avocat revendique le secret professionnel pour le compte d'un client nommément désigné. Ainsi, l'examen et la reproduction des documents se poursuivent jusqu'à ce que le secret professionnel soit expressément invoqué, ce qui augmente considérablement le risque que des documents protégés soient examinés. De plus, il se peut que le nom du

Act requires the lawyer to breach that privilege in order to claim the privilege attaching to the material sought by the official. The same, in my view, may be said about the obligation of the lawyer under s. 64(10) to provide the authorities with the latest known address for the client.

[56] *Lavallee* concerned law office searches that were judicially pre-authorized and therefore addressed a scheme that was, in that respect, different from the scheme that is in issue here. Warrantless searches, such as those permitted under this scheme, are presumptively unreasonable. Moreover, the judicial pre-authorization requirement is, in itself, an important protection against improper search and seizure of privileged material. However, I do not foreclose the possibility that Parliament could devise a constitutionally compliant inspection regime without a judicial pre-authorization requirement.

(4) Summary

[57] In my view, the search powers in ss. 62, 63 and 63.1 as applied to lawyers, along with the inadequate protection of solicitor-client privilege provided by s. 64, constitute a very significant limitation of the right to be free of unreasonable searches and seizures guaranteed by s. 8 of the *Charter*.

(5) Is the Limitation Justified Under Section 1?

[58] Section 1 of the *Charter* "guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society". In order for a limitation to be justified, it must serve and be a proportionate response to a pressing and substantial objective: *R. v. Oakes*, [1986] 1 S.C.R. 103, at pp. 138-39. The government has a difficult task in seeking to uphold as reasonable provisions, such as those in issue here, which have been found to authorize unreasonable searches:

client soit protégé par le secret professionnel de l'avocat (bien que cela ne soit pas toujours le cas) (par. 28). La Loi oblige alors l'avocat à violer le secret professionnel pour revendiquer celui qui vise les documents réclamés par le fonctionnaire. À mon avis, cela vaut également pour l'obligation, imposée à l'avocat par le par. 64(10), de fournir aux autorités la dernière adresse connue du client.

[56] L'affaire *Lavallee* concernait des perquisitions de cabinets d'avocats autorisées au préalable par un juge et portait donc sur un régime qui différait à cet égard de celui ici en cause. Les perquisitions sans mandat, comme celles autorisées par ce régime, sont présumées abusives. En outre, l'exigence d'autorisation judiciaire préalable constitue en soi une protection importante contre la perquisition et la saisie irrégulière de documents protégés. Je n'écarte cependant pas la possibilité que le législateur conçoive un régime d'inspection conforme à la Constitution qui n'exige pas d'autorisation judiciaire préalable.

(4) Résumé

[57] À mon avis, les pouvoirs de perquisition et de fouille qui sont prévus aux art. 62, 63 et 63.1 et qui sont exercés à l'endroit des avocats, conjugués à la protection insuffisante que l'art. 64 accorde au secret professionnel de l'avocat, constituent une restriction considérable du droit d'être protégé contre les fouilles, les perquisitions et les saisies abusives garanti par l'art. 8 de la *Charte*.

(5) La restriction est-elle justifiée au sens de l'article premier?

[58] L'article premier de la *Charte* « garantit les droits et libertés qui [. . .] sont énoncés [dans la *Charte*]. 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 ». Pour être justifiée, une restriction doit viser un objectif urgent et réel et être une réponse proportionnée à cet objectif (*R. c. Oakes*, [1986] 1 R.C.S. 103, p. 138-139). L'État a la tâche difficile de chercher à faire déclarer valides pour cause de raisonnabilité

Lavallee, at para. 46; *R. v. Kokesch*, [1990] 3 S.C.R. 3, at pp. 18-19.

[59] I accept, of course, that the objectives of combating money laundering and terrorist financing are pressing and substantial as both the application judge and the Court of Appeal held.

[60] With respect to the proportionality analysis, the appellant has the burden of proving that (i) the objective is rationally connected to the limit; (ii) the limit impairs the right as little as possible; and (iii) there is proportionality between the effects of the limitation of the *Charter* right and the objective. The rational connection does not impose a particularly onerous threshold: *Little Sisters Book and Art Emporium v. Canada (Minister of Justice)*, 2000 SCC 69, [2000] 2 S.C.R. 1120, at para. 228. There is a logical and direct link between, on one hand, the combating of money laundering and terrorist financing (in which lawyers may unbeknownst to them be participating) and, on the other, governmental supervision through searches conducted at law offices.

[61] In my view, however, the justification fails the minimal impairment test. There are other less drastic means of pursuing the same identified objectives. The Court has previously outlined the sorts of protections that are required in order to meet the constitutional standard of protection for solicitor-client privilege: *Lavallee.*

[62] I am therefore of the view that s. 64, and to the extent that they operate in relation to lawyers' offices, ss. 62, 63 and 63.1 of the Act, cannot be justified.

(6) Remedy

[63] With respect to ss. 62, 63 and 63.1, I would follow the example of the application judge and

des dispositions, comme celles qui nous intéressent en l'espèce, dont il a été jugé qu'elles autorisent des fouilles et des perquisitions abusives (*Lavallee*, par. 46; *R. c. Kokesch*, [1990] 3 R.C.S. 3, p. 18-19).

[59] Je reconnais évidemment que les objectifs de la lutte contre le recyclage des produits de la criminalité et le financement des activités terroristes sont des objectifs urgents et réels, ainsi que l'ont conclu la juge de première instance et la Cour d'appel.

[60] En ce qui concerne l'analyse de la proportionnalité, il incombe à l'appelant de démontrer : (i) qu'il existe un lien rationnel entre l'objectif et la restriction; (ii) que la restriction porte le moins possible atteinte au droit en question; (iii) qu'il y a proportionnalité entre les effets de la restriction apportée au droit garanti par la *Charte* et l'objectif visé. Pour démontrer l'existence d'un lien rationnel, il n'est pas nécessaire de répondre à une norme particulièrement exigeante (*Little Sisters Book and Art Emporium c. Canada (Ministre de la Justice)*, 2000 CSC 69, [2000] 2 R.C.S. 1120, par. 228). Il existe un lien logique et direct entre, d'une part, la lutte contre le recyclage des produits de criminalité et le financement des activités terroristes (auxquels les avocats peuvent participer à leur insu) et, d'autre part, le contrôle qu'exerce l'État au moyen de perquisitions effectuées dans des cabinets d'avocats.

[61] J'estime toutefois que la justification ne satisfait pas au critère de l'atteinte minimale. Il existe d'autres moyens moins radicaux de poursuivre les mêmes objectifs. La Cour a déjà défini le type de protection nécessaire pour satisfaire à la norme constitutionnelle de protection du secret professionnel de l'avocat (*Lavallee*).

[62] Je suis par conséquent d'avis que l'art. 64 et, dans la mesure où ils s'appliquent aux cabinets d'avocats, les art. 62, 63 et 63.1 de la Loi ne peuvent se justifier.

(6) Réparation

[63] En ce qui concerne les art. 62, 63 et 63.1, je suis d'avis de suivre l'exemple de la juge de

read those provisions down to exclude legal counsel and legal firms from the scope of their operation.

[64] The correct approach to s. 64 is more controversial. The Attorney General submits that the appropriate remedy is to read into s. 64 the requirements that would render these provisions constitutionally sound. I cannot accept this approach, however.

[65] The Attorney General's argument rests on the premise that s. 64 (as it now stands) can only violate s. 8 to a "very limited extent": A.F., at para. 116. This is not the case in my respectful view, for the reasons I have developed at length earlier. Moreover, "reading in" as a constitutional remedy is generally not appropriate when there is a variety of options that would render the provision constitutional: see *Schachter v. Canada*, [1992] 2 S.C.R. 679, at pp. 705-7. In this case, there is such a variety of legislative approaches available. As Arbour J. said in *Lavallee*, at para. 48:

> The need to ensure that privilege holders are given a genuine opportunity to enforce the protection of their confidential communications to their lawyers, at the time when they need the protection of the law the most, cannot easily be met by a judicial redrafting of the provision. Neither can the need to ensure that the courts are given enough flexibility and discretion to remain the protectors of constitutional rights and the guardians of the law. In my view, the process for seizing documents in the possession of a lawyer is indeed a delicate matter, which presents some procedural options that are best left to Parliament.

[66] Applying this reasoning, reading in is not appropriate to remedy the constitutional defects of s. 64.

première instance et de donner une interprétation atténuée de ces dispositions pour exclure les conseillers juridiques et les cabinets d'avocats de leur champ d'application.

[64] La méthode qu'il convient d'utiliser dans le cas de l'art. 64 fait moins l'unanimité. D'après le procureur général, la réparation appropriée consiste à ajouter par interprétation à l'art. 64 des exigences qui rendraient ces dispositions constitutionnelles. Je ne puis toutefois souscrire à cette approche.

[65] L'argument du procureur général repose sur la prémisse que l'art. 64 (dans sa forme actuelle) ne peut violer l'art. 8 que de [TRADUCTION] « façon très limitée » (m.a., par. 116). Avec égards, j'estime que ce n'est pas le cas, et ce, pour les raisons que j'ai déjà longuement exposées. Qui plus est, le recours à une « interprétation large » en tant que réparation constitutionnelle ne convient généralement pas lorsque plusieurs solutions permettent de rendre la disposition constitutionnelle (voir *Schachter c. Canada*, [1992] 2 R.C.S. 679, p. 705-707). En l'espèce, un large éventail de solutions s'offrent au législateur. Comme l'a dit la juge Arbour dans *Lavallee*, par. 48 :

> Une reformulation judiciaire de la disposition ne peut pas aisément combler le besoin d'assurer que les détenteurs du privilège aient une occasion réelle de veiller à la protection de la confidentialité de leurs communications avec leurs avocats au moment où ils ont le plus besoin de la protection de la loi. Cette reformulation ne peut pas non plus aisément combler le besoin d'assurer que les tribunaux jouissent de la souplesse et du pouvoir discrétionnaire nécessaires pour garantir qu'ils demeurent les protecteurs des droits constitutionnels et les gardiens de la loi. D'après moi, la saisie de documents en la possession d'un avocat est effectivement une question délicate comportant des choix de procédure qu'il incombe davantage au législateur de faire.

[66] Si l'on applique ce raisonnement au cas qui nous occupe, force est de constater que le recours à une interprétation large ne convient pas pour remédier aux lacunes constitutionnelles de l'art. 64.

(7) Conclusion

[67] I would declare that s. 64 is of no force or effect and that ss. 62, 63 and 63.1 should be read down so that they do not apply to documents in the possession of legal counsel or in law office premises.

[68] I add this. The issues that would arise in the event of a challenge to professional regulatory schemes are not before us in this case. Different considerations would come into play in relation to regulatory audits of lawyers conducted on behalf of lawyers' professional governing bodies. The regulatory schemes in which the professional governing bodies operate in Canada serve a different purpose from the Act and Regulations and generally contain much stricter measures to protect solicitor-client privilege.

B. *Do the Provisions Violate Section 7 of the Charter?*

[69] There are two steps to the analysis under s. 7 of the *Charter*. The first is to determine whether the challenged provisions limit the right to life, liberty or security of the person. If they do, the analysis moves to the second step of determining whether that limitation is in accordance with the principles of fundamental justice: *Canada (Attorney General) v. Bedford*, 2013 SCC 72, [2013] 3 S.C.R. 1101, at para. 57; *Blencoe v. British Columbia (Human Rights Commission)*, 2000 SCC 44, [2000] 2 S.C.R. 307, at para. 47.

[70] The Attorney General maintains that there is no s. 7 violation here, but I respectfully disagree. These provisions limit the liberty of lawyers in a way that is not in accordance with the principle of fundamental justice in relation to the lawyer's duty of commitment to the client's cause.

(7) Conclusion

[67] Je suis d'avis de déclarer inopérant l'art. 64 et de donner aux art. 62, 63 et 63.1 une interprétation atténuée pour qu'ils ne s'appliquent pas aux documents en la possession d'un conseiller juridique ou se trouvant dans un cabinet d'avocats.

[68] J'ajouterais ceci. Les questions qui se poseraient en cas de contestation de régimes réglementaires professionnels ne nous ont pas été soumises en l'espèce. D'autres considérations entreraient en jeu dans le cas des vérifications réglementaires effectuées à l'endroit des avocats au nom des ordres professionnels qui encadrent la profession. Les régimes réglementaires dans le cadre desquels les ordres professionnels exercent leurs activités au Canada visent un objectif différent de celui de la Loi et du Règlement et ils prévoient en règle générale des mesures beaucoup plus strictes pour protéger le secret professionnel de l'avocat.

B. *Les dispositions violent-elles l'art. 7 de la Charte?*

[69] L'analyse fondée sur l'art. 7 de la *Charte* se fait en deux étapes. Dans un premier temps, on doit déterminer si les dispositions contestées restreignent le droit à la vie, à la liberté ou à la sécurité de la personne. Dans l'affirmative, on passe alors à la seconde étape de l'analyse, qui consiste à se demander si cette restriction est conforme aux principes de justice fondamentale (*Canada (Procureur général) c. Bedford*, 2013 CSC 72, [2013] 3 R.C.S. 1101, par. 57; *Blencoe c. Colombie-Britannique (Human Rights Commission)*, 2000 CSC 44, [2000] 2 R.C.S. 307, par. 47).

[70] Le procureur général soutient qu'il n'y a aucune violation de l'art. 7 en l'espèce. Je ne suis pas de cet avis. Ces dispositions restreignent la liberté des avocats d'une manière non conforme au principe de justice fondamentale concernant le devoir de l'avocat de se dévouer à la cause du client.

(1) Do the Provisions Limit Lawyers' and/or Clients' Right to Life, Liberty or Security of the Person?

[71] There is no dispute that these provisions engage the liberty interests of lawyers. If lawyers do not comply with the Act's requirements, they are liable to prosecution and imprisonment. Section 74 provides that the failure to comply with certain provisions of the Act (including the search provisions) can lead to the imposition of a fine of up to $500,000 or imprisonment of up to five years, or both. This includes failure to comply with ss. 6 and 6.1 of the Act, which set out the general verification and record keeping obligations. It also includes the failure of persons in charge of law offices subject to searches to give FINTRAC "all reasonable assistance" during a search conducted under the authority of s. 62, as well as the failure to comply with a request for documents made by FINTRAC under s. 63.1.

[72] Both the application judge and a majority of the Court of Appeal found that this regime also limited the liberty of clients. However, I do not find it necessary to decide this point. I have already concluded that lawyers' liberty interests are engaged by the challenged provisions and it has not been suggested that the s. 7 analysis would be different in relation to clients' as compared to lawyers' liberty interests.

(2) Is the Limitation Contrary to the Principle of Fundamental Justice in Relation to Solicitor-Client Privilege?

[73] I have already concluded that the search provisions of the Act offend the s. 8 right to be free from unreasonable searches and seizures and that they are unconstitutional and of no force and effect as they apply to records in the possession of lawyers. This conclusion makes it unnecessary to undertake an independent s. 7 analysis based on a principle of fundamental justice in relation to solicitor-client

(1) Les dispositions limitent-elles le droit à la vie, à la liberté ou à la sécurité de la personne des avocats et/ou des clients?

[71] Personne ne conteste que ces dispositions mettent en jeu le droit à la liberté de l'avocat. S'il ne se conforme pas aux exigences de la Loi, l'avocat s'expose à des poursuites et à l'emprisonnement. L'article 74 prévoit que le défaut de se conformer à certaines dispositions de la Loi (y compris celles relatives aux fouilles et aux perquisitions) est punissable d'une amende maximale de 500 000 $ et d'un emprisonnement maximal de cinq ans, ou de l'une de ces peines. Parmi ces dispositions, il y a lieu de mentionner les art. 6 et 6.1 de la Loi qui prévoient les obligations générales en matière de vérification d'identité et de tenue de documents. Il y a également lieu de mentionner le défaut de l'exploitant du cabinet d'avocats faisant l'objet d'une perquisition de prêter au CANAFE « toute l'assistance possible » lors d'une perquisition effectuée en vertu de l'art. 62, ainsi que le défaut d'obtempérer à une demande de production de documents présentée par le CANAFE en vertu de l'art. 63.1.

[72] La juge de première instance et les juges majoritaires de la Cour d'appel ont tous conclu que le présent régime restreignait aussi la liberté des clients. Toutefois, je ne juge pas nécessaire de statuer sur ce point. J'ai déjà conclu que les dispositions attaquées mettent en jeu le droit à la liberté des avocats et personne n'a prétendu que l'analyse du droit à la liberté des clients conduite sur la base de l'art. 7 différerait de celle portant sur le droit à la liberté des avocats.

(2) La restriction est-elle contraire au principe de justice fondamentale du secret professionnel de l'avocat?

[73] J'ai déjà conclu que les dispositions de la Loi en matière de fouille et de perquisition portent atteinte au droit, prévu à l'art. 8, d'être protégé contre les fouilles, perquisitions et saisies abusives et qu'elles sont inconstitutionnelles et inopérantes dans le cas des documents en la possession des avocats. Cette conclusion rend superflue dans la présente affaire toute analyse distincte fondée sur l'art. 7 qui

privilege in this case: see, e.g., *Lavallee*, at para. 34; *R. v. Rodgers*, 2006 SCC 15, [2006] 1 S.C.R. 554, at para. 23; and *R. v. Mills*, [1999] 3 S.C.R. 668, at para. 88.

(3) Is the Limitation Contrary to the Principle of Fundamental Justice Relating to the Independence of the Bar?

(a) *The Court of Appeal's Decision*

[74] The Court of Appeal found that the limitation of lawyers' liberty interests was not in accordance with what it concluded was a principle of fundamental justice in relation to the independence of the bar. While the Court of Appeal at times expressed the principle of the independence of the bar in very broad terms, the crux of its reasoning rested on much narrower grounds. The legislation, the court found, constituted state interference with the lawyer's duty of loyalty to the client: it places the lawyer in a conflict of interest because

> the legal advisor must choose to conform to the *Act* and to the *Regulations* and thus, at the very least, be in breach of his or her duty of loyalty acting both for the client and for the State or, in order to respect his or her obligations to the client, expose himself or herself to prosecution . . . they are forced not only to keep but also to create archives for the State.
>
> . . . the Regime imposes conflicting interests and corresponding obligations on the lawyer, regarding clients' interests, state interests, and Lawyers' liberty interests. [paras. 122-23]

(b) *Positions of the Parties and Overview*

[75] The Federation, supported by several interveners, maintains that the independence of the bar is a principle of fundamental justice and that the scheme is contrary to that principle in two respects. First, the scheme directly interferes with how lawyers deliver legal services to clients because it requires lawyers, by threat of imprisonment, to prepare records of the clients' activities, relationships and details of their transactions as part of a regime whose overall purpose is predominantly criminal. This, it is argued, is

repose sur un principe de justice fondamentale concernant le secret professionnel de l'avocat (voir, p. ex., *Lavallee*, par. 34; *R. c. Rodgers*, 2006 CSC 15, [2006] 1 R.C.S. 554, par. 23; et *R. c. Mills*, [1999] 3 R.C.S. 668, par. 88).

(3) La restriction est-elle contraire au principe de justice fondamentale de l'indépendance du barreau?

a) *Décision de la Cour d'appel*

[74] La Cour d'appel a conclu que la restriction au droit à la liberté des avocats n'était pas conforme à ce qui, selon elle, était un principe de justice fondamentale concernant l'indépendance du barreau. Bien qu'elle ait parfois énoncé le principe de l'indépendance du barreau en termes très généraux, l'essentiel de son raisonnement reposait sur des motifs beaucoup plus restreints. Selon la Cour d'appel, la législation constitue une atteinte de l'État au devoir de loyauté de l'avocat envers son client : elle met l'avocat en situation de conflit d'intérêts parce que

> [TRADUCTION] le conseiller juridique doit choisir de se conformer à la *Loi* et au *Règlement* et, ce faisant, manquer tout au moins à son devoir de loyauté, car il agit alors à la fois pour son client et pour l'État au bénéfice duquel il doit non seulement conserver des archives mais aussi les constituer ou, afin de respecter ses obligations envers son client, s'exposer à des poursuites.
>
> . . . le régime impose des intérêts contradictoires et des obligations correspondantes aux avocats en ce qui concerne les intérêts de leurs clients, ceux de l'État et le droit à la liberté des avocats. [par. 122-123]

b) *Thèses des parties et survol*

[75] La Fédération, avec l'appui de plusieurs intervenants, soutient que l'indépendance du barreau est un principe de justice fondamentale et que le régime va à l'encontre de ce principe sous deux rapports. En premier lieu, le régime constitue une ingérence directe dans la fourniture de services juridiques aux clients par l'avocat car il l'oblige, sous peine d'emprisonnement, à préparer des documents concernant les activités et les relations des clients ainsi que le détail de leurs opérations dans le cadre d'un régime

direct government intervention in the way in which the lawyer delivers legal services. Second, the lawyer is required to retain that information so the lawyer's office, as the Federation puts it, becomes an archive for the use of the prosecution. This undermines the trust between lawyer and client that is and must be at the foundation of the solicitor-client relationship. The argument goes that the lawyer is being conscripted against his or her clients by being required to obtain information from a client that is not required in order to provide legal services and to act as a government repository for that information.

[76] As I understand these submissions, there are really two versions of the principle that are being advanced, a broad one and a narrow one.

[77] According to the broad version, the independence of the bar means that lawyers "are free from incursions from any source, including from public authorities": Court of Appeal reasons, at para. 113. The narrower, more focused version, is anchored in concern about state interference with the lawyer's commitment to the client's cause. This narrower version, as I see it, boils down to the proposition that the state cannot impose duties on lawyers that interfere with their duty of commitment to advancing their clients' legitimate interests. In my view, the narrower principle is the one that is most relevant to this case: the central contention is that this scheme substantially interferes with the lawyers' duty of commitment to their clients' cause because it imposes duties on lawyers to the state to act in ways that are contrary to their clients' legitimate interests and may, in effect, turn lawyers into state agents for that purpose.

[78] The Attorney General submits that there is no principle of fundamental justice in relation to the independence of the bar. He argues that the Court of Appeal's broad definition of the independence of the bar essentially places lawyers above the law. The principle of the independence of the bar does not meet any of the three requirements that must be

dont l'objectif général relève principalement du droit criminel. On soutient qu'il s'agit d'une intervention directe de l'État dans la prestation de services juridiques par l'avocat. En second lieu, l'avocat a l'obligation de conserver ces renseignements de sorte que, comme l'explique la Fédération, le cabinet de l'avocat devient un dépôt d'archives à la disposition de la poursuite. Cela sape la confiance entre l'avocat et le client, confiance qui est et doit demeurer à la base de la relation avocat-client. Suivant cet argument, l'avocat devient l'adversaire de son client du fait qu'il est obligé d'obtenir de ce dernier des renseignements dont il n'a pas besoin pour fournir des services juridiques et qu'il est tenu en outre de conserver ces renseignements pour le compte de l'État.

[76] Si j'ai bien compris ces arguments, l'intimée fait en réalité valoir deux versions du principe : l'une large et l'autre étroite.

[77] D'après la version large, l'indépendance du barreau signifie que les avocats [TRADUCTION] « sont à l'abri de toute ingérence extérieure, notamment de la part des pouvoirs publics » (motifs de la Cour d'appel, par. 113). La conception plus étroite, davantage circonscrite, est ancrée dans la crainte que l'État nuise au dévouement de l'avocat à la cause du client. Cette conception revient, selon moi, à affirmer que l'État ne peut imposer aux avocats des obligations qui nuisent à l'accomplissement de leur devoir de se dévouer au service des intérêts légitimes de leurs clients. À mon avis, le principe plus étroit est le plus pertinent en l'espèce : d'après l'argument central, le présent régime entrave de façon substantielle l'accomplissement du devoir des avocats de se dévouer à la cause de leurs clients parce qu'il leur impose des obligations d'agir envers l'État qui sont contraires aux intérêts légitimes de leurs clients et peuvent en fait transformer les avocats en agents de l'État à cette fin.

[78] Pour sa part, le procureur général fait valoir qu'il n'existe aucun principe de justice fondamentale se rapportant à l'indépendance du barreau. D'après lui, la définition large donnée par la Cour d'appel à l'indépendance du barreau place essentiellement les avocats au-dessus des lois. Le principe de l'indépendance du barreau ne satisfait à aucune

met by a principle of fundamental justice. While an important state interest, the independence of the bar is not a legal principle. There is no broad societal consensus concerning the existence of this principle and it cannot be identified with sufficient precision. The independence of the bar, says the Attorney General, does not describe a justiciable standard.

[79] The Attorney General submits that even if the independence of the bar is a principle of fundamental justice, the scheme is consistent with it. The Court of Appeal was wrong to conclude that the scheme has the effect of turning at least some lawyers into state agents. This conclusion, argues the Attorney General, is based on the Court of Appeal's misinterpretation of the nature of the obligations imposed on lawyers to maintain financial records, the extent to which FINTRAC can access these records through a compliance audit, and the prohibition on derivative use of these records provided by s. 65 of the Act. The Attorney General notes that lawyers are exempted from the Act's reporting requirements that apply to accountants and other professionals who act as financial intermediaries.

[80] In my view, there is considerable merit in the Attorney General's submissions considered in relation to the broad notion of the independence of the bar asserted by the Federation. However, I do not for the purposes of this appeal have to finally determine that point. The narrower understanding of the independence of the bar which relates it to the lawyer's duty of commitment to the client's cause is the aspect of the lawyer's special duty to his or her client that is most relevant to this appeal.

[81] The duty of lawyers to avoid conflicting interests is at the heart of both the general legal framework defining the fiduciary duties of lawyers to their clients and of the ethical principles governing lawyers' professional conduct. This duty aims to avoid two types of risks of harm to clients: the risk of misuse of confidential information and the risk of impairment of the lawyer's representation of the client (see,

des trois conditions que doit remplir un principe de justice fondamentale. Bien qu'elle constitue un intérêt important de l'État, l'indépendance du barreau n'est pas un principe juridique. Il ne se dégage pas de large consensus au sein de la société quant à l'existence de ce principe, qui ne peut être défini avec suffisamment de précision. Aux dires du procureur général, l'indépendance du barreau n'évoque pas une norme justiciable.

[79] Le procureur général soutient que, même si l'indépendance du barreau constitue un principe de justice fondamentale, le régime respecte ce principe. La Cour d'appel a eu tort de conclure que le régime avait pour effet de transformer au moins certains avocats en des agents de l'État. Le procureur général ajoute que cette conclusion tient à une mauvaise interprétation, par la Cour d'appel, de la nature des obligations imposées aux avocats de tenir des documents financiers, de la mesure dans laquelle le CANAFE peut consulter les documents en question au cours d'une vérification de conformité et de l'interdiction frappant l'utilisation dérivée de ces documents prévue à l'art. 65 de la Loi. Le procureur général fait observer que les avocats sont dispensés des obligations de déclaration de la Loi auxquelles sont assujettis les comptables et autres professionnels qui agissent comme intermédiaires financiers.

[80] À mon avis, il y a beaucoup de mérite dans les arguments du procureur général examinés relativement à la notion générale d'indépendance du barreau qu'invoque la Fédération. Cependant, je n'ai pas à statuer de manière définitive sur ce point pour les besoins du présent pourvoi. La conception plus étroite de l'indépendance du barreau qui a trait au devoir de l'avocat de se dévouer à la cause du client constitue l'aspect du devoir particulier de l'avocat envers son client qui est le plus pertinent en l'espèce.

[81] Le devoir des avocats d'éviter les conflits d'intérêts est au cœur tant du cadre juridique général définissant les obligations fiduciaires qu'ils ont envers leurs clients que des principes de déontologie régissant leur conduite professionnelle. Ce devoir vise à éviter aux clients deux risques de préjudice : le risque d'utilisation à mauvais escient des renseignements confidentiels et le risque d'entrave à

e.g., *Canadian National Railway Co. v. McKercher LLP*, 2013 SCC 39, [2013] 2 S.C.R. 649, at para. 23).

[82] The Court has recognized that aspects of these fiduciary and ethical duties have a constitutional dimension. I have already discussed at length one important example. The centrality to the administration of justice of preventing misuse of the client's confidential information, reflected in solicitor-client privilege, led the Court to conclude that the privilege required constitutional protection in the context of law office searches and seizures: see *Lavallee*. Solicitor-client privilege is "essential to the effective operation of the legal system": *R. v. Gruenke*, [1991] 3 S.C.R. 263, at p. 289. As Major J. put it in *R. v. McClure*, 2001 SCC 14, [2001] 1 S.C.R. 445, at para. 31: "The important relationship between a client and his or her lawyer stretches beyond the parties and is <u>integral to the workings of the legal system itself</u>" (emphasis added).

[83] The question now is whether another central dimension of the solicitor-client relationship — the lawyer's duty of commitment to the client's cause — also requires some measure of constitutional protection against government intrusion. In my view it does, for many of the same reasons that support constitutional protection for solicitor-client privilege. "The law is a complex web of interests, relationships and rules. The integrity of the administration of justice depends upon the unique role of the solicitor who provides legal advice to clients within this complex system": *McClure*, at para. 2. These words, written in the context of solicitor-client privilege, are equally apt to describe the centrality to the administration of justice of the lawyer's duty of commitment to the client's cause. A client must be able to place "unrestricted and unbounded confidence" in his or her lawyer; that confidence which is at the core of the solicitor-client relationship is a part of the legal system itself, not merely ancillary to it: *Smith v. Jones*, [1999] 1 S.C.R. 455, at para. 45, citing with approval,

la représentation du client par l'avocat (voir, p. ex., *Compagnie des chemins de fer nationaux du Canada c. McKercher LLP*, 2013 CSC 39, [2013] 2 R.C.S. 649, par. 23).

[82] La Cour a reconnu que des aspects de ces obligations fiduciaires et obligations déontologiques revêtent une dimension constitutionnelle. J'ai déjà examiné en profondeur un exemple important. L'importance capitale, pour l'administration de la justice, de prévenir l'utilisation à mauvais escient des renseignements confidentiels du client — importance traduite dans le secret professionnel de l'avocat — a amené la Cour à conclure que le secret professionnel devait être protégé par la Constitution dans le contexte des perquisitions et saisies effectuées dans des cabinets d'avocats (voir *Lavallee*). Le secret professionnel de l'avocat est « essentie[l] au bon fonctionnement du système juridique » (*R. c. Gruenke*, [1991] 3 R.C.S. 263, p. 289). Comme l'a dit le juge Major dans l'arrêt *R. c. McClure*, 2001 CSC 14, [2001] 1 R.C.S. 445, par. 31, « [l]es rapports importants qui existent entre un client et son avocat ne se limitent pas aux parties et font partie <u>intégrante des rouages du système juridique lui-même</u> » (je souligne).

[83] Il s'agit maintenant de savoir si une autre dimension centrale de la relation avocat-client — le devoir de l'avocat de se dévouer à la cause du client — nécessite également une certaine protection constitutionnelle contre l'ingérence de l'État. C'est le cas selon moi, pour bon nombre des mêmes raisons qui militent en faveur de la protection constitutionnelle du secret professionnel de l'avocat. « Le droit est un écheveau complexe d'intérêts, de rapports et de règles. L'intégrité de l'administration de la justice repose sur le rôle unique de l'avocat qui donne des conseils juridiques à des clients au sein de ce système complexe » (*McClure*, par. 2). Ces mots, écrits dans le contexte du secret professionnel de l'avocat, décrivent tout aussi bien l'importance capitale, pour l'administration de la justice, du devoir de l'avocat de se dévouer à la cause du client. Ce dernier doit pouvoir placer « toute sa confiance » en son avocat; cette confiance, qui est au cœur de leur relation, fait partie du système juridique lui-même et n'y est pas simplement accessoire (*Smith*

Anderson v. Bank of British Columbia (1876), 2 Ch. D. 644 (C.A.); *McClure*. The lawyer's duty of commitment to the client's cause, along with the protection of the client's confidences, is central to the lawyer's role in the administration of justice.

[84] We should, in my view, recognize as a principle of fundamental justice that the state cannot impose duties on lawyers that undermine their duty of commitment to their clients' causes. Subject to justification being established, it follows that the state cannot deprive someone of life, liberty or security of the person otherwise than in accordance with this principle.

[85] The analysis leading me to this conclusion addresses three questions: (1) How do we recognize a principle of fundamental justice? (2) Is the principle of commitment to the client's cause such a principle? (3) If so, is the limitation on lawyers' liberty in this legislative scheme in accordance with that principle?

[86] Before addressing those questions, I should make clear what is *not* in issue. While the Court of Appeal and the Federation place great stress on independence of the bar as it relates to self-regulation of the legal profession, I do not find it necessary or desirable in this appeal to address the extent, if at all, to which self-regulation of the legal profession is a principle of fundamental justice. As LeBel J. pointed out in *Finney v. Barreau du Québec*, 2004 SCC 36, [2004] 2 S.C.R. 17, self-regulation is certainly *the means* by which legislatures have chosen in this country to protect the independence of the bar: para. 1. But we do not have to decide here whether that legislative choice is in any respect constitutionally required. Nor does the appeal require us to consider whether other constitutional protections may exist in relation to the place of lawyers in the administration of justice.

c. Jones, [1999] 1 R.C.S. 455, par. 45, où est cité avec approbation *Anderson c. Bank of British Columbia* (1876), 2 Ch. D. 644 (C.A.); *McClure*). Le devoir de l'avocat de se dévouer à la cause du client ainsi que la protection des confidences de ce dernier sont au cœur du rôle joué par l'avocat dans l'administration de la justice.

[84] À mon avis, nous devrions reconnaître comme principe de justice fondamentale l'impossibilité pour l'État d'imposer aux avocats des obligations qui minent leur devoir de se dévouer à la cause de leurs clients. Il s'ensuit que, sous réserve d'une justification établie, l'État ne peut priver quelqu'un de la vie, de la liberté ou de la sécurité de sa personne qu'en conformité avec ce principe.

[85] L'analyse qui m'amène à cette conclusion porte sur les trois questions suivantes : (1) Comment peut-on reconnaître un principe de justice fondamentale? (2) Le principe du dévouement à la cause du client constitue-t-il un tel principe? (3) Dans l'affirmative, la restriction apportée à la liberté des avocats par ce régime législatif est-elle conforme à ce principe?

[86] Avant d'aborder ces questions, je dois préciser ce qui *n'*est *pas* en jeu. Bien que la Cour d'appel et la Fédération tablent fortement sur l'« indépendance » du barreau en ce qui concerne l'autoréglementation de la profession juridique, j'estime qu'il n'est ni nécessaire ni même souhaitable en l'espèce de se pencher sur la mesure, s'il en est, dans laquelle l'autoréglementation de la profession juridique constitue un principe de justice fondamentale. Tel que l'a souligné le juge LeBel dans *Finney c. Barreau du Québec*, 2004 CSC 36, [2004] 2 R.C.S. 17, l'autoréglementation est de toute évidence *le moyen* choisi par le législateur au Canada pour protéger l'indépendance du barreau (par. 1). Nous n'avons cependant pas à décider dans la présente affaire si ce choix du législateur est dicté d'une quelconque manière par la Constitution. Le pourvoi ne nous oblige pas non plus à nous demander s'il existe d'autres protections constitutionnelles en ce qui concerne la place occupée par les avocats dans l'administration de la justice.

(c) *Recognizing Principles of Fundamental Justice*

[87] Principles of fundamental justice have three characteristics. They must be legal principles, there must be "significant societal consensus" that they are "fundamental to the way in which the legal system ought fairly to operate" and they must be sufficiently precise so as "to yield a manageable standard against which to measure deprivations of life, liberty or security of the person": *R. v. Malmo-Levine*, 2003 SCC 74, [2003] 3 S.C.R. 571, at para. 113, per Gonthier and Binnie JJ.; *R. v. D.B.*, 2008 SCC 25, [2008] 2 S.C.R. 3, at para. 46, per Abella J.; *R. v. Anderson*, 2014 SCC 41, [2014] 2 S.C.R. 167, at para. 29, per Moldaver J.

(d) *Is the Duty of Commitment to the Client's Cause Such a Principle?*

(i) Legal Principle and Sufficient Precision

[88] These two elements of the test are conveniently treated together.

[89] Turning first to the definition of a legal principle, the distinction is between, on one hand, a description of "an important state interest" and "the realm of general public policy" and, on the other, a "normative 'legal' principle" and "the basic tenets of our legal system": see *Malmo-Levine*, at paras. 112 and 114; *Re B.C. Motor Vehicle Act*, [1985] 2 S.C.R. 486, at p. 503. Some examples help flesh out this distinction.

[90] The "harm principle", unsuccessfully advanced as a principle of fundamental justice in *Malmo-Levine*, was Mill's theory to the effect that "the only purpose for which power can be rightfully exercised over any member of a civilised community, against his will, is to prevent harm to others": J. S. Mill, *On Liberty and Considerations on Representative Government* (1946), at p. 8. However, the "best interests of the child" principle and the presumption of reduced

c) *Reconnaissance des principes de justice fondamentale*

[87] Le principe de justice fondamentale présente trois caractéristiques. Il doit s'agir d'un principe juridique à l'égard duquel il existe « un consensus substantiel dans la société » sur le fait que ce principe est « essentiel au bon fonctionnement du système de justice », et ce principe doit être suffisamment précis pour « constituer une norme fonctionnelle permettant d'évaluer l'atteinte à la vie, à la liberté ou à la sécurité de la personne » (*R. c. Malmo-Levine*, 2003 CSC 74, [2003] 3 R.C.S. 571, par. 113, les juges Gonthier et Binnie; *R. c. D.B.*, 2008 CSC 25, [2008] 2 R.C.S. 3, par. 46, la juge Abella; *R. c. Anderson*, 2014 CSC 41, [2014] 2 R.C.S. 167, par. 29, le juge Moldaver).

d) *Le devoir de dévouement à la cause du client constitue-t-il un tel principe?*

(i) Principe juridique et précision suffisante

[88] Ces deux éléments du test sont commodément examinés ensemble.

[89] Pour ce qui est tout d'abord de la définition du principe juridique, il faut faire la distinction, d'une part, entre la description d'un « intérêt important de l'État » et « du domaine de l'ordre public en général » et, d'autre part, un « principe "juridique" normatif » et « les préceptes fondamentaux de notre système juridique » (voir *Malmo-Levine*, par. 112 et 114; *Renvoi sur la Motor Vehicle Act (C.-B.)*, [1985] 2 R.C.S. 486, p. 503). Certains exemples permettront de mieux illustrer cette distinction.

[90] Le « principe du préjudice », invoqué sans succès en tant que principe de justice fondamentale dans *Malmo-Levine*, est la théorie de Mill suivant laquelle [TRADUCTION] « la seule raison légitime que puisse avoir une communauté pour user de la force contre un de ses membres est de l'empêcher de nuire aux autres » (J. S. Mill, *On Liberty and Considerations on Representative Government* (1946), p. 8). Toutefois, le principe de l'« intérêt supérieur

moral culpability of young persons were found to be legal principles because they were not legal generalizations, but rather recognized legal principles in both domestic and international law: see *Canadian Foundation for Children, Youth and the Law v. Canada (Attorney General)*, 2004 SCC 4, [2004] 1 S.C.R. 76, at para. 9. Their manifestation in various legal instruments, coupled with their longstanding use by various legal institutions, qualified them as legal principles: *ibid*.; see also *D.B.*, at paras. 47-60.

de l'enfant » et la présomption de culpabilité morale moins élevée des adolescents ont été considérés comme des principes juridiques parce qu'ils étaient non pas des généralisations juridiques, mais plutôt des principes juridiques reconnus tant en droit interne qu'en droit international (voir *Canadian Foundation for Children, Youth and the Law c. Canada (Procureur général)*, 2004 CSC 4, [2004] 1 R.C.S. 76, par. 9). Comme ces principes sont consacrés par divers textes de loi et qu'ils sont appliqués depuis longtemps par diverses institutions juridiques, on les qualifie de principes juridiques (*ibid*.; voir aussi *D.B.*, par. 47-60).

[91] An important indicator that a proposed rule or principle is a legal principle is that it is used as a rule or test in common law, statutory law or international law. The duty of commitment to the client's cause has been recognized by the Court as a distinct element of the broader common law duty of loyalty and thus unquestionably is a legal principle: *McKercher*, at paras. 19 and 43-44; *R. v. Neil*, 2002 SCC 70, [2002] 3 S.C.R. 631, at para. 19.

[91] L'utilisation de la règle ou du principe proposé comme règle ou critère en common law, dans la législation ou en droit international constitue un indice important qu'il s'agit d'un principe juridique. Le devoir de dévouement à la cause du client a été reconnu par la Cour comme un élément distinct du devoir général de loyauté en common law et il constitue donc indéniablement un principe juridique (*McKercher*, par. 19 et 43-44; *R. c. Neil*, 2002 CSC 70, [2002] 3 R.C.S. 631, par. 19).

[92] While this standard is far from self-applying, it has proven to be sufficiently precise to enable the courts to apply it in widely divergent fact situations: see, e.g., *McKercher*, at paras. 43-44 and 55-56; *Neil*, at para. 19. This body of jurisprudence demonstrates that this principle of commitment to the client's cause is sufficiently precise to provide a workable standard in that it can be applied in a manner that provides guidance as to the appropriate result: *Rodriguez v. British Columbia (Attorney General)*, [1993] 3 S.C.R. 519, at pp. 590-91, per Sopinka J.; *Canadian Foundation for Children, Youth and the Law*, at para. 11, per McLachlin C.J.; H. Stewart, *Fundamental Justice: Section 7 of the Canadian Charter of Rights and Freedoms* (2012), at p. 108.

[92] Bien que cette norme ne s'applique pas du tout automatiquement, elle s'est avérée suffisamment précise pour que les tribunaux puissent l'appliquer dans des situations factuelles fort différentes (voir, p. ex., *McKercher*, par. 43-44 et 55-56; *Neil*, par. 19). Cette jurisprudence démontre que le principe de dévouement à la cause du client est assez précis pour constituer une norme pratique en ce qu'on peut l'appliquer de manière à donner des indications sur le résultat approprié (*Rodriguez c. Colombie-Britannique (Procureur général)*, [1993] 3 R.C.S. 519, p. 590-591, le juge Sopinka; *Canadian Foundation for Children, Youth and the Law*, par. 11, la juge en chef McLachlin; H. Stewart, *Fundamental Justice : Section 7 of the Canadian Charter of Rights and Freedoms* (2012), p. 108).

[93] Of course the duty of commitment to the client's cause must not be confused with being the client's dupe or accomplice. It does not countenance a lawyer's involvement in, or facilitation of, a client's illegal activities. Committed representation does not, for example, permit let alone require a

[93] Bien sûr, il ne faut pas confondre le devoir de dévouement à la cause du client et le fait d'être dupé par le client ou d'en être le complice. Ce devoir ne permet pas à l'avocat de participer aux activités illégales d'un client ou de les faciliter. Une représentation dévouée, par exemple, ne l'autorise

lawyer to assert claims that he or she knows are unfounded or to present evidence that he or she knows to be false or to help the client to commit a crime. The duty is perfectly consistent with the lawyer taking appropriate steps with a view to ensuring that his or her services are not being used for improper ends.

pas, et l'oblige encore moins, à présenter des demandes qu'il sait dénuées de fondement, à produire une preuve qu'il sait fausse ou à aider le client à commettre un crime. Le devoir s'accorde parfaitement avec la prise, par l'avocat, des mesures qui s'imposent pour éviter que ses services soient utilisés à des fins illégitimes.

[94] I conclude that the lawyer's duty of commitment to the client's cause is well entrenched as a sufficiently precise legal principle and therefore satisfies the first and the third requirements of a principle of fundamental justice.

[94] Je conclus que le devoir de l'avocat de se dévouer à la cause du client est bien établi comme principe juridique suffisamment précis et qu'il satisfait donc aux première et troisième exigences d'un principe de justice fondamentale.

(ii) <u>Sufficient Consensus That the Duty Is Fundamental</u>

(ii) <u>Consensus suffisant sur le caractère fondamental du devoir</u>

[95] Principles of fundamental justice find their "meaning in the cases and traditions that have long detailed the basic norms for how the state deals with its citizens": *Canadian Foundation for Children, Youth and the Law*, at para. 8, per McLachlin C.J. The duty of commitment to the client's cause is fundamental to how the state and the citizen interact in legal matters.

[95] Les principes de justice fondamentale trouvent leur « sens dans la jurisprudence et les traditions qui, depuis longtemps, exposent en détail les normes fondamentales applicables au traitement des citoyens par l'État » (*Canadian Foundation for Children, Youth and the Law*, par. 8, la juge en chef McLachlin). Le devoir de dévouement à la cause du client est un aspect fondamental de l'interaction entre l'État et le citoyen dans des dossiers juridiques.

[96] Clients — and the broader public — must justifiably feel confident that lawyers are committed to serving their clients' legitimate interests free of other obligations that might interfere with that duty. Otherwise, the lawyer's ability to do so may be compromised and the trust and confidence necessary for the solicitor-client relationship may be undermined. This duty of commitment to the client's cause is an enduring principle that is essential to the integrity of the administration of justice. In *Neil*, the Court underlined the fundamental importance of the duty of loyalty to the administration of justice. The duty of commitment to the client's cause is an essential component of that broader fiduciary obligation. On behalf of the Court, Binnie J. emphasized the ancient pedigree of the duty and wrote that it endures "because it is <u>essential</u> to the integrity of the administration of justice and it is of <u>high public importance</u> that public confidence in that integrity

[96] Les clients — et le public en général — doivent avoir, à juste titre, la conviction que les avocats se dévouent au service des intérêts légitimes de leurs clients en étant libres de toute obligation susceptible de nuire à l'accomplissement de ce devoir. Sinon, la capacité des avocats d'agir ainsi risque d'être compromise et la confiance nécessaire à la relation avocat-client risque d'être sapée. Ce devoir de dévouement à la cause du client est un principe qui subsiste et est essentiel à l'intégrité de l'administration de la justice. Dans *Neil*, la Cour a souligné l'importance fondamentale que revêt le devoir de loyauté pour l'administration de la justice. Le devoir de dévouement à la cause du client constitue un élément essentiel de cette obligation fiduciaire plus large. S'exprimant au nom de la Cour, le juge Binnie a insisté sur les origines lointaines du devoir et dit qu'il subsiste « parce qu'il est <u>essentiel</u> à l'intégrité de l'administration de la justice et il

be maintained": para. 12 (emphasis added). This unequivocal and recent affirmation seems to me to demonstrate that the duty of commitment to the client's cause is both generally accepted and fundamental to the administration of justice as we understand it.

est primordial de préserver la confiance du public dans cette intégrité » (par. 12 (je souligne)). Cette affirmation sans équivoque et récente me semble démontrer que le devoir de dévouement à la cause du client est à la fois généralement reconnu et fondamental pour l'administration de la justice au sens où nous l'entendons.

[97] The duty of commitment to the client's cause is thus not only concerned with justice for individual clients but is also deemed essential to maintaining public confidence in the administration of justice. Public confidence depends not only on fact but also on reasonable perception. It follows that we must be concerned not only with whether the duty is in fact interfered with but also with the perception of a reasonable person, fully apprised of the relevant circumstances and having thought the matter through. The fundamentality of this duty of commitment is supported by many more general and broadly expressed pronouncements about the central importance to the legal system of lawyers being free from government interference in discharging their duties to their clients. In *Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143, McIntyre J. put it this way:

> . . . in the absence of an independent legal profession, skilled and qualified to play its part in the administration of justice and the judicial process, the whole legal system would be in a parlous state. [p. 187]

[97] Le devoir de dévouement à la cause du client ne s'attache donc pas seulement à la justice pour les clients; il est aussi réputé nécessaire pour préserver la confiance du public dans l'administration de la justice. Cette confiance est tributaire non seulement des faits, mais aussi d'une perception raisonnable. Par conséquent, nous devons nous préoccuper non seulement de savoir s'il y a effectivement entorse au devoir, mais aussi de la perception d'une personne raisonnable et bien informée des circonstances pertinentes qui étudierait la question en profondeur. Le caractère fondamental de ce devoir de dévouement trouve appui dans de nombreuses affirmations plus larges et générales au sujet de l'importance primordiale, pour le système juridique, du fait que les avocats soient à l'abri de l'ingérence de l'État lorsqu'ils s'acquittent de leurs obligations envers leurs clients. Dans *Andrews c. Law Society of British Columbia*, [1989] 1 R.C.S. 143, le juge McIntyre s'est exprimé en ces termes :

> . . . en l'absence d'une profession juridique indépendante, possédant l'expérience et les compétences nécessaires à l'exercice de son rôle dans l'administration de la justice et le processus judiciaire, le système juridique en entier serait dans un état précaire. [p. 187]

[98] In *Attorney General of Canada v. Law Society of British Columbia*, [1982] 2 S.C.R. 307, Estey J. wrote:

> The independence of the Bar from the state in all its pervasive manifestations is one of the hallmarks of a free society. Consequently, regulation of these members of the law profession by the state must, so far as by human ingenuity it can be so designed, be free from state interference, in the political sense, with the delivery of services to the individual citizens in the state, particularly in fields of public and criminal law. The public interest in a free society knows no area more sensitive than the independence, impartiality and availability to the general

[98] Dans l'arrêt *Procureur général du Canada c. Law Society of British Columbia*, [1982] 2 R.C.S. 307, le juge Estey a écrit :

> L'une des marques d'une société libre est l'indépendance du barreau face à un État de plus en plus envahissant. En conséquence, la réglementation des membres du barreau par l'État, doit, dans la mesure où cela est humainement possible, être exempte de toute ingérence politique dans la fourniture de services aux citoyens, surtout dans les domaines du droit public et du droit pénal. Du point de vue de l'intérêt public dans une société libre, il est des plus importants que les membres du barreau soient indépendants, impartiaux et accessibles et que le grand public

public of the members of the Bar and through those members, legal advice and services generally. [Emphasis added; pp. 335-36.]

[99] Similarly, in *Pearlman v. Manitoba Law Society Judicial Committee*, [1991] 2 S.C.R. 869, the Court took up the theme in these words:

Stress was rightly laid on the high value that free societies have placed historically on . . . an independent bar, free to represent citizens without fear or favour in the protection of individual rights and civil liberties against incursions from any source, including the state. [p. 887]

(Citing the Ministry of the Attorney General of Ontario, *The Report of the Professional Organizations Committee* (1980), at p. 26.)

[100] In *Finney*, the Court said this:

An independent bar composed of lawyers who are <u>free of influence by public authorities</u> is an important component of the fundamental legal framework of Canadian society. [Emphasis added; para. 1.]

[101] Various international bodies have also broadly affirmed the fundamental importance of preventing state interference with legal representation. The *Basic Principles on the Role of Lawyers* adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders state that "adequate protection of the human rights and fundamental freedoms to which all persons are entitled . . . requires that all persons have effective access to legal services provided by an independent legal profession": U.N. Doc. A/CONF.144/28/Rev.1 (1991), at p. 119. Similarly, the Council of Bars and Law Societies of Europe's *Charter of Core Principles of the European Legal Profession* emphasizes lawyers' "freedom . . . to pursue the client's case", including it as the first of 10 "core principles" (p. 5 (online)). The International Bar Association's *International Principles on Conduct for the Legal Profession*, adopted in 2011, also emphasize committed client representation as the first principle governing lawyers' conduct: "A lawyer shall maintain independence and be afforded

ait, par leur intermédiaire, accès aux conseils et aux services juridiques en général. [Je souligne; p. 335-336.]

[99] De même, dans *Pearlman c. Comité judiciaire de la Société du Barreau du Manitoba*, [1991] 2 R.C.S. 869, la Cour a repris ainsi ce thème :

On a insisté à juste titre sur la grande importance qu'a revêtue pour les sociétés libres, au cours de l'histoire, l'existence [. . .] d'un barreau indépendant, dont les membres sont libres de représenter les citoyens, sans craindre de représailles ni s'attendre à des faveurs, afin d'assurer la protection des droits individuels et des libertés civiles contre les attaques de toute origine, notamment celles de l'État. [p. 887]

(Citant le ministère du Procureur général de l'Ontario, *The Report of the Professional Organizations Committee* (1980), p. 26.)

[100] Dans l'arrêt *Finney*, la Cour a dit :

Un barreau indépendant, composé d'avocats <u>libres vis-à-vis des pouvoirs publics</u>, constitue un élément important de l'ordre juridique fondamental de la société canadienne. [Je souligne; par. 1.]

[101] Divers organismes internationaux ont également confirmé de façon générale l'importance fondamentale d'empêcher l'État de nuire à la représentation par avocat. Les *Principes de base relatifs au rôle du barreau* adoptés par le Huitième Congrès des Nations Unies pour la prévention du crime et le traitement des délinquants indiquent que « la protection adéquate des libertés fondamentales et des droits de l'homme [. . .] dont toute personne doit pouvoir jouir, exige que chacun ait effectivement accès à des services juridiques fournis par des avocats indépendants » (Doc. N.U. A/CONF.144/28/Rév.1 (1991), p. 127). Dans le même ordre d'idées, la *Charte des principes essentiels de l'avocat européen* du Conseil des barreaux européens insiste sur « la liberté [de l'avocat] d'assurer la défense de son client » en en faisant le premier de 10 « principes essentiels » (p. 5 (en ligne)). *Les principes internationaux de déontologie de la profession juridique* de l'Association internationale du barreau, qui ont été adoptés en 2011, soulignent également la représentation dévouée du client comme

the protection such independence offers in giving clients unbiased advice and representation" (p. 5 (online)).

premier principe régissant la conduite des avocats : « L'avocat doit préserver son indépendance et pouvoir bénéficier de la protection qu'offre cette indépendance lorsqu'il représente ses clients et qu'il leur fournit des conseils impartiaux » (p. 5 (en ligne)).

[102] I conclude that there is overwhelming evidence of a strong and widespread consensus concerning the fundamental importance in democratic states of protection against state interference with the lawyer's commitment to his or her client's cause.

[102] Je conclus qu'une preuve abondante établit l'existence d'un vaste et solide consensus au sujet de l'importance fondamentale, dans les États démocratiques, d'empêcher que l'État nuise au dévouement de l'avocat à la cause de son client.

[103] The duty of commitment to the client's cause ensures that "divided loyalty does not cause the lawyer to 'soft peddle' his or her [representation]" and prevents the solicitor-client relationship from being undermined: *Neil*, at para. 19; *McKercher*, at paras. 43-44. In the context of state action engaging s. 7 of the *Charter*, this means at least that (subject to justification) the state cannot impose duties on lawyers that undermine the lawyer's compliance with that duty, either in fact or in the perception of a reasonable person, fully apprised of all of the relevant circumstances and having thought the matter through. The paradigm case of such interference would be state-imposed duties on lawyers that conflict with or otherwise undermine compliance with the lawyer's duty of commitment to serving the client's legitimate interests.

[103] Le devoir de dévouement à la cause du client fait en sorte qu'« une situation de loyauté partagée n'incite pas l'avocat à "mettre une sourdine" à [sa représentation] » et empêche que la relation avocat-client soit minée (*Neil*, par. 19; *McKercher*, par. 43-44). Dans le cas d'une mesure de l'État qui met en jeu l'art. 7 de la *Charte*, cela veut dire tout au moins que l'État ne peut (sous réserve d'une justification) imposer aux avocats des obligations qui entravent leur respect de ce devoir, soit dans les faits, soit aux yeux d'une personne raisonnable et bien informée de toutes les circonstances pertinentes qui étudierait la question en profondeur. L'exemple type d'une telle ingérence serait des obligations imposées aux avocats par l'État qui entrent en conflit avec le devoir de l'avocat de se dévouer au service des intérêts légitimes du client ou qui nuisent autrement au respect de ce devoir.

(e) *Is the Scheme Consistent With This Principle?*

e) *Le régime est-il compatible avec ce principe?*

[104] The scheme limits lawyers' liberty by punishing with imprisonment the failure to comply with its requirements. Is this limitation of liberty in accordance with the principle of fundamental justice in relation to the lawyer's duty of committed representation? In other words, does this regime impose duties on lawyers, the performance of which in fact or in the perception of a reasonable person undermines the lawyers' ability to comply with the duty of commitment to the clients' cause?

[104] Le régime restreint la liberté des avocats en sanctionnant par l'emprisonnement le non-respect de ses exigences. La restriction de cette liberté est-elle conforme au principe de justice fondamentale concernant le devoir de représentation dévouée qui incombe à l'avocat? Autrement dit, le présent régime impose-t-il à l'avocat des obligations dont l'acquittement, dans les faits ou aux yeux d'une personne raisonnable, nuit à la capacité de l'avocat à respecter le devoir de se dévouer à la cause du client?

[105] To answer this question, we must look at the scheme as a whole and in light of my conclusion

[105] Pour répondre à cette question, nous devons examiner le régime dans son ensemble et

that the search aspects of the scheme inadequately protect solicitor-client privilege.

[106] The profession has developed practice standards relating to the subjects addressed by the scheme. The profession's own activity in this area recognizes that lawyers should take care that they not unknowingly assist in, or turn a blind eye to, money laundering or terrorism financing. These professional standards also underline the point that the lawyer's duty of commitment to the client's cause cannot extend to in any way furthering the client's unlawful purposes.

[107] The scheme requires lawyers to make and retain records that the profession does not think are necessary for effective and ethical representation of clients. The Federation's *Model Rule on Client Identification and Verification Requirements* (online), which has been adopted by all law societies in Canada, contains a number of verification and record keeping provisions similar to the requirements of the Act and Regulations. However, the Model Rule is narrower in scope. A few illustrative examples will make this point. The Model Rule does not impose verification requirements when the lawyer is engaged in or gives instructions in respect of an electronic funds transfer: r. 4. The lawyer is not always required to identify the third party when engaged in or giving instructions in respect of a funds transfer, as r. 6 provides that this should be done "where appropriate". There is no obligation under the Model Rule to establish an internal compliance program, as is required under s. 9.6 of the Act. As a final example, the Model Rule contains no equivalent of the scheme's obligation to produce and retain a "receipt of funds record" under s. 33.4 of the Regulations.

compte tenu de ma conclusion que les aspects du régime relatifs aux fouilles et aux perquisitions ne protègent pas suffisamment le secret professionnel de l'avocat.

[106] La profession a établi des normes de pratique relatives aux thèmes visés par le régime. De par ses propres activités exercées dans ce domaine, la profession reconnaît que les avocats doivent prendre garde de favoriser involontairement le recyclage des produits de criminalité ou le financement des activités terroristes, ou de fermer les yeux sur ces activités. Ces normes professionnelles font également ressortir que le devoir de l'avocat de se dévouer à la cause du client ne saurait aller jusqu'à contribuer d'une quelconque manière à la réalisation de ses desseins illicites.

[107] Le régime oblige les avocats à établir et à conserver des documents qui, d'après la profession, ne sont pas nécessaires à la représentation efficace et éthique des clients. Le *Règlement type sur les exigences d'identification et de vérification de l'identité des clients* de la Fédération (en ligne), qui a été adopté par tous les barreaux du Canada, renferme un certain nombre de dispositions concernant la vérification de l'identité et la tenue de documents qui s'apparentent aux exigences de la Loi et du Règlement. La portée du Règlement type est cependant plus étroite. Quelques exemples l'illustreront. Le Règlement type n'impose pas au juriste l'obligation de vérifier l'identité de ses clients lorsqu'il procède à un virement de fonds électronique ou donne des directives à cet égard (art. 4). Le juriste n'est pas toujours tenu d'identifier un tiers lorsqu'il effectue un virement de fonds ou donne des directives à cet égard, étant donné qu'aux termes de l'art. 6, cette mesure ne doit être prise que « le cas échéant ». Le Règlement type n'oblige pas à établir un programme interne de conformité, contrairement à ce que prévoit l'art. 9.6 de la Loi. À titre de dernier exemple, le Règlement type ne renferme aucun équivalent de l'obligation prévue par le régime de produire et de conserver un « relevé de réception de fonds » conformément à l'art. 33.4 du Règlement.

[108] Professional ethical standards such as these cannot dictate to Parliament what the public interest requires or set the constitutional parameters for legislation. But these ethical standards do provide evidence of a strong consensus in the profession as to what ethical practice in relation to these issues requires. Viewed in this light, the legislation requires lawyers to gather and retain considerably more information than the profession thinks is needed for ethical and effective client representation. This, coupled with the inadequate protection of solicitor-client privilege, undermines the lawyer's ability to comply with his or her duty of commitment to the client's cause. The lawyer is required to create and preserve records which are not required for ethical and effective representation. The lawyer is required to do this in the knowledge that any solicitor-client confidences contained in these records are not adequately protected against searches and seizures authorized by the scheme. This may, in the lawyer's correctly formed opinion, be contrary to the client's legitimate interests and therefore these duties imposed by the scheme may directly conflict with the lawyer's duty of committed representation.

[109] I also conclude that a reasonable and informed person, thinking the matter through, would perceive that these provisions in combination significantly undermine the capacity of lawyers to provide committed representation. The reasonable and well-informed client would see his or her lawyer being required by the state to collect and retain information that, in the view of the legal profession, is not required for effective and ethical representation and with respect to which there are inadequate protections for solicitor-client privilege. Clients would thus reasonably perceive that lawyers were, at least in part, acting on behalf of the state in collecting and retaining this information in circumstances in which privileged information might well be disclosed to the state without the client's consent. This would reduce confidence to an unacceptable degree in the lawyer's ability to provide committed representation.

[108] De telles normes de déontologie ne sauraient dicter au législateur ce qu'exige l'intérêt public ou fixer les paramètres constitutionnels d'une loi. Mais ces normes déontologiques témoignent effectivement d'un solide consensus au sein de la profession en ce qui a trait aux normes déontologiques que commandent ces enjeux. Vue sous cet angle, la législation oblige les avocats à recueillir et à conserver beaucoup plus de renseignements que ce que la profession estime nécessaire pour la représentation éthique et efficace du client. Ce fait, conjugué à la protection insuffisante du secret professionnel de l'avocat, mine la capacité de ce dernier à respecter son devoir de se dévouer à la cause du client. L'avocat est tenu de créer et de conserver des documents qui ne sont pas nécessaires à une représentation éthique et efficace tout en sachant que les renseignements visés par son secret professionnel qui figurent dans ces documents ne bénéficient pas d'une protection convenable contre les perquisitions et saisies autorisées par le régime. Cela peut, comme le penserait à juste titre l'avocat, être contraire aux intérêts légitimes du client et, par conséquent, ces obligations imposées par le régime peuvent entrer directement en conflit avec le devoir de représentation dévouée de l'avocat.

[109] Je conclus en outre que la personne raisonnable et bien informée examinant la question en profondeur estimerait que la combinaison de ces dispositions mine sensiblement la capacité des avocats de représenter leurs clients avec dévouement. Le client raisonnable et bien informé verrait son avocat tenu par l'État de recueillir et de conserver des renseignements qui, de l'avis de la profession juridique, ne sont pas nécessaires pour le représenter de manière efficace et éthique et à l'égard desquels le secret professionnel de l'avocat ne bénéficie pas d'une protection suffisante. Il serait donc raisonnable pour les clients de penser que les avocats agissent, du moins en partie, pour le compte de l'État lorsqu'ils recueillent et conservent ces renseignements dans une situation où des renseignements confidentiels pourraient fort bien être communiqués à l'État sans le consentement du client. On assisterait ainsi à une érosion inacceptable de la confiance en la capacité de l'avocat de représenter ses clients avec dévouement.

[110] I conclude that the scheme taken as a whole limits the liberty of lawyers in a manner that is not in accordance with the principle of fundamental justice relating to the lawyer's duty of committed representation.

[111] I emphasize, however, that this holding does not place lawyers above the law. It is only when the state's imposition of duties on lawyers undermines, in fact or in the perception of a reasonable person, the lawyer's ability to comply with his or her duty of commitment to the client's cause that there will be a departure from what is required by this principle of fundamental justice.

[112] In light of my holding in relation to s. 8 of the *Charter*, the scheme requires significant modification in order to comply with the requirements of the right to be free from unreasonable searches and seizures. Given that there are a number of ways in which the scheme could be made compliant with s. 8, I do not want to venture into speculation about how a modified scheme could appropriately respond to the requirements of s. 7. However, it seems to me that if, for example, the scheme were to provide the required constitutional protections for solicitor-client privilege as well as meaningful derivative use immunity of the required records for the purposes of prosecuting clients, it would be much harder to see how it would interfere with the lawyer's duty of commitment to the client's cause.

[113] The information gathering and record retention provisions of this scheme serve important public purposes. They help to ensure that lawyers take significant steps so that when they act as financial intermediaries, they are not assisting money laundering or terrorist financing. The scheme also serves the purpose of requiring lawyers to be able to demonstrate to the competent authorities that this is the case. In order to pursue these objectives, Parliament is entitled, within proper limits which I have outlined, to impose obligations beyond those which the legal profession considers essential to effective and ethical representation. Lawyers have a duty to give and clients are entitled to receive committed legal representation as well as to have their

[110] Je conclus que, pris dans son ensemble, le régime restreint la liberté des avocats d'une manière qui n'est pas conforme au principe de justice fondamentale concernant le devoir de représentation dévouée de l'avocat.

[111] Je tiens toutefois à souligner que cette conclusion n'a pas pour effet de placer les avocats au-dessus des lois. Ce n'est qu'au moment où l'État impose à l'avocat des obligations qui minent, dans les faits ou aux yeux d'une personne raisonnable, la capacité de ce dernier à respecter son devoir de se dévouer à la cause du client qu'il y a dérogation à ce que requiert ce principe de justice fondamentale.

[112] Compte tenu de ma conclusion relative à l'art. 8 de la *Charte*, le régime doit être considérablement remanié pour respecter les exigences du droit à la protection contre les fouilles, les perquisitions et les saisies abusives. Puisqu'il existe plusieurs façons de rendre le régime conforme à l'art. 8, je ne veux pas me hasarder à conjecturer la manière dont un régime modifié pourrait répondre convenablement aux exigences de l'art. 7. Par contre, il me semble que si, par exemple, le régime prévoyait les protections constitutionnelles dont a besoin le secret professionnel de l'avocat et une immunité utile contre l'utilisation dérivée des documents nécessaires à la poursuite des clients, il serait beaucoup plus difficile de voir comment le régime nuirait à l'accomplissement du devoir de l'avocat de se dévouer à la cause du client.

[113] Les dispositions du présent régime relatives à la cueillette de renseignements et à la conservation de documents servent à des fins importantes d'ordre public. En effet, elles tendent à faire en sorte que les avocats prennent d'importantes mesures pour éviter de faciliter le recyclage des produits de criminalité ou le financement des activités terroristes lorsqu'ils agissent en tant qu'intermédiaire financier. Le régime sert également à exiger des avocats qu'ils soient à même d'en faire la démonstration aux autorités compétentes. Afin de poursuivre ces objectifs, le législateur peut, dans les limites appropriées que j'ai exposées, imposer d'autres obligations que celles que la profession juridique juge essentielles à une représentation efficace et éthique.

privileged communications with their lawyer protected. Clients are not, however, entitled to make unwitting accomplices of their lawyers let alone enlist them in the service of their unlawful ends.

Les avocats sont tenus, et les clients ont droit, à une représentation dévouée ainsi qu'à la protection des communications confidentielles entre eux. Les clients n'ont cependant pas le droit de faire de leurs avocats des complices involontaires et encore moins de faire appel à eux pour réaliser leurs desseins illicites.

(f) *Justification*

[114] I agree with the conclusion reached by the application judge and the Court of Appeal (which was unanimous on this point) that the scheme fails the proportionality test under s. 1 and is therefore not a limitation that is demonstrably justified in a free and democratic society. My conclusion is based on my view that it is the combination of the inadequate protection of solicitor-client privilege and the information gathering and retention aspects of the scheme that results in the s. 7 violation.

f) *Justification*

[114] Je souscris à la conclusion de la juge de première instance et de la Cour d'appel (unanime sur ce point) selon laquelle le régime ne satisfait pas au critère de proportionnalité de l'examen fondé sur l'article premier et ne constitue donc pas une limite dont la justification peut se démontrer dans le cadre d'une société libre et démocratique. Ma conclusion repose sur mon avis que c'est la combinaison de la protection insuffisante du secret professionnel de l'avocat et des aspects du régime relatifs à la cueillette et à la conservation de renseignements qui se traduit par la violation de l'art. 7.

(4) Conclusion

[115] I would agree with the application judge's decision that ss. 33.3, 33.4, 33.5 and 59.4 of the Regulations are of no force and effect and that s. 11.1 of the Regulations should be read down so that it does not apply to documents in the possession of legal counsel or in law office premises.

(4) Conclusion

[115] Je suis d'accord avec la décision de la juge de première instance que les art. 33.3, 33.4, 33.5 et 59.4 du Règlement sont inopérants et que l'art. 11.1 du Règlement doit recevoir une interprétation atténuée pour qu'il ne s'applique pas aux documents en la possession d'un conseiller juridique ou se trouvant dans un cabinet d'avocats.

IV. Disposition

[116] To summarize, I conclude that the search provisions of the Act infringe s. 8 of the *Charter* and that the information gathering and retention provisions, in combination with the search provisions, infringe s. 7 of the *Charter*. Sections 5(*i*) and 5(*j*) of the Act provide that Part 1 of the Act applies to persons and entities described in the Regulations and, in my view, do not on their own infringe either s. 7 or s. 8 of the *Charter*.

IV. Dispositif

[116] Pour résumer, j'estime que les dispositions de la Loi en matière de fouille et de perquisition violent l'art. 8 de la *Charte* et que les dispositions relatives à la cueillette et à la conservation de renseignements, combinées à celles applicables aux fouilles et aux perquisitions, contreviennent à l'art. 7 de la *Charte.* Les alinéas 5*i*) et 5*j*) de la Loi prévoient que la partie 1 de la Loi s'applique aux personnes et aux entités visées par le Règlement et, à mon avis, ils ne violent pas à eux seuls l'art. 7 ou l'art. 8 de la *Charte*.

[117] I would allow the appeal in part with costs of the appeal and the proceedings below to the Federation. I would set aside that part of the application judge's order declaring that ss. 5(*i*) and 5(*j*) of the Act are inconsistent with the Constitution of Canada and are of no force and effect to the extent that the reference in those subsections to "persons and entities" includes legal counsel and law firms. I would strike ss. 5(*i*) and 5(*j*) from that part of her order declaring that ss. 5(*i*), 5(*j*), 62, 63 and 63.1 of the Act are read down to exclude legal counsel and law firms from the operation of those sections. I would otherwise dismiss the appeal and answer the constitutional questions as follows:

1. Do ss. 5(*i*), 5(*j*), 62, 63, 63.1 or 64 of the *Proceeds of Crime (Money Laundering) and Terrorist Financing Act*, S.C. 2000, c. 17, infringe s. 7 of the *Canadian Charter of Rights and Freedoms*?

Answer: With respect to ss. 62, 63, 63.1 and 64 of the Act, it is not necessary to answer this question given the answer to question 5. With respect to ss. 5(*i*) and 5(*j*) of the Act, the answer is no.

2. If so, is the infringement a reasonable limit prescribed by law as can be demonstrably justified in a free and democratic society under s. 1 of the *Canadian Charter of Rights and Freedoms*?

Answer: It is not necessary to answer this question.

3. Do ss. 11.1, 33.3, 33.4 or 59.4 of the *Proceeds of Crime (Money Laundering) and Terrorist Financing Regulations*, SOR/2002-184, infringe s. 7 of the *Canadian Charter of Rights and Freedoms*?

Answer: With respect to s. 11.1 of the Regulations, to the extent that it applies to legal counsel and legal firms, the answer is yes. With respect to ss. 33.3, 33.4 and 59.4 of the Regulations, the answer is yes.

[117] Je suis d'avis d'accueillir le pourvoi en partie et d'accorder à la Fédération ses dépens relatifs au présent pourvoi et aux procédures devant les juridictions inférieures. J'annulerais la partie de l'ordonnance où la juge de première instance déclare les al. 5*i*) et 5*j*) de la Loi incompatibles avec la Constitution du Canada et inopérants dans la mesure où les « personnes et les entités » mentionnées à ces alinéas comprennent les conseillers juridiques et les cabinets d'avocats. Je retirerais les al. 5*i*) et 5*j*) de la partie de l'ordonnance donnant à ces alinéas de même qu'aux art. 62, 63 et 63.1 de la Loi une interprétation atténuée pour soustraire à leur application les conseillers juridiques et les cabinets d'avocats. Pour le reste, je suis d'avis de rejeter le pourvoi et de répondre comme suit aux questions constitutionnelles :

1. Les alinéas 5*i*) et 5*j*) et les art. 62, 63, 63.1 ou 64 de la *Loi sur le recyclage des produits de la criminalité et le financement des activités terroristes*, L.C. 2000, c. 17, violent-ils l'art. 7 de la *Charte canadienne des droits et libertés*?

Réponse : En ce qui concerne les art. 62, 63, 63.1 et 64 de la Loi, il n'est pas nécessaire de répondre à cette question compte tenu de la réponse donnée à la question 5. En ce qui concerne les al. 5*i*) et 5*j*) de la Loi, la réponse est non.

2. Dans l'affirmative, s'agit-il d'une violation constituant une limite raisonnable, établie par une règle de droit et dont la justification peut se démontrer dans le cadre d'une société libre et démocratique conformément à l'article premier de la *Charte canadienne des droits et libertés*?

Réponse : Il n'est pas nécessaire de répondre à cette question.

3. Les articles 11.1, 33.3, 33.4 ou 59.4 du *Règlement sur le recyclage des produits de la criminalité et le financement des activités terroristes*, DORS/2002-184, violent-ils l'art. 7 de la *Charte canadienne des droits et libertés*?

Réponse : En ce qui concerne l'art. 11.1 du Règlement, dans la mesure où il s'applique aux conseillers juridiques et aux cabinets d'avocats, la réponse est oui. En ce qui concerne les art. 33.3, 33.4 et 59.4 du Règlement, la réponse est oui.

4. If so, is the infringement a reasonable limit prescribed by law as can be demonstrably justified in a free and democratic society under s. 1 of the *Canadian Charter of Rights and Freedoms*?

Answer: No.

5. Do ss. 5(*i*), 5(*j*), 62, 63, 63.1 or 64 of the *Proceeds of Crime (Money Laundering) and Terrorist Financing Act*, S.C. 2000, c. 17, infringe s. 8 of the *Canadian Charter of Rights and Freedoms*?

Answer: To the extent that ss. 62, 63 and 63.1 of the Act apply to documents in the possession of legal counsel and legal firms, the answer is yes. With respect to s. 64, the answer is yes. With respect to ss. 5(*i*) and 5(*j*), the answer is no.

6. If so, is the infringement a reasonable limit prescribed by law as can be demonstrably justified in a free and democratic society under s. 1 of the *Canadian Charter of Rights and Freedoms*?

Answer: No.

7. Do ss. 11.1, 33.3, 33.4 or 59.4 of the *Proceeds of Crime (Money Laundering) and Terrorist Financing Regulations*, SOR/2002-184, infringe s. 8 of the *Canadian Charter of Rights and Freedoms*?

Answer: No.

8. If so, is the infringement a reasonable limit prescribed by law as can be demonstrably justified in a free and democratic society under s. 1 of the *Canadian Charter of Rights and Freedoms*?

Answer: It is not necessary to answer this question.

The following are the reasons delivered by

[118] THE CHIEF JUSTICE AND MOLDAVER J. — We have read the decision of Cromwell J. and we

4. Dans l'affirmative, s'agit-il d'une violation constituant une limite raisonnable, établie par une règle de droit et dont la justification peut se démontrer dans le cadre d'une société libre et démocratique conformément à l'article premier de la *Charte canadienne des droits et libertés*?

Réponse : Non.

5. Les alinéas 5*i*) et 5*j*) et les art. 62, 63, 63.1 ou 64 de la *Loi sur le recyclage des produits de la criminalité et le financement des activités terroristes*, L.C. 2000, c. 17, violent-ils l'art. 8 de la *Charte canadienne des droits et libertés*?

Réponse : Dans la mesure où les art. 62, 63 et 63.1 de la Loi s'appliquent aux documents se trouvant en la possession d'un conseiller juridique ou d'un cabinet d'avocats, la réponse est oui. En ce qui concerne l'art. 64, la réponse est oui. En ce qui concerne les al. 5*i*) et 5*j*), la réponse est non.

6. Dans l'affirmative, s'agit-il d'une violation constituant une limite raisonnable, établie par une règle de droit et dont la justification peut se démontrer dans le cadre d'une société libre et démocratique conformément à l'article premier de la *Charte canadienne des droits et libertés*?

Réponse : Non.

7. Les articles 11.1, 33.3, 33.4 ou 59.4 du *Règlement sur le recyclage des produits de la criminalité et le financement des activités terroristes*, DORS/2002-184, violent-ils l'art. 8 de la *Charte canadienne des droits et libertés*?

Réponse : Non.

8. Dans l'affirmative, s'agit-il d'une violation constituant une limite raisonnable, établie par une règle de droit et dont la justification peut se démontrer dans le cadre d'une société libre et démocratique conformément à l'article premier de la *Charte canadienne des droits et libertés*?

Réponse : Il n'est pas nécessaire de répondre à cette question.

Version française des motifs rendus par

[118] LA JUGE EN CHEF ET LE JUGE MOLDAVER — Nous avons pris connaissance de la décision du

agree with his reasons insofar as they relate to s. 8 of the *Canadian Charter of Rights and Freedoms*.

[119] However, we respectfully disagree with the approach taken by our colleague in his analysis of s. 7 of the *Charter*. To the extent that the s. 7 interests of the lawyer are engaged, we do not share our colleague's view that the principle of fundamental justice that would be offended is the lawyer's commitment to the client's cause. In our view, this "principle" lacks sufficient certainty to constitute a principle of fundamental justice: see *R. v. Malmo-Levine*, 2003 SCC 74, [2003] 3 S.C.R. 571, at para. 113. The lawyer's commitment to the client's interest will vary with the nature of the retainer between the lawyer and client, as well as with other circumstances. It does not, in our respectful opinion, provide a workable constitutional standard.

[120] Rather, we are inclined to the view that the s. 7 analysis would be better resolved relying on the principle of fundamental justice which recognizes that the lawyer is required to keep the client's confidences — solicitor-client privilege. This duty, as our colleague explains in his discussion of s. 8, has already been recognized as a constitutional norm. We note that in applying the norm of commitment to the client's cause, our colleague relies on breach of solicitor-client privilege. In our view, breach of this principle is sufficient to establish that the potential deprivation of liberty would violate s. 7.

[121] For these reasons, we would allow the appeal in part in accordance with the disposition of our colleague.

APPENDIX

Proceeds of Crime (Money Laundering) and Terrorist Financing Act, S.C. 2000, c. 17

2. The definitions in this section apply in this Act.

juge Cromwell et nous faisons nôtres ses motifs portant sur l'art. 8 de la *Charte canadienne des droits et libertés*.

[119] Toutefois, nous sommes en désaccord avec la manière dont notre collègue analyse l'art. 7 de la *Charte*. Dans la mesure où les droits garantis à l'avocat par l'art. 7 entrent en jeu, nous ne partageons pas l'avis de notre collègue que le principe de justice fondamentale auquel il serait contrevenu est le dévouement de l'avocat à la cause du client. Nous estimons que ce « principe » n'est pas suffisamment certain pour constituer un principe de justice fondamentale (voir *R. c. Malmo-Levine*, 2003 CSC 74, [2003] 3 R.C.S. 571, par. 113). Le dévouement de l'avocat à l'intérêt du client varie selon la nature du mandat conclu entre eux ainsi que d'autres facteurs. À notre humble avis, ce dévouement ne fournit pas une norme constitutionnelle pratique.

[120] Nous sommes plutôt enclins à penser qu'il vaudrait mieux résoudre l'analyse relative à l'art. 7 sur la base du principe de justice fondamentale qui reconnaît l'obligation de l'avocat de garder secrètes les confidences du client, soit le secret professionnel de l'avocat. Comme l'explique notre collègue dans son examen de l'art. 8, ce devoir a déjà été reconnu comme une norme constitutionnelle. Signalons qu'en appliquant la norme du dévouement à la cause du client, notre collègue se fonde sur une violation du secret professionnel de l'avocat. Selon nous, la transgression de ce principe suffit pour établir que la privation potentielle de liberté violerait l'art. 7.

[121] Pour ces motifs, nous sommes d'avis d'accueillir le pourvoi en partie conformément au dispositif de notre collègue.

ANNEXE

Loi sur le recyclage des produits de la criminalité et le financement des activités terroristes, L.C. 2000, ch. 17

2. Les définitions qui suivent s'appliquent à la présente loi.

. . .

"legal counsel" means, in Quebec, an advocate or a notary and, in any other province, a barrister or solicitor. [am. S.C. 2010, c. 12, s. 1862, eff. June 18, 2014]

. . .

3. The object of this Act is

(*a*) to implement specific measures to detect and deter money laundering and the financing of terrorist activities and to facilitate the investigation and prosecution of money laundering offences and terrorist activity financing offences, including

(i) establishing record keeping and client identification requirements for financial services providers and other persons or entities that engage in businesses, professions or activities that are susceptible to being used for money laundering or the financing of terrorist activities,

(ii) requiring the reporting of suspicious financial transactions and of cross-border movements of currency and monetary instruments, and

(iii) establishing an agency that is responsible for ensuring compliance with Parts 1 and 1.1 and for dealing with reported and other information;

(*b*) to respond to the threat posed by organized crime by providing law enforcement officials with the information they need to deprive criminals of the proceeds of their criminal activities, while ensuring that appropriate safeguards are put in place to protect the privacy of persons with respect to personal information about themselves;

(*c*) to assist in fulfilling Canada's international commitments to participate in the fight against transnational crime, particularly money laundering, and the fight against terrorist activity; and

(*d*) to enhance Canada's capacity to take targeted measures to protect its financial system and to facilitate Canada's efforts to mitigate the risk that its financial system could be used as a vehicle for money

. . .

« conseiller juridique » Un avocat et, au Québec, un avocat ou un notaire [mod. par L.C. 2010, c. 12, art. 1862, entré en vigueur le 18 juin 2014]

. . .

3. La présente loi a pour objet :

a) de mettre en œuvre des mesures visant à détecter et décourager le recyclage des produits de la criminalité et le financement des activités terroristes et à faciliter les enquêtes et les poursuites relatives aux infractions de recyclage des produits de la criminalité et aux infractions de financement des activités terroristes, notamment :

(i) imposer des obligations de tenue de documents et d'identification des clients aux fournisseurs de services financiers et autres personnes ou entités qui se livrent à l'exploitation d'une entreprise ou à l'exercice d'une profession ou d'activités susceptibles d'être utilisées pour le recyclage des produits de la criminalité ou pour le financement des activités terroristes,

(ii) établir un régime de déclaration obligatoire des opérations financières douteuses et des mouvements transfrontaliers d'espèces et d'effets,

(iii) constituer un organisme chargé du contrôle d'application des parties 1 et 1.1 et de l'examen de renseignements, notamment ceux portés à son attention au titre du sous-alinéa (ii);

b) de combattre le crime organisé en fournissant aux responsables de l'application de la loi les renseignements leur permettant de priver les criminels du produit de leurs activités illicites, tout en assurant la mise en place des garanties nécessaires à la protection de la vie privée des personnes à l'égard des renseignements personnels les concernant;

c) d'aider le Canada à remplir ses engagements internationaux dans la lutte contre le crime transnational, particulièrement le recyclage des produits de la criminalité, et la lutte contre les activités terroristes.

d) de renforcer la capacité du Canada de prendre des mesures ciblées pour protéger son système financier et de faciliter les efforts qu'il déploie pour réduire le risque que ce système puisse servir de véhicule pour laundering and the financing of terrorist activities. [am. S.C. 2010, c. 12, s. 1863, eff. June 18, 2014; am. S.C. 2014, c. 20, s. 255, eff. June 19, 2014]

5. This Part applies to the following persons and entities:

. . .

(*i*) persons and entities engaged in a business, profession or activity described in regulations made under paragraph 73(1)(*a*);

(*j*) persons and entities engaged in a business or profession described in regulations made under paragraph 73(1)(*b*), while carrying out the activities described in the regulations;

. . .

6. Every person or entity referred to in section 5 shall keep and retain prescribed records in accordance with the regulations.

6.1 Every person or entity referred to in section 5 shall verify, in the prescribed circumstances and in accordance with the regulations, the identity of any person or entity.

7. Subject to section 10.1, every person or entity referred to in section 5 shall report to the Centre, in the prescribed form and manner, every financial transaction that occurs or that is attempted in the course of their activities and in respect of which there are reasonable grounds to suspect that

(*a*) the transaction is related to the commission or the attempted commission of a money laundering offence; or

(*b*) the transaction is related to the commission or the attempted commission of a terrorist activity financing offence.

9. (1) Subject to section 10.1, every person or entity referred to in section 5 shall report to the Centre, in the prescribed form and manner,

le recyclage des produits de la criminalité et le financement des activités terroristes. [mod. par L.C. 2010, c. 12, art. 1863, entré en vigueur le 18 juin 2014; mod. par L.C. 2014, c. 20, art. 255, entré en vigueur le 19 juin 2014]

5. La présente partie s'applique aux personnes et entités suivantes :

. . .

i) les personnes et les entités qui se livrent à l'exploitation d'une entreprise ou à l'exercice d'une profession ou d'activités visées par un règlement pris en vertu de l'alinéa 73(1)*a*);

j) les personnes et les entités qui se livrent à l'exploitation d'une entreprise ou à l'exercice d'une profession visées par un règlement pris en vertu de l'alinéa 73(1)*b*) lorsqu'elles exercent les activités mentionnées aux règlements;

. . .

6. Il incombe à toute personne ou entité visée à l'article 5 de tenir et de conserver, conformément aux règlements, les documents prévus par règlement.

6.1 Il incombe à toute personne ou entité visée à l'article 5 de vérifier, dans les cas prévus par les règlements et en conformité avec ceux-ci, l'identité de toute personne ou entité.

7. Il incombe, sous réserve de l'article 10.1, à toute personne ou entité visée à l'article 5 de déclarer au Centre, selon les modalités réglementaires, toute opération financière qu'on a effectuée ou tentée dans le cours de ses activités et à l'égard de laquelle il y a des motifs raisonnables de soupçonner qu'elle est liée à la perpétration — réelle ou tentée —, selon le cas :

a) d'une infraction de recyclage des produits de la criminalité;

b) d'une infraction de financement des activités terroristes.

9. (1) Il incombe, sous réserve de l'article 10.1, à toute personne ou entité visée à l'article 5 de déclarer au Centre, selon les modalités réglementaires :

(*a*) any financial transaction, or any financial transaction within a class of financial transactions, specified in a directive issued under Part 1.1 that occurs or that is attempted in the course of their activities; and

(*b*) any prescribed financial transaction that occurs in the course of their activities.

(2) Subsection (1) does not apply to prescribed persons or entities, or prescribed classes of persons or entities, in respect of prescribed transactions, classes of transactions, clients or classes of clients, if the prescribed conditions are met.

(3) Every person or entity referred to in section 5 shall establish and maintain a list, in the prescribed form and manner, of their clients in respect of whom a report would have been required under subsection (1) were it not for subsection (2). However, a person or an entity may choose to report a client's transactions under subsection (1) instead of maintaining the list in respect of that client. [am. S.C. 2010, c. 12, s. 1864, eff. June 18, 2014]

9.1 Subject to section 9, every person or entity that is required to make a report to the Centre under an Act of Parliament or any regulations under it shall make it in the form and manner prescribed under this Act for a report under that Act.

9.6 (1) Every person or entity referred to in section 5 shall establish and implement, in accordance with the regulations, a program intended to ensure their compliance with this Part and Part 1.1.

(2) The program shall include the development and application of policies and procedures for the person or entity to assess, in the course of their activities, the risk of a money laundering offence or a terrorist activity financing offence.

(3) If the person or entity considers that the risk referred to in subsection (2) is high, the person or entity shall take prescribed special measures for identifying clients, keeping records and monitoring financial transactions in respect of the activities that pose the high risk. [am. S.C. 2010, c. 12, s. 1865, eff. June 18, 2014]

10.1 Sections 7 and 9 do not apply to persons or entities referred to in paragraph 5(*i*) or (*j*) who are, as the

a) les opérations financières — ou les opérations financières faisant partie d'une catégorie d'opérations financières — précisées dans les directives prévues par la partie 1.1 qui sont effectuées ou tentées dans le cours de ses activités;

b) les opérations financières visées par règlement qui sont effectuées dans le cours de ses activités.

(2) Le paragraphe (1) ne s'applique pas aux personnes ou entités — ou aux catégories de personnes ou entités — visées par règlement à l'égard d'opérations, de catégories d'opérations, de clients ou de catégories de clients visés par règlement, si les conditions réglementaires sont remplies.

(3) Il incombe à toute personne ou entité visée à l'article 5 de dresser et de maintenir, selon les modalités réglementaires, une liste des clients à l'égard desquels elle aurait été tenue, n'était le paragraphe (2), de faire une déclaration en application du paragraphe (1). Néanmoins, elle peut choisir de se conformer au paragraphe (1) à l'égard d'un client au lieu d'inscrire celui-ci sur une telle liste. [mod. par L.C. 2010, c. 12, art. 1864, entré en vigueur le 18 juin 2014]

9.1 Sous réserve de l'article 9, il incombe à toute personne ou entité qui est tenue de faire une déclaration au Centre sous le régime d'une loi fédérale de la faire selon les modalités réglementaires prescrites pour cette loi.

9.6 (1) Il incombe à toute personne ou entité visée à l'article 5 d'établir et de mettre en œuvre, en conformité avec les règlements, un programme destiné à assurer l'observation de la présente partie et de la partie 1.1.

(2) Le programme doit notamment prévoir l'élaboration et la mise en application de principes et de mesures permettant à la personne ou à l'entité d'évaluer, dans le cours de ses activités, les risques de perpétration d'infractions de recyclage des produits de la criminalité et d'infractions de financement des activités terroristes.

(3) Si elle estime que les risques visés au paragraphe (2) sont élevés, la personne ou entité prend, relativement aux activités en cause, les mesures spéciales réglementaires relatives à l'identification des clients, à la tenue des documents et au contrôle des opérations financières. [mod. par L.C. 2010, c. 12, art. 1865, entré en vigueur le 18 juin 2014]

10.1 Les articles 7 et 9 ne s'appliquent pas aux personnes ni aux entités visées aux alinéas 5*i*) ou *j*) qui case may be, legal counsel or legal firms, when they are providing legal services.

62. (1) An authorized person may, from time to time, examine the records and inquire into the business and affairs of any person or entity referred to in section 5 for the purpose of ensuring compliance with Part 1 or 1.1, and for that purpose may

(*a*) at any reasonable time, enter any premises, other than a dwelling-house, in which the authorized person believes, on reasonable grounds, that there are records relevant to ensuring compliance with Part 1 or 1.1;

(*b*) use or cause to be used any computer system or data processing system in the premises to examine any data contained in or available to the system;

(*c*) reproduce any record, or cause it to be reproduced from the data, in the form of a printout or other intelligible output and remove the printout or other output for examination or copying; and

(*d*) use or cause to be used any copying equipment in the premises to make copies of any record.

(2) he owner or person in charge of premises referred to in subsection (1) and every person found there shall give the authorized person all reasonable assistance to enable them to carry out their responsibilities and shall furnish them with any information with respect to the administration of Part 1 or 1.1 or the regulations under it that they may reasonably require. [am. S.C. 2010, c. 12, s. 1882, eff. June 18, 2014]

63. (1) If the premises referred to in subsection 62(1) is a dwelling-house, the authorized person may not enter it without the consent of the occupant except under the authority of a warrant issued under subsection (2).

(2) A justice of the peace may issue a warrant authorizing the authorized person to enter a dwelling-house, subject to any conditions that may be specified in the warrant, if on *ex parte* application the justice is satisfied by information on oath that

(*a*) there are reasonable grounds to believe that there are in the premises records relevant to ensuring compliance with Part 1 or 1.1;

sont, selon le cas, des conseillers juridiques ou des cabinets juridiques, lorsqu'elles fournissent des services juridiques.

62. (1) La personne autorisée peut, à l'occasion, examiner les documents et les activités des personnes ou entités visées à l'article 5 afin de procéder à des contrôles d'application de la partie 1 ou 1.1 et, à cette fin, elle peut :

a) pénétrer à toute heure convenable dans tout local, autre qu'une habitation, lorsqu'elle a des motifs raisonnables de croire que s'y trouvent des documents utiles à l'application de la partie 1 ou 1.1;

b) avoir recours à tout système informatique se trouvant dans le local pour vérifier les données qu'il contient ou auxquelles il donne accès;

c) à partir de ces données, reproduire ou faire reproduire tout document sous forme d'imprimé ou toute autre forme intelligible qu'elle peut emporter pour examen ou reproduction;

d) utiliser ou faire utiliser les appareils de reprographie se trouvant sur place pour faire des copies de tout document.

(2) L'exploitant du local visité, ainsi que quiconque s'y trouve, est tenu de prêter à la personne autorisée toute l'assistance possible dans l'exercice de ses fonctions et lui donner les renseignements qu'elle peut valablement exiger quant à l'application de la partie 1 ou 1.1 ou de ses règlements. [mod. par L.C. 2010, c. 12, art. 1882, entré en vigueur le 18 juin 2014]

63. (1) Dans le cas d'une habitation, toutefois, la personne autorisée ne peut procéder à la visite sans l'autorisation de l'occupant que si elle est munie du mandat prévu au paragraphe (2).

(2) Sur demande *ex parte*, le juge de paix peut délivrer un mandat autorisant, sous réserve des conditions éventuellement fixées, la personne autorisée à procéder à la visite d'une habitation s'il est convaincu, sur la foi d'une dénonciation sous serment, que sont réunies les conditions suivantes :

a) il y a des motifs raisonnables de croire que s'y trouvent des documents utiles pour l'application de la partie 1 ou 1.1;

(*b*) entry to the dwelling-house is necessary for any purpose that relates to ensuring compliance with Part 1 or 1.1; and

(*c*) entry to the dwelling-house has been refused or there are reasonable grounds for believing that entry will be refused.

(3) For greater certainty, an authorized person who enters a dwelling-house under authority of a warrant may enter only a room or part of a room in which the person believes on reasonable grounds that a person or an entity referred to in section 5 is carrying on its business, profession or activity. [am. S.C. 2010, c. 12, s. 1882, eff. June 18, 2014]

63.1 (1) For an examination under subsection 62(1), an authorized person may also serve notice to require that the person or entity provide, at the place and in accordance with the time and manner stipulated in the notice, any document or other information relevant to the administration of Part 1 or 1.1 in the form of electronic data, a printout or other intelligible output.

(2) The person or entity on whom the notice is served shall provide, in accordance with the notice, the documents or other information with respect to the administration of Part 1 or 1.1 that the authorized person may reasonably require. [am. S.C. 2010, c. 12, s. 1882, eff. June 18, 2014]

64. (1) In this section, "judge" means a judge of a superior court having jurisdiction in the province where the matter arises or a judge of the Federal Court.

(2) If an authorized person acting under section 62, 63 or 63.1 is about to examine or copy a document in the possession of a legal counsel who claims that a named client or former client of the legal counsel has a solicitor-client privilege in respect of the document, the authorized person shall not examine or make copies of the document.

(3) A legal counsel who claims privilege under subsection (2) shall

(*a*) place the document, together with any other document in respect of which the legal counsel at the same time makes the same claim on behalf of the same client, in a package and suitably seal and identify the package or, if the authorized person and the legal counsel agree,

b) la visite est nécessaire pour l'application de la partie 1 ou 1.1;

c) un refus a été opposé à la visite ou il y a des motifs raisonnables de croire que tel sera le cas.

(3) Il est entendu que, lors de la visite d'une habitation, la personne autorisée ne peut visiter que les parties d'une pièce où, à son avis, fondé sur des motifs raisonnables, la personne ou l'entité visée à l'article 5 exploite son entreprise ou exerce sa profession ou son activité. [mod. par L.C. 2010, c. 12, art. 1882, entré en vigueur le 18 juin 2014]

63.1 (1) La personne autorisée peut en outre, dans le cadre d'un examen visé au paragraphe 62(1), par avis signifié, exiger de la personne ou entité qu'elle fournisse, au lieu et selon les modalités de temps ou autres qui sont précisés dans l'avis, tout document ou autre information utile à l'application de la partie 1 ou 1.1, sous forme de données électroniques ou d'imprimé, ou sous toute autre forme intelligible.

(2) La personne ou l'entité à qui l'avis est signifié doit fournir, en conformité avec celui-ci, les documents ou autre information que la personne autorisée peut valablement exiger quant à l'application de la partie 1 ou 1.1. [mod. par L.C. 2010, c. 12, art. 1882, entré en vigueur le 18 juin 2014]

64. (1) Au présent article, « juge » s'entend d'un juge d'une cour supérieure compétente de la province où l'affaire prend naissance ou d'un juge de la Cour fédérale.

(2) Il est interdit à la personne autorisée d'examiner ou reproduire un document se trouvant en la possession d'un conseiller juridique et à l'égard duquel celui-ci fait valoir le secret professionnel le liant à un client actuel ou antérieur, nommément désigné.

(3) Le conseiller juridique qui fait valoir le secret professionnel en vertu du paragraphe (2) doit :

a) d'une part, mettre sous scellés le document ainsi que tout autre document pour lequel il fait valoir, en même temps, le secret professionnel au nom du même client, bien sceller et marquer le tout, ou, si la personne autorisée et le conseiller juridique en conviennent, allow the pages of the document to be initialled and numbered or otherwise suitably identified; and

(*b*) retain it and ensure that it is preserved until it is produced to a judge as required under this section and an order is issued under this section in respect of the document.

(4) If a document has been retained under subsection (3), the client or the legal counsel on behalf of the client may

(*a*) within 14 days after the day the document was begun to be so retained, apply, on three days notice of motion to the Deputy Attorney General of Canada, to a judge for an order

(i) fixing a day, not later than 21 days after the date of the order, and a place for the determination of the question whether the client has solicitor-client privilege in respect of the document, and

(ii) requiring the production of the document to the judge at that time and place;

(*b*) serve a copy of the order on the Deputy Attorney General of Canada; and

(*c*) if the client or legal counsel has served a copy of the order under paragraph (*b*), apply at the appointed time and place for an order determining the question.

(5) An application under paragraph (4)(*c*) shall be heard in private and, on the application, the judge

(*a*) may, if the judge considers it necessary to determine the question, inspect the document and, if the judge does so, the judge shall ensure that it is repackaged and resealed;

(*b*) shall decide the question summarily and

(i) if the judge is of the opinion that the client has a solicitor-client privilege in respect of the document, order the release of the document to the legal counsel, or

(ii) if the judge is of the opinion that the client does not have a solicitor-client privilege in respect of the document, order that the legal counsel make the document available for examination or copying by the authorized person; and

faire en sorte que les pages du document soient paraphées et numérotées ou autrement bien marquées;

b) d'autre part, retenir le document et veiller à sa conservation jusqu'à ce que, conformément au présent article, le document soit produit devant un juge et une ordonnance rendue concernant le document.

(4) Lorsqu'un document a été placé sous scellés conformément au paragraphe (3), le client ou le conseiller juridique, au nom de celui-ci, peut :

a) dans un délai de quatorze jours à compter de la date où le document a été placé sous scellés, demander à un juge, moyennant un avis de présentation de trois jours adressé au sous-procureur général du Canada, de rendre une ordonnance :

(i) fixant une date, au plus tard vingt et un jours après la date de l'ordonnance, et un lieu, où sera tranchée la question de savoir si le client bénéficie du secret professionnel du conseiller juridique en ce qui concerne le document,

(ii) exigeant, en outre, la présentation du document au juge au moment et au lieu fixés;

b) faire signifier une copie de l'ordonnance au sous-procureur général du Canada;

c) s'il a effectué la signification conformément à l'alinéa *b*), demander, au moment et au lieu fixés, une ordonnance qui tranche la question.

(5) La demande prévue à l'alinéa (4)*c*) doit être entendue à huis clos et le juge qui en est saisi :

a) peut examiner le document, s'il l'estime nécessaire pour statuer sur la question; dans ce cas, il veille ensuite à ce que le document soit remis sous scellés;

b) statue sur la question de façon sommaire et, selon le cas :

(i) il ordonne la restitution du document au conseiller juridique s'il est d'avis que le client bénéficie du secret professionnel du conseiller juridique en ce qui concerne le document,

(ii) il ordonne au conseiller juridique de permettre à la personne autorisée d'examiner ou de reproduire le document, dans le cas contraire;

(*c*) at the same time as making an order under paragraph (*b*), deliver concise reasons that identify the document without divulging the details of it.

(6) If a document is being retained under subsection (3) and a judge, on the application of the Attorney General of Canada, is satisfied that no application has been made under paragraph (4)(*a*) or that after having made that application no further application has been made under paragraph (4)(*c*), the judge shall order that the legal counsel make the document available for examination or copying by the authorized person.

(7) If the judge to whom an application has been made under paragraph (4)(*a*) cannot act or continue to act in the application under paragraph (4)(*c*) for any reason, the application under paragraph (4)(*c*) may be made to another judge.

(8) No costs may be awarded on the disposition of an application under this section.

(9) The authorized person shall not examine or make copies of any document without giving a reasonable opportunity for a claim of solicitor-client privilege to be made under subsection (2).

(9.1) The authorized person shall not examine or make copies of a document in the possession of a person, not being a legal counsel, who contends that a claim of solicitor-client privilege may be made in respect of the document by a legal counsel, without giving that person a reasonable opportunity to contact that legal counsel to enable a claim of solicitor-client privilege to be made.

(10) If a legal counsel has made a claim that a named client or former client of the legal counsel has a solicitor-client privilege in respect of a document, the legal counsel shall at the same time communicate to the authorized person the client's latest known address so that the authorized person may endeavour to advise the client of the claim of privilege that has been made on their behalf and may by doing so give the client an opportunity, if it is practicable within the time limited by this section, to waive the privilege before the matter is to be decided by a judge.

65. (1) The Centre may disclose to the appropriate law enforcement agencies any information of which it

c) motive brièvement sa décision en indiquant de quel document il s'agit sans en révéler les détails.

(6) En cas de mise sous scellés d'un document en vertu du paragraphe (3) et, s'il est convaincu, sur requête du procureur général du Canada, que ni le client ni le conseiller juridique n'a présenté de demande en vertu de l'alinéa (4)*a*) ou que, en ayant présenté une, ni l'un ni l'autre n'a présenté de demande en vertu de l'alinéa (4)*c*), le juge saisi ordonne au conseiller juridique de permettre à la personne autorisée d'examiner ou de reproduire le document.

(7) Lorsque, pour quelque motif, le juge saisi d'une demande visée à l'alinéa (4)*a*) ne peut instruire ou continuer d'instruire la demande visée à l'alinéa (4)*c*), un autre juge peut être saisi de cette dernière.

(8) Il ne peut être adjugé de dépens pour la présentation d'une demande fondée sur le présent article.

(9) La personne autorisée ne doit examiner ou reproduire aucun document sans donner aux intéressés une occasion raisonnable de faire valoir le secret professionnel du conseiller juridique en vertu du paragraphe (2).

(9.1) Il est interdit à la personne autorisée d'examiner ou de reproduire un document en la possession d'une personne qui n'est pas un conseiller juridique mais qui soutient que le document pourrait être visé par le secret professionnel sans donner à celle-ci une occasion raisonnable de communiquer avec le conseiller juridique visé afin que celui-ci puisse faire valoir le secret professionnel.

(10) Le conseiller juridique qui fait valoir au nom d'un client actuel ou antérieur, nommément désigné, le secret professionnel du conseiller juridique en ce qui concerne un document doit en même temps communiquer la dernière adresse connue de ce client à la personne autorisée, afin que celle-ci puisse, d'une part, chercher à informer le client du secret professionnel qui est invoqué en son nom et, d'autre part, lui donner l'occasion, si la chose est matériellement possible dans le délai mentionné au présent article, de renoncer à faire valoir le secret professionnel avant que la question ne soit soumise à la décision d'un juge.

65. (1) Le Centre peut communiquer aux organismes compétents chargés de l'application de la loi tout becomes aware under subsection (4) or section 62, 63 or 63.1 and that it suspects on reasonable grounds would be relevant to investigating or prosecuting an offence under this Act arising out of a contravention of Part 1 or 1.1.

(2) For the purpose of ensuring compliance with Part 1 or 1.1, the Centre may disclose to or receive from any agency or body that regulates or supervises persons or entities to whom Part 1 or 1.1 applies information relating to the compliance of those persons or entities with that Part.

(3) Any information disclosed by the Centre under subsection (1) may be used by an agency referred to in that subsection only as evidence of a contravention of Part 1 or 1.1, and any information disclosed by the Centre under subsection (2) may be used by an agency or body referred to in subsection (2) only for purposes relating to compliance with Part 1 or 1.1.

(4) For the purpose of ensuring compliance with Parts 1 and 1.1, the Centre shall receive information voluntarily provided to it by a person or entity — other than an agency or body referred to in subsection (2) — relating to the compliance with Part 1 or 1.1 of persons or entities referred to in section 5. [am. S.C. 2010, c. 12, s. 1882, eff. June 18, 2014; am. S.C. 2014, c. 20, s. 287, eff. June 19, 2014]

65.1 (1) The Centre may enter into an agreement or arrangement, in writing, with an institution or agency of a foreign state that has powers and duties, similar to those of the Centre, with respect to verifying compliance with requirements to identify persons or entities, keep and retain records or make reports, or with an international organization made up of such institutions or agencies and established by the governments of states, that stipulates

(*a*) that the Centre and the institution, agency or organization may exchange information about the compliance of persons and entities with those requirements and about the assessment of risk related to their compliance;

(*b*) that the information may only be used for purposes relevant to ensuring compliance with the requirements and to assessing risk related to compliance; and

renseignement dont il prend connaissance au titre du paragraphe (4) ou des articles 62, 63 ou 63.1 et qu'il soupçonne, pour des motifs raisonnables, seraient utiles aux fins d'enquête ou de poursuite relativement à une infraction prévue par la présente loi qui est liée à une contravention aux parties 1 ou 1.1.

(2) Afin d'assurer l'observation de la partie 1 ou 1.1, le Centre peut communiquer à tout organisme qui réglemente ou supervise des personnes ou entités assujetties à cette partie ou recevoir d'un tel organisme des renseignements relatifs à l'observation de cette partie par ces personnes ou entités.

(3) Les renseignements communiqués par le Centre au titre du paragraphe (1) ne peuvent être utilisés par un organisme visé à ce paragraphe qu'à titre de preuve de la contravention aux parties 1 ou 1.1 et les renseignements communiqués par le Centre au titre du paragraphe (2) ne peuvent être utilisés par un organisme visé à ce paragraphe qu'à des fins relatives à l'observation de ces parties.

(4) Afin d'assurer l'observation des parties 1 et 1.1, le Centre reçoit tout renseignement qui lui est communiqué volontairement par une personne ou entité — à l'exception des organismes visés au paragraphe (2) — et qui se rapporte à l'observation de l'une ou l'autre de ces parties par les personnes et entités visées à l'article 5. [mod. par L.C. 2010, c. 12, art. 1882, entré en vigueur le 18 juin 2014; mod. par L.C. 2014, c. 20, art. 287, entré en vigueur le 19 juin 2014]

65.1 (1) Le Centre peut conclure avec tout organisme d'un État étranger ayant des attributions similaires aux siennes concernant la vérification de la conformité aux obligations portant sur l'identification de personnes ou d'entités, la tenue et la conservation de documents ou la production de déclarations ou avec toute organisation internationale regroupant de tels organismes, créée par les gouvernements de divers États, un accord écrit stipulant :

a) que le Centre peut échanger avec cet organisme ou cette organisation des renseignements relatifs au respect par une personne ou une entité de ces obligations et relatifs à l'évaluation des risques liés au respect de ces obligations;

b) que les renseignements doivent être utilisés uniquement en vue d'assurer la conformité à ces obligations et d'évaluer les risques liés au respect de ces obligations;

(*c*) that the information will be treated in a confidential manner and not be further disclosed without the express consent of the Centre.

(2) The Centre may, in accordance with the agreement or arrangement, provide the institution, agency or organization with information referred to in the agreement or arrangement.

(3) When the Centre receives information from an institution, agency or organization under an agreement or arrangement, the Centre may provide it with an evaluation of whether the information is useful to the Centre.

Proceeds of Crime (Money Laundering) and Terrorist Financing Regulations, SOR/2002-184

1. . . .

(2) The following definitions apply in these Regulations.

. . .

"receipt of funds record" means, in respect of a transaction in which an amount of funds is received, a record that contains the following information:

(*a*) if the information is not readily obtainable from other records that the recipient keeps and retains under these Regulations, the name of the person or entity from whom the amount is in fact received and

(i) where the amount is received from a person, their address and date of birth and the nature of their principal business or their occupation, and

(ii) where the amount is received from an entity, their address and the nature of their principal business;

(*b*) the date of the transaction;

(*c*) the number of any account that is affected by the transaction, and the type of that account, the full name of the person or entity that is the account holder and the currency in which the transaction is conducted;

(*d*) the purpose and details of the transaction, including other persons or entities involved and the type and form of the transaction;

c) que les renseignements seront traités de manière confidentielle et ne seront pas autrement communiqués sans le consentement exprès du Centre.

(2) Il peut communiquer à l'organisme ou à l'organisation, en conformité avec l'accord, les renseignements qui y sont visés.

(3) Il peut fournir à l'organisme ou à l'organisation lui ayant communiqué des renseignements au titre de l'accord une évaluation de leur utilité pour lui.

Règlement sur le recyclage des produits de la criminalité et le financement des activités terroristes, DORS/2002-184

1. . . .

(2) Les définitions qui suivent s'appliquent au présent règlement.

. . .

« relevé de réception de fonds » Document comportant, à l'égard de la réception de fonds dans le cadre d'une opération, les renseignements suivants :

a) s'ils ne peuvent être facilement obtenus d'autres documents tenus et conservés en application du présent règlement par le destinataire, le nom de la personne ou de l'entité qui remet de fait la somme, ainsi que les renseignements suivants :

(i) s'il s'agit d'une somme reçue d'une personne, son adresse, sa date de naissance et la nature de son entreprise principale ou sa profession,

(ii) s'il s'agit d'une somme reçue d'une entité, son adresse et la nature de son entreprise principale;

b) la date de l'opération;

c) pour chaque compte touché par l'opération, le numéro du compte, le type de compte, le nom au complet de chaque titulaire du compte et la devise dans laquelle l'opération est effectuée;

d) le détail de l'opération et son objet, notamment le nom des autres personnes ou entités en cause et le type et le mode d'opération;

(*e*) if the funds are received in cash, whether the cash is received by armoured car, in person, by mail or in any other way; and

(*f*) the amount and currency of the funds received.

11.1 (1) Every financial entity or securities dealer that is required to confirm the existence of an entity in accordance with these Regulations when it opens an account in respect of that entity, every life insurance company, life insurance broker or agent or legal counsel or legal firm that is required to confirm the existence of an entity in accordance with these Regulations and every money services business that is required to confirm the existence of an entity in accordance with these Regulations when it enters into an ongoing electronic funds transfer, fund remittance or foreign exchange service agreement with that entity, or a service agreement for the issuance or redemption of money orders, traveller's cheques or other similar negotiable instruments, shall, at the time the existence of the entity is confirmed, obtain the following information:

(*a*) in the case of a corporation, the names of all directors of the corporation and the names and addresses of all persons who own or control, directly or indirectly, 25 per cent or more of the shares of the corporation;

(*b*) in the case of a trust, the names and addresses of all trustees and all known beneficiaries and settlors of the trust;

(*c*) in the case of an entity other than a corporation or trust, the names and addresses of all persons who own or control, directly or indirectly, 25 per cent or more of the entity; and

(*d*) in all cases, information establishing the ownership, control and structure of the entity.

(2) Every person or entity that is subject to subsection (1) shall take reasonable measures to confirm the accuracy of the information obtained under that subsection.

(3) The person or entity shall keep a record that sets out the information obtained and the measures taken to confirm the accuracy of that information.

e) si les fonds sont reçus en espèces, la manière dont ils sont reçus, notamment par véhicule blindé, en personne ou par courrier;

f) le montant total de la somme reçue et la devise en cause.

11.1 (1) Toute entité financière ou tout courtier en valeurs mobilières tenu de vérifier l'existence d'une entité conformément au présent règlement lorsqu'il ouvre un compte au nom de cette entité, toute société d'assurance-vie ou tout représentant d'assurance-vie ou tout conseiller juridique ou cabinet d'avocats tenu de vérifier l'existence d'une entité conformément au présent règlement et toute entreprise de transfert de fonds ou de vente de titres négociables tenue de vérifier l'existence d'une entité conformément au présent règlement lorsqu'elle conclut un accord de relation commerciale suivie avec cette entité pour le télévirement, la remise de fonds ou des opérations de change, ou un accord de relation commerciale pour l'émission ou le rachat de mandats-poste, chèques de voyage ou autres titres négociables semblables, doit, au moment de la vérification, obtenir les renseignements suivants à l'égard de cette entité :

a) s'agissant d'une personne morale, le nom de tous ses administrateurs de même que les nom et adresse de toutes les personnes qui détiennent ou contrôlent, directement ou indirectement, au moins vingt-cinq pour cent de ses actions;

b) s'agissant d'une fiducie, les nom et adresse de tous ses bénéficiaires et ses constituants connus de même que de tous ses fiduciaires;

c) s'agissant d'une entité autre qu'une personne morale ou une fiducie, les nom et adresse de toutes les personnes qui en détiennent ou contrôlent, directement ou indirectement, au moins vingt-cinq pour cent;

d) dans tous les cas, les renseignements permettant d'établir la propriété, le contrôle et la structure de l'entité.

(2) Toute personne ou entité assujettie au paragraphe (1) prend des mesures raisonnables pour confirmer l'exactitude des renseignements obtenus au titre de ce paragraphe.

(3) La personne ou l'entité conserve un document faisant état des renseignements obtenus et des mesures prises pour en confirmer l'exactitude.

(4) If the person or entity is not able to obtain the information referred to in subsection (1) or to confirm that information in accordance with subsection (2), the person or entity shall

(*a*) take reasonable measures to ascertain the identity of the most senior managing officer of the entity; and

(*b*) treat that entity as high risk for the purpose of subsection 9.6(3) of the Act and apply the prescribed special measures in accordance with section 71.1 of these Regulations.

(5) If the entity, the existence of which is being confirmed by a person or entity under subsection (1), is a not-for-profit organization, the person or entity shall determine, and keep a record that sets out, whether that entity is

(*a*) a charity registered with the Canada Revenue Agency under the *Income Tax Act*; or

(*b*) an organization, other than one referred to in paragraph (*a*), that solicits charitable donations from the public.

(6) This section does not apply in respect of a group plan account held within a dividend reinvestment plan or a distribution reinvestment plan, including a plan that permits purchases of additional shares or units by the member with contributions other than the dividends or distributions paid by the sponsor of the plan, if the sponsor of the plan is an entity whose shares or units are traded on a Canadian stock exchange, and that operates in a country that is a member of the Financial Action Task Force.

33.3 (1) Subject to subsection (2), every legal counsel and every legal firm is subject to Part 1 of the Act when they engage in any of the following activities on behalf of any person or entity:

(*a*) receiving or paying funds, other than those received or paid in respect of professional fees, disbursements, expenses or bail; or

(*b*) giving instructions in respect of any activity referred to in paragraph (*a*).

(2) Subsection (1) does not apply in respect of legal counsel when they engage in any of the activities referred to in that subsection on behalf of their employer.

(4) Si la personne ou l'entité n'est pas en mesure d'obtenir les renseignements visés au paragraphe (1) ou d'en confirmer l'exactitude conformément au paragraphe (2), elle doit, à la fois :

a) prendre des mesures raisonnables pour vérifier l'identité du premier dirigeant de l'entité;

b) considérer que cette entité représente un risque élevé au titre du paragraphe 9.6(3) de la Loi et appliquer les mesures spéciales visées à l'article 71.1 du présent règlement.

(5) Dans le cas où la vérification visée au paragraphe (1) porte sur une entité qui est un organisme sans but lucratif, la personne ou l'entité qui est tenue d'effectuer la vérification doit déterminer auquel des types d'organisme ci-après celle-ci appartient et conserver ce renseignement dans un document :

a) organisme de bienfaisance enregistré auprès de l'Agence du revenu du Canada conformément à la *Loi de l'impôt sur le revenu*;

b) organisme, autre que celui visé à l'alinéa a), qui sollicite des dons de bienfaisance du public.

(6) Le présent article ne s'applique pas à l'égard du compte de régime collectif détenu dans un régime de réinvestissement des dividendes ou des distributions, notamment dans un régime qui permet au membre d'acquérir des actions ou des unités supplémentaires au moyen de cotisations — qui ne sont pas des dividendes ou des distributions versés par le promoteur du régime —, si les actions ou les unités de ce promoteur sont cotées dans une bourse de valeurs au Canada et qu'il exerce ses activités dans un pays membre du Groupe d'action financière.

33.3 (1) Sous réserve du paragraphe (2), les conseillers juridiques et les cabinets d'avocats sont assujettis à la partie 1 de la Loi lorsqu'ils exercent l'une ou l'autre des activités ci-après pour le compte d'une personne ou entité :

a) ils reçoivent ou paient des fonds autres que ceux reçus ou payés à titre d'honoraires, de débours, de dépenses ou de cautionnement;

b) ils donnent des instructions à l'égard de l'une ou l'autre des activités visées à l'alinéa *a*).

(2) Le paragraphe (1) ne s'applique pas à l'égard d'un conseiller juridique qui exerce une activité visée à ce paragraphe pour le compte de son employeur.

33.4 Subject to subsection 62(2), every legal counsel and every legal firm shall, when engaging in an activity described in section 33.3, keep the following records:

(*a*) a receipt of funds record in respect of every amount of $3,000 or more that they receive in the course of a single transaction, unless the amount is received from a financial entity or a public body; and

(*b*) where the receipt of funds record is in respect of a client that is a corporation, a copy of the part of official corporate records that contains any provision relating to the power to bind the corporation in respect of transactions with the legal counsel or legal firm.

33.5 A legal counsel or legal firm that, in connection with a transaction, receives funds from the trust account of a legal firm or from the trust account of a legal counsel who is not acting on behalf of their employer,

(*a*) must keep and retain a record of that fact; and

(*b*) is not required to include in the receipt of funds record that is kept in respect of those funds

(i) the number and type of any account that is affected by the transaction, or

(ii) the full name of the person or entity that is the holder of the account.

59.4 (1) Subject to subsections (2) and 62(2) and section 63, every legal counsel and every legal firm shall, in respect of a transaction for which a record is required to be kept under section 33.4,

(*a*) in accordance with subsection 64(1), ascertain the identity of every person who conducts the transaction;

(*b*) in accordance with section 65, confirm the existence of and ascertain the name and address of every corporation on whose behalf the transaction is conducted and the names of the corporation's directors; and

(*c*) in accordance with section 66, confirm the existence of every entity, other than a corporation, on whose behalf the transaction is conducted.

33.4 Sous réserve du paragraphe 62(2), les conseillers juridiques et les cabinets d'avocats doivent, dans l'exercice d'une activité visée à l'article 33.3, tenir les documents suivants :

a) un relevé de réception de fonds à l'égard de chaque somme de 3 000 $ ou plus reçue au cours d'une seule opération, à moins que cette somme ne soit reçue d'une entité financière ou d'un organisme public;

b) s'agissant d'un relevé de réception de fonds à l'égard d'un client qui est une personne morale, une copie de l'extrait des registres officiels de celle-ci où figure une disposition portant sur le pouvoir de lier la personne morale quant aux opérations effectuées avec le conseiller juridique ou le cabinet d'avocats.

33.5 Le conseiller juridique ou le cabinet d'avocats qui, relativement à une opération, reçoit des fonds provenant du compte en fiducie d'un cabinet d'avocats ou d'un conseiller juridique qui n'agit pas pour le compte de son employeur :

a) doit tenir et conserver un document indiquant ce fait;

b) n'est pas tenu d'inclure les renseignements ci-après dans le relevé de réception de fonds tenu à l'égard de ces fonds :

(i) les numéro et type du compte, pour chaque compte touché par l'opération,

(ii) le nom au complet de chaque titulaire du compte.

59.4 (1) Sous réserve des paragraphes (2) et 62(2) et de l'article 63, les conseillers juridiques et les cabinets d'avocats doivent prendre les mesures ci-après relativement à toute opération à l'égard de laquelle ils tiennent des documents en application de l'article 33.4 :

a) conformément au paragraphe 64(1), vérifier l'identité de toute personne qui effectue l'opération;

b) conformément à l'article 65, vérifier l'existence, la dénomination sociale et l'adresse de toute personne morale pour le compte de laquelle l'opération est effectuée, ainsi que les noms des administrateurs de la personne morale;

c) conformément à l'article 66, vérifier l'existence de toute entité autre qu'une personne morale pour le compte de laquelle l'opération est effectuée.

(2) Subsection (1) does not apply in respect of a transaction for which funds are received by a legal counsel or legal firm from the trust account of a legal firm or from the trust account of a legal counsel who is not acting on behalf of their employer.

64. (1) In the cases referred to in sections 53, 53.1, 54, 55, 56, 57, 59, 59.1, 59.2, 59.3, 59.4, 59.5, 60 and 61, the identity of a person shall be ascertained, at the time referred to in subsection (2) and in accordance with subsection (3),

(*a*) by referring to the person's birth certificate, driver's licence, provincial health insurance card (if such use of the card is not prohibited by the applicable provincial law), passport or other similar document; or

(*b*) if the person is not physically present when the account is opened, the credit card application is submitted, the trust is established, the client information record is created or the transaction is conducted,

(i) by obtaining the person's name, address and date of birth and

(A) confirming that one of the following entities has identified the person in accordance with paragraph (*a*), namely,

(I) an entity, referred to in any of paragraphs 5(*a*) to (*g*) of the Act, that is affiliated with the entity ascertaining the identity of the person,

(II) an entity that carries on activities outside Canada similar to the activities of a person or entity referred to in any of paragraphs 5(*a*) to (*g*) of the Act and that is affiliated with the entity ascertaining the identity of the person, or

(III) an entity that is subject to the Act and is a member of the same association as the entity ascertaining the identity of the person, and

(B) verifying that the name, address and date of birth in the record kept by that affiliated entity or that entity that is a member of the same association corresponds to the information provided in accordance with these Regulations by the person, or

(2) Le paragraphe (1) ne s'applique pas à l'égard d'une opération pour laquelle un conseiller juridique ou cabinet d'avocats reçoit des fonds provenant du compte en fiducie d'un cabinet d'avocats ou d'un conseiller juridique qui n'agit pas pour le compte de son employeur.

64. (1) Dans les cas prévus aux articles 53, 53.1, 54, 55, 56, 57, 59, 59.1, 59.2, 59.3, 59.4, 59.5, 60 et 61, l'identité de la personne est vérifiée, au moment prévu au paragraphe (2) et conformément au paragraphe (3) :

a) au moyen de son certificat de naissance, son permis de conduire, sa carte d'assurance-maladie provinciale (si un tel usage n'est pas interdit aux termes de la loi provinciale applicable), son passeport ou tout document semblable;

b) si la personne est absente à l'ouverture du compte, de la demande de carte de crédit, de la constitution de la fiducie, de la constitution du dossier-client ou de l'exécution de l'opération, par l'un des moyens suivants :

(i) une fois reçus les nom, adresse et date de naissance pour la personne :

(A) par la confirmation que l'une des entités ci-après a identifié la personne conformément à l'alinéa *a*) :

(I) une entité visée à l'un des alinéas 5*a*) à *g*) de la Loi qui est membre du même groupe que l'entité qui effectue la vérification,

(II) une entité qui exerce à l'étranger des activités similaires à celles d'une personne ou entité visée à l'un des alinéas 5*a*) à *g*) de la Loi et qui est membre du même groupe que l'entité qui effectue la vérification,

(III) une entité qui est assujettie à la Loi et qui est membre de la même association que l'entité qui effectue la vérification,

(B) par la vérification de la concordance entre les nom, adresse et date de naissance figurant au dossier de l'entité qui est membre du même groupe ou de la même association et les renseignements fournis par la personne conformément au présent règlement,

(ii) subject to subsection (1.3), by using one of the following combinations of the identification methods set out in Part A of Schedule 7, namely,

(A) methods 1 and 3,

(B) methods 1 and 4,

(C) methods 1 and 5,

(D) methods 2 and 3,

(E) methods 2 and 4,

(F) methods 2 and 5,

(G) methods 3 and 4, or

(H) methods 3 and 5.

(1.1) In the case referred to in paragraph 54.1(*a*), the identity of a person shall be ascertained by a person or entity, at the time referred to in subsection (2) and in accordance with subsection (3),

(*a*) by referring to the person's birth certificate, driver's licence, provincial health insurance card (if such use of the card is not prohibited by the applicable provincial law), passport or other similar document; or

(*b*) where the person is not physically present when the credit card application is submitted,

(i) by obtaining the person's name, address and date of birth and

(A) confirming that one of the following entities has identified the person in accordance with paragraph (*a*), namely,

(I) an entity, referred to in any of paragraphs 5(*a*) to (*g*) of the Act, that is affiliated with the entity ascertaining the identity of the person,

(II) an entity that carries on activities outside Canada similar to the activities of a person or entity referred to in any of paragraphs 5(*a*) to (*g*) of the Act and that is affiliated with the entity ascertaining the identity of the person, or

(III) an entity that is subject to the Act and is a member of the same association as the entity ascertaining the identity of the person, and

(ii) sous réserve du paragraphe (1.3), au moyen de l'une des combinaisons ci-après de méthodes d'identification figurant à la partie A de l'annexe 7 :

(A) les méthodes 1 et 3,

(B) les méthodes 1 et 4,

(C) les méthodes 1 et 5,

(D) les méthodes 2 et 3,

(E) les méthodes 2 et 4,

(F) les méthodes 2 et 5,

(G) les méthodes 3 et 4,

(H) les méthodes 3 et 5.

(1.1) Dans le cas prévu à l'alinéa 54.1*a*), l'identité de la personne est vérifiée par une personne ou entité, au moment prévu au paragraphe (2) et conformément au paragraphe (3) :

a) au moyen de son certificat de naissance, son permis de conduire, sa carte d'assurance-maladie provinciale (si un tel usage n'est pas interdit aux termes de la loi provinciale applicable), son passeport ou tout document semblable;

b) si la personne est absente lors de la présentation de la demande de carte de crédit, par l'un des moyens suivants :

(i) une fois reçus les nom, adresse et date de naissance pour la personne :

(A) par la confirmation que l'une des entités ci-après a identifié la personne conformément à l'alinéa *a*) :

(I) une entité visée à l'un des alinéas 5*a*) à *g*) de la Loi qui est membre du même groupe que l'entité qui effectue la vérification,

(II) une entité qui exerce à l'étranger des activités similaires à celles d'une personne ou entité visée à l'un des alinéas 5*a*) à *g*) de la Loi et qui est membre du même groupe que l'entité qui effectue la vérification,

(III) une entité qui est assujettie à la Loi et qui est membre de la même association que l'entité qui effectue la vérification,

(B) verifying that the name, address and date of birth in the record kept by that affiliated entity or that entity that is a member of the same association corresponds to the information provided in accordance with these Regulations by the person,

(ii) subject to subsection (1.3), by using a combination of any two identification methods referred to in either Part A or Part B of Schedule 7, or

(iii) subject to subsection (1.3), where the person has no credit history in Canada and the credit limit on the card is not more than $1,500, by using a combination of any two identification methods referred to in any of Parts A, B and C of Schedule 7.

(1.2) For the purposes of paragraphs (1)(*b*)(i) and (1.1)(*b*)(i), an entity is affiliated with another entity if one of them is wholly-owned by the other or both are wholly-owned by the same entity.

(1.21) For the purposes of subparagraphs (1)(*b*)(i) and (1.1)(*b*)(i),

(*a*) a financial services cooperative and each of its members that is a financial entity are considered to be members of the same association; and

(*b*) a credit union central and each of its members that is a financial entity are considered to be members of the same association.

(1.3) A combination of methods referred to in subparagraph (1)(*b*)(ii) or (1.1)(*b*)(ii) or (iii) shall not be relied on by a person or entity to ascertain the identity of a person unless

(*a*) the information obtained in respect of that person from each of the two applicable identification methods is determined by the person or entity to be consistent; and

(*b*) the information referred to in paragraph (*a*) is determined by the person or entity to be consistent with the information in respect of that person, if any, that is contained in a record kept by the person or entity under these Regulations.

(2) The identity shall be ascertained

(B) par la vérification de la concordance entre les nom, adresse et date de naissance figurant au dossier de l'entité qui est membre du même groupe ou de la même association et les renseignements fournis par la personne conformément au présent règlement,

(ii) sous réserve du paragraphe (1.3), au moyen de la combinaison de deux des méthodes d'identification figurant ou bien à la partie A ou bien à la partie B de l'annexe 7,

(iii) sous réserve du paragraphe (1.3), lorsque la personne n'a pas d'antécédents de crédit au Canada et que la limite de crédit applicable à la carte ne dépasse pas 1 500 $, au moyen de la combinaison de deux des méthodes d'identification figurant aux parties A, B ou C de l'annexe 7.

(1.2) Pour l'application des sous-alinéas (1)*b*)(i) et (1.1)*b*)(i), sont du même groupe les entités dont l'une est entièrement propriétaire de l'autre ou les entités qui sont entièrement la propriété de la même entité.

(1.21) Pour l'application des sous-alinéas (1)*b*)(i) et (1.1)*b*)(i) :

a) toute coopérative de services financiers et chacun de ses membres qui est une entité financière sont réputés faire partie de la même association;

b) toute centrale de caisses de crédit et chacun de ses membres qui est une entité financière sont réputés faire partie de la même association.

(1.3) La personne ou l'entité qui vérifie l'identité d'une personne ne se fonde sur aucune combinaison de méthodes visées aux sous-alinéas (1)*b*)(ii), (1.1)*b*)(ii) ou (iii) sauf :

a) s'il est établi, par la personne ou l'entité, que les renseignements obtenus à l'égard de la personne au moyen de chacune des deux méthodes d'identification correspondent;

b) s'il est établi, par la personne ou l'entité, que les renseignements visés à l'alinéa *a*) correspondent aux renseignements, le cas échéant, consignés dans un document par la personne ou l'entité conformément au présent règlement, à l'égard de cette personne.

(2) Les vérifications sont effectuées :

(*a*) in the cases referred to in paragraph 54(1)(*a*), subsection 57(1) and paragraph 60(*a*), before any transaction other than an initial deposit is carried out on an account;

(*b*) in the cases referred to in section 53, paragraph 54(1)(*b*), subsection 59(1) and paragraphs 59.3(*a*), 59.4(1)(*a*), 59.5(*a*), 60(*b*) and 61(*b*), at the time of the transaction;

(*b.1*) in the case referred to in section 53.1, before the transaction is reported as required under section 7 of the Act;

(*b.2*) in the case referred to in paragraph 54.1(*a*), before any credit card is activated;

(*c*) in the cases referred to in paragraphs 55(*a*), (*d*) and (*e*), within 15 days after the trust company becomes the trustee;

(*d*) in the cases referred to in subsection 56(1) and paragraph 61(*a*), within 30 days after the client information record is created;

(*e*) in the cases referred to in paragraphs 59.1(*a*) and 59.2(1)(*a*), at the time of the transaction; and

(*f*) in the case referred to in subsection 62(3), at the time a contribution in respect of an individual member of the group plan is made to the plan, if

(i) the member's contribution is not made as described in paragraph 62(3)(*a*), or

(ii) the existence of the plan sponsor has not been confirmed in accordance with section 65 or 66.

(3) Unless otherwise specified in these Regulations, only original documents that are valid and have not expired may be referred to for the purpose of ascertaining identity in accordance with paragraph (1)(*a*) or (1.1)(*a*).

64.1 (1) A person or entity that is required to take measures to ascertain identity under subsection 64(1) or (1.1) may rely on an agent or mandatary to take the identification measures described in that subsection only if that person or entity has entered into an agreement or arrangement, in writing, with that agent or mandatary for the purposes of ascertaining identity.

(2) A person or entity that enters into an agreement or arrangement referred to in subsection (1) must obtain

a) dans les cas prévus à l'alinéa 54(1)*a*), au paragraphe 57(1) et à l'alinéa 60*a*), avant toute opération effectuée à l'égard du compte, sauf le dépôt initial;

b) dans les cas prévus à l'article 53, à l'alinéa 54(1)*b*), au paragraphe 59(1) et aux alinéas 59.3*a*), 59.4(1)*a*), 59.5*a*), 60*b*) et 61*b*), au moment de l'opération;

b.1) dans le cas prévu à l'article 53.1, avant que l'opération ne fasse l'objet d'une déclaration en application de l'article 7 de la Loi;

b.2) dans le cas prévu à l'alinéa 54.1*a*), avant l'activation de toute carte de crédit;

c) dans les cas prévus aux alinéas 55*a*), *d*) et *e*), dans les quinze jours suivant la date où la société de fiducie commence à agir comme fiduciaire;

d) dans les cas prévus au paragraphe 56(1) et à l'alinéa 61*a*), dans les trente jours suivant la constitution du dossier-client;

e) dans les cas prévus aux alinéas 59.1*a*) et 59.2(1)*a*), au moment de l'opération;

f) dans le cas prévu au paragraphe 62(3), au moment où une contribution est faite à l'égard d'un membre du régime collectif, si, selon le cas :

(i) la contribution du membre n'est pas faite de la façon prévue à l'alinéa 62(3)*a*),

(ii) l'existence du promoteur du régime n'a pas été vérifiée conformément aux articles 65 ou 66.

(3) Sauf indication contraire du présent règlement, seuls les documents originaux valides et non échus peuvent servir à vérifier l'identité d'une personne conformément aux alinéas (1)*a*) ou (1.1)*a*).

64.1 (1) La personne ou l'entité qui est tenue de prendre des mesures de vérification de l'identité en application des paragraphes 64(1) ou (1.1) ne peut confier cette responsabilité à un mandataire que si elle a conclu par écrit un accord ou une entente avec lui à cet égard.

(2) La personne ou l'entité qui conclut un tel accord ou une telle entente obtient du mandataire les

from the agent or mandatary the customer information obtained by the agent or mandatary under that agreement or arrangement.

65. (1) The existence of a corporation shall be confirmed and its name and address and the names of its directors shall be ascertained as of the time referred to in subsection (2), by referring to its certificate of corporate status, a record that it is required to file annually under the applicable provincial securities legislation or any other record that ascertains its existence as a corporation. The record may be in paper form or in an electronic version that is obtained from a source that is accessible to the public.

(2) The information referred to in subsection (1) shall be ascertained,

(*a*) in the case referred to in paragraphs 54(1)(*d*) and 60(*e*), before any transaction other than the initial deposit is carried out on the account;

(*a.1*) in the case referred to in paragraph 54.1(*b*), before any credit card is issued on the account;

(*b*) in the cases referred to in paragraphs 55(*b*) and (*d*), within 15 days after the trust company becomes the trustee;

(*c*) in the cases referred to in subsections 56(3) and 59(2) and paragraph 61(*c*), within 30 days after the client information record is created;

(*d*) in the case referred to in subsection 57(3), within 30 days after the opening of the account; and

(*e*) in the cases referred to in paragraphs 59.1(*b*), 59.2(1)(*b*), 59.3(*b*), 59.4(1)(*b*) and 59.5(*b*), within 30 days after the transaction.

(3) Where the information has been ascertained by referring to an electronic version of a record, the person or entity required to ascertain the information shall keep a record that sets out the corporation's registration number, the type of record referred to and the source of the electronic version of the record.

(4) Where the information has been ascertained by referring to a paper copy of a record, the person or entity required to ascertain the information shall retain the record or a copy of it.

renseignements relatifs au client que celui-ci doit se procurer aux termes de l'accord ou de l'entente.

65. (1) L'existence, la dénomination sociale et l'adresse d'une personne morale, ainsi que les noms de ses administrateurs, se vérifient, au moment prévu au paragraphe (2), au moyen d'une copie papier du certificat de constitution de la personne morale, de tout document qu'elle est tenue de déposer annuellement aux termes de la loi provinciale régissant les valeurs mobilières ou de tout autre document qui fait foi de son existence ou par consultation de la version électronique d'un de ces documents obtenue d'une source accessible au public.

(2) Les vérifications sont effectuées :

a) dans les cas prévus aux alinéas 54(1)*d*) et 60*e*), avant toute opération effectuée à l'égard du compte, sauf le dépôt initial;

a.1) dans le cas prévu à l'alinéa 54.1*b*), avant l'émission de toute carte de crédit sur le compte;

b) dans les cas prévus aux alinéas 55*b*) et *d*), dans les quinze jours suivant la date où la société de fiducie commence à agir comme fiduciaire;

c) dans les cas prévus aux paragraphes 56(3) et 59(2) et à l'alinéa 61*c*), dans les trente jours suivant la constitution du dossier-client;

d) dans le cas prévu au paragraphe 57(3), dans les trente jours suivant l'ouverture du compte;

e) dans les cas prévus aux alinéas 59.1*b*), 59.2(1)*b*), 59.3*b*), 59.4(1)*b*) et 59.5*b*), dans les trente jours suivant l'opération.

(3) Si la vérification est effectuée par consultation de la version électronique d'un document, la personne ou l'entité doit tenir un document comportant le numéro d'enregistrement de la personne morale, le type du document consulté et la provenance de la version électronique.

(4) Si la vérification est effectuée au moyen d'une copie papier d'un document, la personne ou l'entité doit conserver le document ou une copie de celui-ci.

66. (1) The existence of an entity, other than a corporation, shall be confirmed as of the time referred to in subsection (2), by referring to a partnership agreement, articles of association or other similar record that ascertains its existence. The record may be in paper form or in an electronic version that is obtained from a source that is accessible to the public.

(2) The existence of the entity shall be confirmed

(*a*) in the case referred to in paragraphs 54(1)(*e*) and 60(*f*), before any transaction other than the initial deposit is carried out on the account;

(*a.1*) in the case referred to in paragraph 54.1(*c*), before any credit card is issued on the account;

(*b*) in the cases referred to in paragraphs 55(*c*) and (*d*), within 15 days after the trust company becomes the trustee;

(*c*) in the cases referred to in subsections 56(4) and 59(3) and paragraph 61(*d*), within 30 days after the client information record is created;

(*d*) in the case referred to in subsection 57(4), within 30 days after the account is opened; and

(*e*) in the cases referred to in paragraphs 59.1(*c*), 59.2(1)(*c*), 59.3(*c*), 59.4(1)(*c*) and 59.5(*c*), within 30 days after the transaction.

(3) Where the existence of the entity has been confirmed by referring to an electronic version of a record, the person or entity required to confirm that information shall keep a record that sets out the registration number of the entity whose existence is being confirmed, the type of record referred to and the source of the electronic version of the record.

(4) Where the existence of the entity has been confirmed by referring to a paper copy of a record, the person or entity required to confirm that information shall retain the record or a copy of it.

66.1 (1) The prescribed persons or entities for the purpose of section 9.5 of the Act are every financial entity, money services business and casino that is required to keep a record under these Regulations in respect of an electronic funds transfer referred to in subsection (2).

(2) Subject to subsection (3), the prescribed electronic funds transfers to which section 9.5 of the Act applies are

66. (1) L'existence d'une entité qui n'est pas une personne morale se vérifie, au moment prévu au paragraphe (2), au moyen d'une copie papier de la convention de société, de l'acte d'association ou de tout autre document qui fait foi de son existence ou par consultation de la version électronique d'un de ces documents obtenue d'une source accessible au public.

(2) La vérification est effectuée :

a) dans les cas prévus aux alinéas 54(1)*e*) et 60*f*), avant toute opération effectuée à l'égard du compte, sauf le dépôt initial;

a.1) dans le cas prévu à l'alinéa 54.1*c*), avant l'émission de toute carte de crédit pour le compte;

b) dans les cas prévus aux alinéas 55*c*) et *d*), dans les quinze jours suivant la date où la société de fiducie commence à agir comme fiduciaire;

c) dans les cas prévus aux paragraphes 56(4) et 59(3) et à l'alinéa 61*d*), dans les trente jours suivant la constitution du dossier-client;

d) dans le cas prévu au paragraphe 57(4), dans les trente jours suivant l'ouverture du compte;

e) dans les cas prévus aux alinéas 59.1*c*), 59.2(1)*c*), 59.3*c*), 59.4(1)*c*) et 59.5*c*), dans les trente jours suivant l'opération.

(3) Si la vérification est effectuée par consultation de la version électronique d'un document, la personne ou l'entité doit tenir un document comportant le numéro d'enregistrement de la l'entité, le type du document consulté et la provenance de la version électronique.

(4) Si la vérification est effectuée au moyen d'une copie papier d'un document, la personne ou l'entité doit conserver le document ou une copie de celui-ci.

66.1 (1) Pour l'application de l'article 9.5 de la Loi, les personnes ou entités sont les entités financières, les entreprises de transfert de fonds ou de vente de titres négociables et les casinos qui tiennent un document en application du présent règlement à l'égard d'un télévirement visé au paragraphe (2).

(2) Sous réserve du paragraphe (3), les télévirements visés par l'article 9.5 de la Loi s'entendent au sens du

those as defined in subsection 1(2), but including transfers within Canada that are SWIFT MT 103 messages.

(3) For greater certainty, subsection (2) does not apply in respect of

(*a*) a transfer carried out using a credit or debit card, if the recipient has an agreement with the payment service provider permitting payment by such means for the provision of goods and services;

(*b*) a transfer where the recipient withdraws cash from their account;

(*c*) a transfer carried out by means of a direct deposit or a pre-authorized debit; or

(*d*) a transfer carried out using cheque imaging and presentment.

67. Every person or entity that is required by these Regulations to ascertain the identity of a person in connection with a record that the person or entity has created and is required to keep under these Regulations, or a transaction that they have carried out and in respect of which they are required to keep a record under these Regulations or under section 12.1 of the *Proceeds of Crime (Money Laundering) and Terrorist Financing Suspicious Transaction Reporting Regulations*, shall set out on or in or include with that record the name of that person and

(*a*) if a birth certificate, driver's licence, provincial health insurance card (if such use of the card is not prohibited by the applicable provincial law), passport or any other similar record is relied on to ascertain the person's identity, the type and reference number of the record and the place where it was issued;

(*b*) if a confirmation of a cleared cheque from a financial entity is relied on to ascertain the person's identity, the name of the financial entity and the account number of the deposit account on which the cheque was drawn;

(*c*) if the person's identity is ascertained by confirming that they hold a deposit account with a financial entity, the name of the financial entity where the account is held and the number of the account and the date of the confirmation;

paragraphe 1(2), sauf qu'ils comprennent également les télévirements effectués à l'intérieur du Canada qui sont des messages SWIFT MT 103.

(3) Il est entendu que le paragraphe (2) ne s'applique pas :

a) si le destinataire conclu un accord avec le fournisseur de services de paiement permettant le paiement par ce moyen des biens et services fournis, au télévirement effectué au moyen d'une carte de crédit ou de débit;

b) au télévirement où le destinataire retire de l'argent de son compte;

c) au télévirement effectué au moyen d'un dépôt direct ou d'un débit pré-autorisé;

d) au télévirement effectué par imagerie et présentation de chèques.

67. Toute personne ou entité qui est tenue de vérifier l'identité d'une personne en application du présent règlement relativement à un document que la personne ou l'entité a constitué et qu'elle est tenue de conserver en application du présent règlement, ou à une opération financière qu'elle a effectuée et à l'égard de laquelle elle doit tenir un document en application du présent règlement ou de l'article 12.1 du *Règlement sur la déclaration des opérations douteuses — recyclage des produits de la criminalité et financement des activités terroristes*, doit indiquer dans le document, ou joindre à celui-ci le nom de la personne ainsi que les renseignements suivants :

a) si l'identité est vérifiée au moyen du certificat de naissance de la personne, de son permis de conduire, de sa carte d'assurance-maladie provinciale (si un tel usage n'est pas interdit aux termes de la loi provinciale applicable), de son passeport ou d'un document semblable, les type et numéro de référence du document utilisé, de même que le lieu où il a été délivré;

b) si l'identité est vérifiée par la confirmation qu'un chèque tiré par la personne sur un compte de dépôt auprès d'une entité financière a été compensé, le nom de l'entité et le numéro du compte duquel le chèque a été tiré;

c) si l'identité est vérifiée par la confirmation que la personne est titulaire d'un compte de dépôt ouvert à son nom auprès d'une entité financière, le nom de l'entité où le compte est ouvert, le numéro du compte et la date de la confirmation;

(*d*) if the person's identity is ascertained by relying on a previous confirmation of their identity by an entity that is affiliated with the entity ascertaining the identity of the person or an entity that is a member of the same association — being a central cooperative credit society as defined in section 2 of the *Cooperative Credit Associations Act* — as the entity ascertaining the identity of the person, the name of that entity and the type and reference number of the record that entity previously relied on to ascertain the person's identity;

(*e*) if an identification product is used to ascertain the person's identity, the name of the identification product, the name of the entity offering the product, the search reference number and the date the product was used to ascertain the person's identity;

(*f*) if the person's identity is ascertained by consulting a credit file kept by an entity in respect of the person, the name of the entity and the date of the consultation;

(*g*) if the person's identity is ascertained from an attestation signed by a commissioner of oaths in Canada or a guarantor in Canada, the attestation;

(*h*) if the person's identity is ascertained by consulting an independent data source, the name of the data source, the date of the consultation and the information provided by the data source;

(*i*) if the person's identity is ascertained by relying on a utility invoice issued in the person's name, the invoice or a legible photocopy or electronic image of the invoice;

(*j*) if the person's identity is ascertained by relying on a photocopy or electronic image of a document provided by the person, that photocopy or electronic image; and

(*k*) if the person's identity is ascertained by relying on a deposit account statement issued in the person's name by a financial entity, a legible photocopy or electronic image of the statement.

68. Where any record is required to be kept under these Regulations, a copy of it may be kept

(*a*) in a machine-readable form, if a paper copy can be readily produced from it; or

(*b*) in an electronic form, if a paper copy can be readily produced from it and an electronic signature of the

d) si l'identité est vérifiée par la confirmation préalable de l'identité par une entité du même groupe que l'entité qui effectue la vérification ou par une entité qui est membre de la même association — soit une coopérative de crédit centrale au sens de l'article 2 de la *Loi sur les associations coopératives de crédit* — que l'entité qui effectue la vérification, le nom de l'entité et les type et numéro de référence du document utilisé précédemment par l'entité pour vérifier l'identité de la personne;

e) si l'identité est vérifiée au moyen d'un produit d'identification, le nom de celui-ci et de l'entité qui l'offre, le numéro de référence de la recherche et la date où le produit a été utilisé pour la vérification;

f) si l'identité est vérifiée par la consultation du dossier de crédit de la personne tenu par une entité, le nom de l'entité et la date de la consultation;

g) si l'identité est vérifiée au moyen d'une attestation signée par un commissaire à l'assermentation au Canada ou par un répondant au Canada, l'attestation;

h) si l'identité est vérifiée par la consultation d'une source de données indépendante, le nom de celle-ci, la date à laquelle elle a été consultée et les renseignements obtenus;

i) si l'identité est vérifiée au moyen d'une facture de services publics établie au nom de la personne, la facture ou une photocopie lisible ou image électronique de celle-ci;

j) si l'identité est vérifiée au moyen d'une photocopie ou image électronique d'un document fourni par la personne, cette photocopie ou image électronique;

k) si l'identité est vérifiée au moyen d'un relevé de compte de dépôt établi au nom de la personne par une entité financière, la photocopie lisible du relevé.

68. Il peut être conservé, au lieu des documents exigés aux termes du présent règlement :

a) soit une copie de ceux-ci qui est lisible par machine, pourvu qu'un imprimé puisse facilement être produit;

b) soit une copie électronique de ceux-ci, pourvu qu'un imprimé puisse facilement être produit et que la person who must sign the record in accordance with these Regulations is retained.

69. (1) Subject to subsection (2), every person or entity that is required to obtain, keep or create records under these Regulations shall retain those records for a period of at least five years following

(*a*) in respect of signature cards, account operating agreements, account application forms, credit card applications and records setting out the intended use of the account, the day on which the account to which they relate is closed;

(*a.1*) in respect of client credit files that are required to be kept under paragraph 14(*i*) and records that are required to be kept under paragraph 14(*n*), 14.1(*g*) or 23(1)(*f*), the day on which the account to which they relate is closed;

(*b*) in respect of client information records, certificates of corporate status, records that are required to be filed annually under the applicable provincial securities legislation or other similar records that ascertain the existence of a corporation, and records that ascertain the existence of an entity, other than a corporation, including partnership agreements and articles of association, the day on which the last business transaction is conducted;

(*b.1*) in respect of client credit files that are required to be kept under paragraph 30(*a*), records that are required to be kept under section 11.1, paragraph 14(*o*), subsection 15.1(2) or section 20.1 or 31, lists that are required to be kept under section 32 and records, other than client information records, that are required to be kept under that section, the day on which the last business transaction is conducted; and

(*c*) in respect of all other records, the day on which they were created.

(2) Where records that an individual keeps under these Regulations are the property of the individual's employer or a person or entity with which the individual is in a contractual relationship, the individual is not required to retain the records after the end of the individual's employment or contractual relationship.

70. Every record that is required to be kept under these Regulations shall be retained in such a way that it

signature électronique de la personne qui est tenue de signer le document aux termes du présent règlement soit également conservée.

69. (1) Sous réserve du paragraphe (2), la personne ou l'entité à qui incombe l'obligation d'obtenir, de tenir ou de constituer des documents aux termes du présent règlement doit les conserver pendant au moins cinq ans suivant :

a) la date de clôture du compte auquel les documents se rapportent, dans le cas de fiches-signature, de conventions de tenue de compte, de formules de demande d'ouverture de compte, de demandes de cartes de crédit et de documents indiquant l'utilisation prévue du compte;

a.1) la date de clôture du compte auquel les documents se rapportent, dans le cas de dossiers de crédit tenus en vertu de l'alinéa 14*i*) et de documents tenus en vertu des alinéas 14*n*), 14.1*g*) ou 23(1)*f*);

b) la date à laquelle la dernière opération commerciale est effectuée, dans le cas de dossiers-clients, de certificats de constitution, de documents à déposer annuellement aux termes de la loi provinciale régissant les valeurs mobilières ou de documents semblables qui font foi de l'existence d'une personne morale, de conventions de société, d'actes d'association ou de documents semblables faisant foi de l'existence d'une entité autre qu'une personne morale;

b.1) la date à laquelle la dernière opération commerciale est effectuée, dans le cas de dossiers de crédit tenus en vertu de l'alinéa 30*a*), de documents tenus en vertu de l'article 11.1, de l'alinéa 14*o*), du paragraphe 15.1(2) ou des articles 20.1 ou 31 et de documents, autres que des dossiers-clients, ou listes tenus en vertu de l'article 32;

c) la date d'établissement des documents, dans les autres cas.

(2) Si les documents qu'un individu tient aux termes du présent règlement appartiennent à son employeur ou à la personne ou l'entité avec laquelle il est lié par contrat, l'individu n'est pas tenu de conserver ces documents une fois que le lien d'emploi ou le lien contractuel est rompu.

70. Tout document à tenir aux termes du présent règlement doit être conservé de manière à pouvoir être can be provided to an authorized person within 30 days after a request is made to examine it under section 62 of the Act.

Canadian Charter of Rights and Freedoms

1. The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

7. Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

8. Everyone has the right to be secure against unreasonable search or seizure.

Appeal allowed in part with costs.

Solicitor for the appellant: Attorney General of Canada, Ottawa.

Solicitors for the respondent: Hunter Litigation Chambers, Vancouver; Blake, Cassels & Graydon, Vancouver.

Solicitors for the intervener the Criminal Lawyers' Association (Ontario): Stockwoods, Toronto.

Solicitors for the intervener the Canadian Civil Liberties Association: Osler, Hoskin & Harcourt, Toronto.

Solicitors for the intervener the Law Society of British Columbia: McCarthy Tétrault, Vancouver.

Solicitors for the intervener the Canadian Bar Association: Lawson Lundell, Vancouver.

Solicitors for the intervener the Advocates' Society: Stern Landesman Clark, Toronto; Paliare Roland Rosenberg Rothstein, Toronto.

Solicitors for the interveners Barreau du Québec and Chambre des notaires du Québec: Lavery, de Billy, Montréal.

produit auprès d'une personne autorisée dans les trente jours suivant la date où il est demandé en vertu de l'article 62 de la Loi.

Charte canadienne des droits et libertés

1. La *Charte canadienne des droits et libertés* 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.

7. Chacun a droit à la vie, à la liberté et à la sécurité de sa personne; il ne peut être porté atteinte à ce droit qu'en conformité avec les principes de justice fondamentale.

8. Chacun a droit à la protection contre les fouilles, les perquisitions ou les saisies abusives.

Pourvoi accueilli en partie avec dépens.

Procureur de l'appelant : Procureur général du Canada, Ottawa.

Procureurs de l'intimée : Hunter Litigation Chambers, Vancouver; Blake, Cassels & Graydon, Vancouver.

Procureurs de l'intervenante Criminal Lawyers' Association (Ontario) : Stockwoods, Toronto.

Procureurs de l'intervenante l'Association canadienne des libertés civiles : Osler, Hoskin & Harcourt, Toronto.

Procureurs de l'intervenante Law Society of British Columbia : McCarthy Tétrault, Vancouver.

Procureurs de l'intervenante l'Association du Barreau canadien : Lawson Lundell, Vancouver.

Procureurs de l'intervenante Advocates' Society : Stern Landesman Clark, Toronto; Paliare Roland Rosenberg Rothstein, Toronto.

Procureurs des intervenants le Barreau du Québec et la Chambre des notaires du Québec : Lavery, de Billy, Montréal.

Minister of Citizenship and Immigration and Minister of Public Safety and Emergency Preparedness *Appellants/Respondents on cross-appeal*

v.

Mohamed Harkat *Respondent/Appellant on cross-appeal*

and

Attorney General of Ontario, British Columbia Civil Liberties Association, Canadian Council of Criminal Defence Lawyers, Canadian Civil Liberties Association, Canadian Bar Association, Canadian Association of Refugee Lawyers, Canadian Council for Refugees, International Civil Liberties Monitoring Group, Canadian Council on American-Islamic Relations (now known as National Council of Canadian Muslims), Amnesty International and Criminal Lawyers' Association (Ontario) *Interveners*

Indexed as: Canada (Citizenship and Immigration) *v.* Harkat

2014 SCC 37

File No.: 34884.

2013: October 10, 11; 2014: May 14.

Present: McLachlin C.J. and LeBel, Abella, Rothstein, Cromwell, Moldaver, Karakatsanis and Wagner JJ.

ON APPEAL FROM THE FEDERAL COURT OF APPEAL

Constitutional law — Charter of Rights — Right to life, liberty and security of person — Certificate issued against foreign national stating that he is inadmissible to Canada on national security grounds for allegedly engaging in terrorism — Named person challenging

Please see in particular para. 77

c.

Mohamed Harkat *Intimé/Appelant au pourvoi incident*

et

Procureur général de l'Ontario, Association des libertés civiles de la Colombie-Britannique, Conseil canadien des avocats de la défense, Association canadienne des libertés civiles, Association du barreau canadien, Association canadienne des avocats et avocates en droit des réfugiés, Conseil canadien pour les réfugiés, Coalition pour la surveillance internationale des libertés civiles, Canadian Council on American-Islamic Relations (maintenant connu sous le nom de Conseil national des musulmans canadiens), Amnistie internationale et Criminal Lawyers' Association (Ontario) *Intervenants*

Répertorié : Canada (Citoyenneté et Immigration) *c.* Harkat

2014 CSC 37

Nº du greffe : 34884.

2013 : 10, 11 octobre; 2014 : 14 mai.

Présents : La juge en chef McLachlin et les juges LeBel, Abella, Rothstein, Cromwell, Moldaver, Karakatsanis et Wagner.

EN APPEL DE LA COUR D'APPEL FÉDÉRALE

Droit constitutionnel — Charte des droits — Droit à la vie, à la liberté et à la sécurité de la personne — Certificat délivré contre un étranger atteste que cette personne est interdite de territoire au Canada pour raison de sécurité nationale parce qu'elle se serait livrée *constitutionality of security certificate scheme on grounds that it prevents full disclosure and personal participation in hearings — Whether scheme under which security certificate issued deprives named person of right to life, liberty and security of person in accordance with principles of fundamental justice — Canadian Charter of Rights and Freedoms, s. 7 — Immigration and Refugee Protection Act, S.C. 2001, c. 27, ss. 77(2), 83(1)(c), (d), (e), (h), (i), 85.4(2), 85.5(b).*

Immigration — Inadmissibility and removal — National security — Certificate issued against foreign national stating that he is inadmissible to Canada on national security grounds for allegedly engaging in terrorism — Judge reviewing reasonableness of certificate finding sufficient evidence to demonstrate that certificate was reasonable and upholding certificate — Whether designated judge erred in concluding that certificate was reasonable.

Evidence — Privilege — Informer privilege — Information used against named person obtained by CSIS from human sources — Whether CSIS human sources are covered by class privilege — Whether CSIS human sources can be cross-examined.

Constitutional law — Charter of Rights — Procedural fairness — Duty to disclose — Remedy — Summaries of intercepted conversations tendered as evidence against named person — Source materials for summaries destroyed in accordance with internal policy of CSIS — Whether destruction of source materials breached named person's right to procedural fairness — Whether designated judge erred in refusing to exclude summaries of intercepted conversations — Canadian Charter of Rights and Freedoms, ss. 7, 24(1).

Stay of proceedings — Duties of candour and utmost good faith — Fairness of process — Ex parte proceedings — Review of reasonableness of security certificate — Whether ministers made reasonable efforts to obtain information sought by special advocates — Whether ministers breached duties of candour and utmost good faith — Whether proceedings against named person were fair — Whether named person entitled to stay of proceedings.

à des activités terroristes — Constitutionnalité du régime des certificats de sécurité contestée par la personne visée au motif qu'il empêche la divulgation complète et sa participation personnelle aux audiences — Le régime en vertu duquel sont délivrés les certificats de sécurité prive-t-il la personne visée de son droit à la vie, à la liberté et à la sécurité de sa personne d'une manière conforme aux principes de justice fondamentale? — Charte canadienne des droits et libertés, art. 7 — Loi sur l'immigration et la protection des réfugiés, L.C. 2001, ch. 27, art. 77(2), 83(1)c), d), e), h), i), 85.4(2), 85.5b).

Immigration — Interdiction de territoire et renvoi — Sécurité nationale — Certificat délivré contre un étranger atteste que cette personne est interdite de territoire au Canada pour raison de sécurité nationale parce qu'elle se serait livrée à des activités terroristes — Juge chargé de se prononcer sur le caractère raisonnable du certificat d'avis qu'il y a une preuve suffisante pour l'établir et confirme la validité du certificat en question — Le juge désigné a-t-il commis une erreur en concluant au caractère raisonnable du certificat?

Preuve — Privilège — Privilège relatif aux indicateurs — Renseignements utilisés contre la personne visée obtenus par le SCRS de sources humaines — Les sources humaines du SCRS sont-elles protégées par un privilège générique? — Les sources humaines du SCRS peuvent-elles être contre-interrogées?

Droit constitutionnel — Charte des droits — Équité procédurale — Obligation de divulgation — Réparation — Résumés de conversations interceptées produits en preuve contre la personne visée — Documents à l'origine des résumés détruits conformément à une politique interne du SCRS — La destruction des documents à l'origine des résumés a-t-elle porté atteinte au droit à l'équité procédurale de la personne visée? — Le juge désigné a-t-il commis une erreur en refusant d'exclure les résumés des conversations interceptées? — Charte canadienne des droits et libertés, art. 7, 24(1).

Arrêt des procédures — Obligations de franchise et de bonne foi la plus absolue — Équité du processus — Procédures ex parte — Examen du caractère raisonnable du certificat de sécurité — Les ministres ont-ils fourni des efforts raisonnables pour obtenir les renseignements demandés par les avocats spéciaux? — Les ministres ont-ils manqué à leurs obligations de franchise et de bonne foi la plus absolue? — Les procédures contre la personne visée étaient-elles équitables? — La personne visée a-t-elle droit à l'arrêt des procédures?

H is alleged to have come to Canada for the purpose of engaging in terrorism. In 2002, a security certificate was issued against H under the scheme then contained in the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (“*IRPA*”). The certificate declared H inadmissible to Canada on national security grounds. After a successful constitutional challenge of the then existing *IRPA* security certificate scheme and subsequent amendments to the *IRPA*, a second security certificate was issued against H and referred to the Federal Court for a determination as to its reasonableness. During the proceedings, the special advocates appointed to protect the interests of H in the closed hearings sought to obtain disclosure of the identity of human sources who provided information regarding H to the Canadian Security Intelligence Service (“CSIS”) as well as permission to interview and to cross-examine them. The designated judge rejected their request, finding that the common law police informer privilege should be extended to cover CSIS human sources. The designated judge also rejected their request to compel the ministers to obtain updated information from foreign intelligence agencies on several alleged terrorists with whom H was claimed to have associated. In addition, H’s request to exclude from the evidence summaries of intercepted conversations on the ground that the original recordings and notes of these conversations were destroyed pursuant to CSIS policy OPS-217 was refused by the designated judge. The designated judge found the security certificate scheme under the amended *IRPA* to be constitutional, and concluded that the certificate declaring H inadmissible to Canada was reasonable. On appeal, the Federal Court of Appeal upheld the constitutionality of the scheme but found that the identity of CSIS human sources is not protected by privilege. It also excluded from the evidence the summaries of intercepted conversations to which H had not been privy, and remitted the matter to the designated judge for redetermination on the basis of what remained of the record after the exclusion of the summaries.

Held (Abella and Cromwell JJ. dissenting in part on the appeal): The appeal should be allowed in part. The cross-appeal should be dismissed. The *IRPA* scheme is constitutional. CSIS human sources are not protected by a class privilege. The designated judge’s conclusion that the security certificate was reasonable is reinstated.

Selon les allégations, H serait entré au Canada pour se livrer à des activités terroristes. En 2002, un certificat de sécurité a été délivré contre lui conformément au régime alors établi par la *Loi sur l’immigration et la protection des réfugiés*, L.C. 2001, ch. 27 (« *LIPR* »). Selon ce certificat, H était interdit de territoire au Canada pour raison de sécurité nationale. Après la contestation constitutionnelle couronnée de succès du régime de la *LIPR* relatif aux certificats de sécurité qui était alors en vigueur et les modifications subséquentes de cette loi, un deuxième certificat de sécurité a été délivré contre H et déposé à la Cour fédérale pour que celle-ci décide de son caractère raisonnable. Au cours de la procédure, les avocats spéciaux nommés pour défendre les intérêts de H durant les audiences à huis clos ont tenté d’obtenir la divulgation de l’identité des sources humaines ayant fourni au Service canadien du renseignement de sécurité (« SCRS ») des renseignements relatifs à H, ainsi que l’autorisation de les questionner et de les contre-interroger. Le juge désigné a rejeté leur demande, concluant que le privilège de common law relatif aux indicateurs de police devrait être élargi et s’appliquer également aux sources humaines du SCRS. Il a également rejeté leur demande visant à contraindre les ministres à obtenir d’organismes étrangers de renseignement des informations à jour sur plusieurs présumés terroristes avec lesquels H se serait associé. Il a aussi rejeté la demande de H pour faire exclure de la preuve les résumés des conversations interceptées au motif que les enregistrements originaux et les notes concernant ces conversations avaient été détruits conformément à la politique OPS-217 du SCRS. Selon le juge désigné, le régime des certificats de sécurité établi par la *LIPR* modifiée est constitutionnel et le certificat attestant que H est interdit de territoire au Canada est raisonnable. En appel, la Cour d’appel fédérale a confirmé la constitutionnalité du régime, mais a conclu que l’identité des sources humaines du SCRS n’était pas protégée par un privilège. Elle a également exclu de la preuve les résumés des conversations interceptées auxquelles H n’avait pas participé, et elle a renvoyé l’affaire au juge désigné pour que celui-ci rende un nouveau jugement en se fondant sur ce qu’il restait du dossier après l’exclusion des résumés.

Arrêt (les juges Abella et Cromwell sont dissidents en partie quant au pourvoi) : Le pourvoi est accueilli en partie. Le pourvoi incident est rejeté. Le régime établi par la *LIPR* est constitutionnel. Les sources humaines du SCRS ne sont pas protégées par un privilège générique. La conclusion du juge désigné selon laquelle le certificat de sécurité est raisonnable est rétablie.

Per McLachlin C.J. and LeBel, Rothstein, Moldaver, Karakatsanis and Wagner JJ.:

Constitutionality of IRPA Scheme

The impugned provisions of the *IRPA* scheme are constitutional. They do not violate the named person's right to know and meet the case against him, or the right to have a decision made on the facts and the law. The alleged defects of the *IRPA* scheme must be assessed in light of the scheme's overall design and of the two central principles that guide the scheme: (1) the designated judge is intended to play a gatekeeper role, is vested with broad discretion and must ensure not only that the record supports the reasonableness of the ministers' finding of inadmissibility but also that the overall process is fair; and (2) participation of the special advocates in closed hearings is intended to be a substantial substitute for personal participation by the named person in those hearings. However, the scheme remains an imperfect substitute for full disclosure in an open court, and the designated judge has an ongoing responsibility to assess the overall fairness of the process and to grant remedies under s. 24(1) of the *Charter* where appropriate.

The *IRPA* scheme provides sufficient disclosure to the named person to be constitutionally compliant, since the designated judge has a statutory duty to ensure that the named person is reasonably informed of the case against him or her throughout the proceedings. However, the *IRPA* scheme's requirement that the named person be "reasonably informed" of the case should be read as a recognition that the named person must receive an incompressible minimum amount of disclosure. A named person is "reasonably informed" if he or she has personally received sufficient disclosure to be able to give meaningful instructions to his public counsel and meaningful guidance and information to his or her special advocates which will allow them to challenge the information and evidence presented in the closed hearings. The level of disclosure required for a named person to be reasonably informed is case-specific, depending on the allegations and evidence against him or her. Ultimately, the designated judge is the arbiter of whether this standard has been met.

Only information and evidence that raises a serious risk of injury to national security or danger to the safety of a person can be withheld from the named person. The designated judge must be vigilant and skeptical with

La juge en chef McLachlin et les juges LeBel, Rothstein, Moldaver, Karakatsanis et Wagner :

Constitutionnalité du régime établi par la LIPR

Les dispositions contestées du régime établi par la *LIPR* sont constitutionnelles. Elles n'enfreignent pas le droit de la personne visée de connaître et de contester la preuve qui pèse contre elle, ni son droit à ce qu'une décision soit rendue compte tenu des faits et du droit. Les vices dont serait entaché le régime établi par la *LIPR* doivent être examinés à la lumière de la structure globale du régime et des deux principes fondamentaux autour desquels il s'articule : (1) le juge désigné est censé jouer le rôle de gardien, il est investi d'un large pouvoir discrétionnaire et il doit s'assurer non seulement que le dossier étaie le caractère raisonnable de la conclusion d'interdiction de territoire tirée par les ministres, mais aussi que l'ensemble du processus est équitable; et (2) la participation des avocats spéciaux aux audiences à huis clos vise à remplacer, pour l'essentiel, la participation personnelle de la personne visée à ces audiences. Toutefois, ce régime demeure un substitut imparfait à la divulgation complète en audience publique, et le juge désigné a la responsabilité tout au long de l'instance d'évaluer l'équité globale du processus et d'accorder des réparations en application du par. 24(1) de la *Charte* lorsqu'il est approprié de le faire.

Le régime établi par la *LIPR* prévoit la divulgation à la personne visée de suffisamment de renseignements pour respecter la Constitution, puisque le juge désigné a l'obligation légale de veiller à ce que cette personne soit suffisamment informée de la thèse contre elle durant l'instance. Cependant, l'exigence du régime établi par la *LIPR* voulant que la personne visée soit « suffisamment informée » de cette thèse doit être considérée comme une reconnaissance de l'obligation de lui fournir une quantité minimale incompressible de renseignements. La personne visée est « suffisamment informée » si elle a reçu elle-même suffisamment de renseignements pour pouvoir donner à ses avocats spéciaux des renseignements qui leur permettront de contester l'information et la preuve présentées aux audiences à huis clos. L'étendue de la divulgation requise pour que la personne visée soit suffisamment informée varie d'une affaire à l'autre, selon les allégations et la preuve contre elle. En dernier ressort, c'est au juge désigné qu'il appartient de décider si cette norme a été respectée.

Seuls les renseignements et les éléments de preuve qui soulèvent un risque sérieux d'atteinte à la sécurité nationale ou à la sécurité d'autrui peuvent être soustraits à la connaissance de la personne visée. Le juge désigné respect to the claims of national security confidentiality and must ensure that only information or evidence which would injure national security or endanger the safety of a person is withheld from the named person. Systematic overclaiming would infringe the named person's right to a fair process or undermine the integrity of the judicial system, requiring a remedy under s. 24(1) of the *Charter*.

doit être vigilant et sceptique quant aux réclamations de confidentialité fondées sur la sécurité nationale et doit garantir que seuls les renseignements ou les éléments de preuve qui porteraient atteinte à la sécurité nationale ou à celle d'autrui sont soustraits à la connaissance de la personne visée. La multiplication systématique des réclamations peut porter atteinte au droit de la personne visée à un processus équitable ou miner l'intégrité du système judiciaire, exigeant ainsi l'octroi d'une réparation en application du par. 24(1) de la *Charte*.

The *IRPA* scheme's approach to disclosure, which fails to provide for a balancing of countervailing interests, does not render the scheme unconstitutional. Section 7 of the *Charter* does not require a balancing approach to disclosure; rather, it requires a fair process. Parliament's choice to adopt a categorical prohibition against disclosure of sensitive information, as opposed to a balancing approach, does not as such constitute a breach of the right to a fair process.

L'approche prévue par le régime établi par la *LIPR* en matière de divulgation — qui ne prévoit pas la mise en balance des intérêts contraires — ne rend pas le régime inconstitutionnel. L'article 7 de la *Charte* n'exige pas l'existence d'une approche de mise en balance quant à la divulgation; il exige plutôt que le processus soit équitable. Le choix du législateur d'une interdiction totale de divulguer les renseignements sensibles — plutôt qu'une approche qui prévoit une mise en balance — ne constitue donc pas une atteinte au droit à un processus équitable.

The communications restrictions imposed on special advocates do not render the scheme unconstitutional. They are not absolute and can be lifted with judicial authorization, subject to conditions deemed appropriate by the designated judge. The judicial authorization process gives the designated judge a sufficiently broad discretion to allow all communications that are necessary for the special advocates to perform their duties. This broad discretion averts unfairness as the designated judge can ensure that the special advocates function as closely as possible to ordinary counsel in a public hearing. The judge should take a liberal approach in authorizing communications and only refuse authorization where the Minister has demonstrated, on a balance of probabilities, a real risk of injurious disclosure. In addition, the named person and his public counsel can send an unlimited amount of one-way communications to the special advocates at any time throughout the proceedings.

Les restrictions aux communications auxquelles doivent se conformer les avocats spéciaux ne rendent pas le régime inconstitutionnel. Elles ne sont pas absolues et peuvent être levées par une autorisation judiciaire, aux conditions que le juge désigné estime indiquées. Le recours à l'autorisation judiciaire donne au juge désigné un pouvoir discrétionnaire suffisamment vaste pour autoriser toutes les communications nécessaires pour que les avocats spéciaux s'acquittent de leurs fonctions. Ce vaste pouvoir discrétionnaire prévient l'iniquité parce que le juge désigné peut s'assurer que les avocats spéciaux agissent autant que possible comme le feraient des avocats ordinaires au cours d'audiences publiques. Le juge devrait adopter une approche libérale lorsqu'il est question d'autoriser les communications et ne refuser son autorisation que dans les cas où le ministre a fait la preuve, selon la prépondérance des probabilités, d'un risque réel de préjudice en cas de divulgation. En outre, la personne visée et ses avocats publics peuvent, eux, transmettre aux avocats spéciaux, à tout moment durant les procédures, une quantité illimitée de communications à sens unique.

The admission of hearsay evidence or the denial of the opportunity for special advocates to cross-examine sources do not render the *IRPA* scheme unconstitutional. The *IRPA* scheme achieves the purpose of excluding unreliable evidence by alternative means to the rule against hearsay evidence and the right to cross-examine witnesses — it provides the designated judge with broad

Admettre des éléments de preuve par ouï-dire ou ne pas donner aux avocats spéciaux la possibilité de contre-interroger certaines sources ne rendent pas le régime établi par la *LIPR* inconstitutionnel. Ce régime atteint l'objectif consistant à écarter les éléments de preuve indignes de foi par d'autres moyens que la règle interdisant le ouï-dire et le droit de contre-interroger discretion to exclude evidence that is not "reliable and appropriate", which allows the judge to exclude not only evidence that he or she finds, after a searching review, to be unreliable, but also evidence whose probative value is outweighed by its prejudicial effect against the named person.

les témoins; il confère au juge désigné le vaste pouvoir discrétionnaire d'exclure des éléments de preuve qui ne seraient pas « dignes de foi et utiles », ce qui lui permet d'exclure non seulement les éléments de preuve qu'il juge, après examen, indignes de foi, mais également ceux dont l'effet préjudiciable à l'endroit de la personne visée l'emporte sur leur valeur probante.

Privilege for CSIS Human Sources

CSIS human sources are not protected by a class privilege. First, police informer privilege does not attach to CSIS human sources. The differences between traditional policing and modern intelligence gathering preclude automatically applying traditional police informer privilege to CSIS human sources. While evidence gathered by the police is traditionally used in criminal trials that provide the accused with significant evidentiary safeguards, the intelligence gathered by CSIS may be used to establish criminal conduct in proceedings that have relaxed rules of evidence and allow for the admission of hearsay evidence. Second, this Court should not create a new privilege for CSIS human sources. If Parliament deems it desirable that CSIS human sources' identities and related information be privileged, it can enact appropriate protections. The *IRPA* scheme already affords broad protection to human sources by precluding the public disclosure of information that would injure national security or endanger a person.

Privilège pour les sources humaines du SCRS

Les sources humaines du SCRS ne sont pas protégées par un privilège générique. Premièrement, le privilège relatif aux indicateurs de police ne vaut pas pour les sources humaines du SCRS. Les différences entre le travail classique des policiers et la collecte moderne de renseignements empêchent d'appliquer systématiquement le privilège d'indicateur de police traditionnel aux sources humaines du SCRS. Les éléments de preuve recueillis par les policiers sont traditionnellement utilisés lors de procès criminels où l'accusé dispose de garanties importantes en matière de preuve, tandis que les renseignements obtenus par le SCRS peuvent servir à établir l'existence d'une conduite criminelle dans une instance où les règles de preuve sont souples et permettent d'admettre une preuve par ouï-dire. Deuxièmement, la Cour ne devrait pas créer un nouveau privilège pour les sources humaines du SCRS. Si le législateur juge souhaitable de protéger au moyen d'un privilège l'identité des sources humaines du SCRS et les renseignements connexes, il peut adopter les mesures de protection voulues. Le régime établi par la *LIPR* accorde déjà aux sources humaines une grande protection en interdisant de rendre publics des renseignements dont la divulgation porterait atteinte à la sécurité nationale ou à la sécurité d'autrui.

Although the identity of CSIS human sources is not privileged, special advocates do not have an unlimited ability to interview and cross-examine human sources. The discretion of the designated judge to allow the special advocates to interview and cross-examine human sources in a closed hearing should be exercised as a last resort. A generalized practice of calling CSIS human sources before a court, even if only in closed hearings, may have a chilling effect on potential sources and hinder CSIS's ability to recruit new sources. In this case, there is no need to authorize the exceptional measure of interviewing and cross-examining human sources.

Même si l'identité des sources humaines du SCRS n'est pas protégée par un privilège, les avocats spéciaux n'ont pas pour autant un droit illimité de questionner et de contre-interroger ces sources. Le pouvoir discrétionnaire du juge désigné d'autoriser les avocats spéciaux à questionner et à contre-interroger les sources humaines lors d'audiences à huis clos devrait être exercé en dernier recours. Une pratique qui consisterait à assigner systématiquement les sources humaines du SCRS à témoigner devant un tribunal, même uniquement lors d'audience à huis clos, pourrait refroidir les ardeurs de sources potentielles et nuire à la capacité du SCRS d'en recruter de nouvelles. Il est inutile en l'espèce que la Cour autorise la mesure exceptionnelle qui consiste à questionner et à contre-interroger les sources humaines.

Summaries

The appropriate remedy for the destruction of materials pursuant to CSIS policy OPS-217 must be assessed on a case-by-case basis and must be tailored to address the prejudicial effect on the named person's case. The summaries of materials destroyed pursuant to policy OPS-217 should only be excluded under s. 24(1) of the *Charter* if their admission would result in an unfair trial or would otherwise undermine the integrity of the justice system. In this case, the designated judge did not err in refusing to exclude the summaries of intercepted conversations that were tendered as evidence by the ministers. Although the destruction of the original CSIS operational materials caused the ministers to fail to meet their disclosure obligations towards H and therefore to breach s. 7 of the *Charter*, the exclusion of the summaries is not necessary to remedy the prejudice to H's ability to know and meet the case against him, or to safeguard the integrity of the justice system. The disclosure of the summaries in an abridged version to H and in an unredacted form to his special advocates was sufficient to prevent significant prejudice to H's ability to know and meet the case against him.

Résumés

La réparation qu'il convient d'accorder pour la destruction des documents en application de la politique OPS-217 du SCRS doit être évaluée au cas par cas et doit être conçue pour remédier à l'effet préjudiciable qu'elle a eu sur la cause de la personne visée. Les résumés des documents détruits en application de la politique OPS-217 ne devraient être exclus en application du par. 24(1) de la *Charte* que lorsque leur utilisation rendrait le procès inéquitable ou minerait autrement l'intégrité du système de justice. En l'espèce, le juge désigné n'a pas commis d'erreur en refusant d'exclure les résumés des conversations interceptées produits en preuve par les ministres. Bien que, en raison de la destruction des documents opérationnels originaux du SCRS, les ministres n'aient pas satisfait à leurs obligations en matière de communication envers H et aient donc contrevenu à l'art. 7 de la *Charte*, l'exclusion des résumés n'est pas nécessaire pour remédier à l'atteinte à la capacité de H de connaître la preuve qui pèse contre lui et d'y répondre ou pour sauvegarder l'intégrité du système de justice. La communication d'une version caviardée des résumés à M. Harkat et d'une version intégrale à ses avocats spéciaux était suffisante pour empêcher qu'il soit porté atteinte de manière importante à la capacité de M. Harkat de connaître la preuve qui pèse contre lui et d'y répondre.

Duties of Candour and Utmost Good Faith and Fairness of Process

The duties of candour and utmost good faith apply when a party relies upon evidence in *ex parte* proceedings. They require an ongoing effort to update, throughout the proceedings, the information and evidence regarding the named person. What constitutes reasonable efforts will turn on the facts of each case; however, the ministers have no general obligation to provide disclosure of evidence or information that is beyond their control. In this case, reasonable efforts were made by the ministers and they did not breach those duties. The proceedings against H were fair and a stay of proceedings should not be granted.

Obligations de franchise et de bonne foi la plus absolue, et équité du processus

Les obligations de franchise et de bonne foi la plus absolue s'appliquent lorsqu'une partie se fonde sur des éléments de preuve durant des procédures *ex parte*. Elles supposent que la partie qui y est tenue fasse des efforts constants pour mettre à jour les renseignements et la preuve relatifs à la personne visée et ce, tout au long des procédures. Ce qui équivaut à des efforts raisonnables dépendra des faits de chaque cas; toutefois, les ministres n'ont aucune obligation générale de communiquer des éléments de preuve ou des renseignements dont ils n'ont pas le contrôle. En l'espèce, les ministres ont fait des efforts raisonnables et n'ont pas manqué à ces obligations. La procédure contre H a été équitable et il n'y a pas lieu d'accorder un arrêt des procédures.

Reasonableness of Certificate

The designated judge committed no reviewable errors in finding that the ministers' decision to declare H inadmissible to Canada was reasonable. The designated judge's weighing of the factual evidence on the record is entitled to appellate deference and should only be

Caractère raisonnable du certificat

Le juge désigné n'a commis aucune erreur susceptible de contrôle en concluant au caractère raisonnable de la décision des ministres d'interdire H de territoire au Canada. Les tribunaux d'appel doivent faire preuve de déférence lorsqu'ils sont appelés à se prononcer sur la interfered with if he committed a palpable and overriding error. There is no palpable and overriding error in his weighing of the evidence or in his assessment of H's credibility, both of which in his view provided reasonable grounds to establish H's inadmissibility.

mise en balance de la preuve factuelle par le juge désigné et n'intervenir à cet égard que si ce dernier a commis une erreur manifeste et dominante. Le juge désigné n'a commis aucune erreur manifeste et dominante lorsqu'il a soupesé les éléments de preuve ou évalué la crédibilité de H, deux éléments qui, à ses yeux, donnaient des motifs raisonnables de conclure à l'interdiction de territoire de H.

Per Abella and Cromwell JJ. (dissenting in part on the appeal): Individuals who come forward with information about a potential terrorist threat, often risk their lives in doing so if their identity is disclosed. Offering only the possibility of anonymity if a court subsequently agrees to protect an informer's identity, requires informers to choose between risk of personal harm if their identity is not protected, or risk of harm to the public if the information is not disclosed.

Les juges Abella et Cromwell (dissidents en partie quant au pourvoi) : La personne qui offre des renseignements au sujet d'une menace terroriste le fait souvent au péril de sa vie si son identité est dévoilée. Lui offrir la possibilité de garder l'anonymat uniquement si un tribunal accepte par la suite de protéger son identité, c'est l'obliger à choisir entre courir le risque de subir un préjudice personnel si son identité n'est pas protégée et risquer de mettre en danger la population en s'abstenant de divulguer les renseignements.

CSIS informants who provide national security information based on a promise of confidentiality are entitled to the assurance that their confidentiality will be protected. This can only be guaranteed by a class privilege, as is done in criminal law cases. A case-by-case approach results in an informant not knowing whether the promise will be kept until a judge engages in a retrospective assessment. This is hardly conducive to encouraging informants to risk their lives by coming forward to offer highly sensitive information in terrorism cases.

Les indicateurs du SCRS qui fournissent des renseignements relatifs à la sécurité nationale après avoir reçu une promesse d'anonymat ont droit à l'assurance que leur identité sera protégée. Seul un privilège générique peut offrir une telle garantie, comme c'est le cas dans le contexte des causes en matière criminelle. Avec une approche au cas par cas, l'indicateur ignore si la promesse sera tenue jusqu'à ce qu'un juge procède à un examen rétrospectif. Cela ne concourt guère à encourager les indicateurs à risquer leur vie en offrant des renseignements hautement sensibles dans des causes relatives au terrorisme.

Informer privilege has been judicially recognized for more than two centuries and has a dual purpose: protection of a channel of information and the safety of those supplying it. It has been applied in settings other than criminal prosecutions, including commissions of inquiry. The privilege for informers in the context of state officials investigating matters of national security is a well-established one. Before CSIS was created as an independent agency, the intelligence function it now carries out was performed by the RCMP Security Service, and informer privilege applied to RCMP Security Service informants. While the functions of CSIS and the RCMP are distinct, the rationale for the informer privilege applies equally to the work of both. The transfer of functions from the RCMP Security Service to CSIS should have no bearing on whether the privilege continues to exist.

Le privilège relatif aux indicateurs est reconnu par la jurisprudence depuis plus de deux siècles et vise un double objectif : la protection d'un canal d'information, d'une part, et la sécurité de ceux qui fournissent les renseignements, d'autre part. Ce privilège a été appliqué dans d'autres contextes que les poursuites criminelles, dont celui des commissions d'enquête. Le privilège qui protège les indicateurs dans le contexte d'enquêtes menées par des représentants de l'État quant à des questions de sécurité nationale est bien établi. Avant que le SCRS ne soit créé à titre d'organisme indépendant, la fonction en matière de renseignement dont il s'acquitte maintenant était assumée par le Service de sécurité de la GRC, et le privilège relatif aux indicateurs s'appliquait aux indicateurs de ce service. Bien que les fonctions du SCRS et celles de la GRC soient distinctes, le fondement de l'existence du privilège relatif aux indicateurs s'applique tout autant au travail de l'un qu'à celui de l'autre. Le transfert des fonctions du Service de sécurité de la GRC au SCRS ne devrait avoir aucune incidence sur la poursuite ou non de l'existence du privilège.

The CSIS informer privilege is not abrogated by statute. In order to abrogate a common law privilege, Parliament must clearly express an intention to do so. *IRPA* makes no reference to informer privilege and does not evince a clear intention to deprive CSIS informants of its benefit.

Given the intensity of the interests at stake in the security certificate context, it would be appropriate to recognize a limited exception specifically crafted for the security certificate process which would address only disclosure to the special advocate, not to the subject of the proceedings. Identity should be disclosed only if the reviewing judge is satisfied that other measures, including withdrawing the substance of the informant's evidence from consideration in support of the certificate, are not sufficient to ensure a just outcome. Even when disclosure of identity is ordered, there should be no cross-examination of the source by the special advocate. Requiring a human source to testify will have a profound chilling effect on the willingness of other sources to come forward, and will undoubtedly damage the relationship between CSIS and the source compelled to testify. CSIS operatives must be able to provide confident assurances to their sources that their identities will not be revealed, not vague assurances hedged with qualifications. Moreover, the human sources themselves, who are not subject to the necessary security clearance, may learn sensitive material in the closed proceedings which CSIS will then be unable to control.

We would therefore allow the ministers' appeal on the informant privilege issue and restore the designated judge's disposition of this issue.

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By McLachlin C.J.

Referred to: *Charkaoui v. Canada (Citizenship and Immigration)*, 2007 SCC 9, [2007] 1 S.C.R. 350; *Vancouver Sun (Re)*, 2004 SCC 43, [2004] 2 S.C.R. 332; *Canadian Broadcasting Corp. v. New Brunswick (Attorney General)*, [1996] 3 S.C.R. 480; *Bank Mellat v. H. M. Treasury*, [2013] UKSC 38, [2013] 4 All E.R. 495; *Almrei (Re)*, 2008 FC 1216, [2009] 3 F.C.R. 497; *Ruby v. Canada (Solicitor General)*, 2002 SCC 75, [2002] 4 S.C.R. 3; *R. v. Ahmad*, 2011 SCC 6, [2011] 1 S.C.R. 110; *Secretary of State for the Home Department*

Le privilège relatif aux indicateurs du SCRS n'a pas été abrogé par la loi. Pour abroger un privilège reconnu par la common law, le législateur doit exprimer clairement son intention de le faire. La *LIPR* ne fait pas référence au privilège relatif aux indicateurs et elle n'exprime pas une intention claire de priver les indicateurs du SCRS des avantages qu'il procure.

Compte tenu de l'importance des intérêts en jeu dans le contexte des certificats de sécurité, il serait approprié de reconnaître l'existence d'une exception limitée, conçue spécifiquement pour le processus applicable aux certificats de sécurité et dont la portée se limiterait à la divulgation à l'avocat spécial et ne viserait pas le sujet des procédures. L'identité ne devrait être communiquée que si le juge siégeant en révision est convaincu que d'autres mesures, y compris le retrait de l'essentiel du témoignage de l'indicateur des éléments pris en compte au soutien du certificat, ne sont pas suffisantes pour garantir une issue équitable. Même lorsque la communication de l'identité est ordonnée, la source ne devrait pas être contre-interrogée par l'avocat spécial. Exiger qu'une source humaine témoigne refroidirait considérablement la volonté d'autres sources de collaborer avec les autorités et mettrait sans aucun doute à mal la relation entre le SCRS et la source assignée à témoigner. Les agents du SCRS doivent pouvoir donner à leurs sources l'assurance ferme que leur identité ne sera pas révélée et non pas des assurances vagues assorties de conditions. En outre, les sources humaines elles-mêmes, qui ne sont pas assujetties à l'habilitation de sécurité obligatoire, pourraient prendre connaissance d'information sensible durant les procédures à huis clos et le SCRS serait dès lors incapable d'en assurer le contrôle.

Nous sommes donc d'avis d'accueillir le pourvoi des ministres en ce qui a trait à la question du privilège relatif à l'indicateur et de rétablir la décision du juge désigné à cet égard.

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v. A.F. (No. 3), [2009] UKHL 28, [2009] 3 All E.R. 643; *Jaballah, Re*, 2009 FC 279, 340 F.T.R. 43; *Canada (Attorney General) v. Almalki*, 2010 FC 1106, [2012] 2 F.C.R. 508; *Khadr v. Canada (Attorney General)*, 2008 FC 549, 329 F.T.R. 80; *Almrei, Re*, 2009 FC 322, 342 F.T.R. 11; *Smith v. Jones*, [1999] 1 S.C.R. 455; *R. v. L. (D.O.)*, [1993] 4 S.C.R. 419; *R. v. Khelawon*, 2006 SCC 57, [2006] 2 S.C.R. 787; *Charkaoui v. Canada (Citizenship and Immigration)*, 2008 SCC 38, [2008] 2 S.C.R. 326; *R. v. Y. (N.)*, 2012 ONCA 745, 113 O.R. (3d) 347; *R. v. National Post*, 2010 SCC 16, [2010] 1 S.C.R. 477; *Canada (Attorney General) v. Almalki*, 2011 FCA 199, [2012] 2 F.C.R. 594; *R. v. La*, [1997] 2 S.C.R. 680; *R. v. Bjelland*, 2009 SCC 38, [2009] 2 S.C.R. 651; *R. v. Bero* (2000), 137 O.A.C. 336; *R. v. J.G.B.* (2001), 139 O.A.C. 341; *Almrei (Re)*, 2009 FC 1263, [2011] 1 F.C.R. 163; *R. v. Chaplin*, [1995] 1 S.C.R. 727; *R. v. Stinchcombe*, [1995] 1 S.C.R. 754; *R. v. O'Connor*, [1995] 4 S.C.R. 411; *R. v. Babos*, 2014 SCC 16, [2014] 1 S.C.R. 309; *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235.

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Urszula Kaczmarczyk, *Q.C.*, *Robert Frater*, *Marianne Zoric* and *André Séguin*, for the appellants/respondents on cross-appeal.

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Robert W. Hubbard and *Greg Skerkowski*, for the intervener the Attorney General of Ontario.

Nader R. Hasan and *Gerald Chan*, for the intervener the British Columbia Civil Liberties Association.

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POURVOI et POURVOI INCIDENT contre un arrêt de la Cour d'appel fédérale (le juge en chef Blais et les juges Létourneau et Layden-Stevenson), 2012 CAF 122, [2012] 3 R.C.F. 635, 349 D.L.R. (4th) 519, 7 Imm. L.R. (4th) 175, 429 N.R. 1, 260 C.R.R. (2d) 290, [2012] A.C.F. nº 492 (QL), 2012 CarswellNat 1156, qui a infirmé trois décisions du juge Noël, 2009 CF 204, [2009] 4 R.C.F. 370, 339 F.T.R. 65, 306 D.L.R. (4th) 269, 78 Imm. L.R. (3d) 303, [2008] A.C.F. nº 1823 (QL), 2008 CarswellNat 5667; 2010 CF 1241, [2012] 3 R.C.F. 251, 380 F.T.R. 61, [2010] A.C.F. nº 1426 (QL), 2010 CarswellNat 4700; et 2010 CF 1243, 380 F.T.R. 255, 224 C.R.R. (2d) 167, 95 Imm. L.R. (3d) 1, [2010] A.C.F. nº 1428 (QL), 2010 CarswellNat 5849; et qui a confirmé une décision du juge Noël, 2010 CF 1242, [2012] 3 R.C.F. 432, 380 F.T.R. 163, 224 C.R.R. (2d) 93, 94 Imm. L.R. (3d) 179, [2010] A.C.F. nº 1427 (QL), 2010 CarswellNat 4715. Pourvoi accueilli en partie, les juges Abella et Cromwell sont dissidents en partie. Pourvoi incident rejeté.

Urszula Kaczmarczyk, *c.r.*, *Robert Frater*, *Marianne Zoric* et *André Séguin*, pour les appelants/intimés au pourvoi incident.

Matthew C. Webber, *Norman D. Boxall*, *Meaghan Thomas* et *Leo Russomanno*, pour l'intimé/appelant au pourvoi incident.

Robert W. Hubbard et *Greg Skerkowski*, pour l'intervenant le procureur général de l'Ontario.

Nader R. Hasan et *Gerald Chan*, pour l'intervenante l'Association des libertés civiles de la Colombie-Britannique.

John Norris and *François Dadour*, for the intervener the Canadian Council of Criminal Defence Lawyers.

Anil K. Kapoor and *Lindsay Trevelyan*, for the intervener the Canadian Civil Liberties Association.

Lorne Waldman, *Peter Edelmann*, *Jacqueline Swaisland* and *Clare Crummey*, for the intervener the Canadian Bar Association.

Marlys A. Edwardh and *Adriel Weaver*, for the intervener the Canadian Association of Refugee Lawyers.

Barbara Jackman, *Sharryn J. Aiken* and *Andrew J. Brouwer*, for the interveners the Canadian Council for Refugees and the International Civil Liberties Monitoring Group.

Faisal Bhabha and *Khalid M. Elgazzar*, for the intervener the Canadian Council on American-Islamic Relations (now known as National Council of Canadian Muslims).

Michael Bossin, *Laïla Demirdache* and *Anna Shea*, for the intervener Amnesty International.

Breese Davies and *Erin Dann*, for the intervener the Criminal Lawyers' Association (Ontario).

Paul J. J. Cavalluzzo and *Paul D. Copeland*, as Special Advocates.

The judgment of McLachlin C.J. and LeBel, Rothstein, Moldaver, Karakatsanis and Wagner JJ. was delivered by

[1] The Chief Justice — The Minister of Citizenship and Immigration and the Minister of Public Safety and Emergency Preparedness (collectively "the ministers") seek to have Mohamed Harkat, a non-citizen, declared inadmissible to Canada. Mr. Harkat is alleged to have come to Canada for the purpose of engaging in terrorism. He has been detained, or living under strict conditions, for over a decade. He potentially faces deportation to a country where he may be at risk of torture

John Norris et *François Dadour*, pour l'intervenant le Conseil canadien des avocats de la défense.

Anil K. Kapoor et *Lindsay Trevelyan*, pour l'intervenante l'Association canadienne des libertés civiles.

Lorne Waldman, *Peter Edelmann*, *Jacqueline Swaisland* et *Clare Crummey*, pour l'intervenante l'Association du barreau canadien.

Marlys A. Edwardh et *Adriel Weaver*, pour l'intervenante l'Association canadienne des avocats et avocates en droit des réfugiés.

Barbara Jackman, *Sharryn J. Aiken* et *Andrew J. Brouwer*, pour les intervenants le Conseil canadien pour les réfugiés et la Coalition pour la surveillance internationale des libertés civiles.

Faisal Bhabha et *Khalid M. Elgazzar*, pour l'intervenant Canadian Council on American-Islamic Relations (maintenant connu sous le nom de Conseil national des musulmans canadiens).

Michael Bossin, *Laïla Demirdache* et *Anna Shea*, pour l'intervenante l'Amnistie internationale.

Breese Davies et *Erin Dann*, pour l'intervenante Criminal Lawyers' Association (Ontario).

Paul J. J. Cavalluzzo et *Paul D. Copeland*, comme avocats spéciaux.

Version française du jugement de la juge en chef McLachlin et des juges LeBel, Rothstein, Moldaver, Karakatsanis et Wagner rendu par

[1] La Juge en chef — Le ministre de la Citoyenneté et de l'Immigration et le ministre de la Sécurité publique et de la Protection civile (collectivement les « ministres ») tentent d'interdire de territoire Mohamed Harkat, un non-citoyen. Selon leurs allégations, M. Harkat serait entré au Canada pour se livrer à des activités terroristes. Il est détenu ou tenu de vivre sous de strictes conditions, depuis plus de 10 ans. Bien que nous ne soyons pas appelés en l'espèce à décider de la

or death, although the constitutionality of his deportation in such circumstances is not before us in the present appeal.

[2] The reasonableness of the ministers' decision to declare Mr. Harkat inadmissible to Canada is subject to judicial review, under Division 9 of Part 1 of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (the "*IRPA* scheme"). This scheme prevents Mr. Harkat from seeing some of the evidence and information tendered against him, because its public disclosure would harm national security.

[3] The issue in this appeal is whether the *IRPA* scheme complies with the Constitution, in particular the guarantee in the *Canadian Charter of Rights and Freedoms* against unjustifiable intrusions on life, liberty, and security of the person. More specifically, this appeal asks whether the *IRPA* scheme gives Mr. Harkat a fair opportunity to defend himself against the allegations made by the ministers, despite the fact that national security considerations prevent him from seeing the entire record and from personally participating in all of the hearings. It requires us to determine how far the principle of full disclosure in an open court can be qualified in order to address the threat posed by non-citizens who may be involved in terrorism.

[4] I conclude that that the *IRPA* scheme is constitutional. Crafting a regime that achieves a fundamentally fair process while protecting confidential national security information is a difficult task. The scheme must apply to a broad range of cases, implicating a variety of national security concerns. Parliament's response to this challenge has been to confer on judges the discretion and flexibility to fashion a fair process, in the particular case before them. If this is impossible, judges must not hesitate to find a breach of the right to a fair process and to grant whatever remedies are appropriate, including a stay of proceedings.

constitutionnalité de son expulsion, M. Harkat pourrait être expulsé vers un pays où il risque la torture ou la mort.

[2] Le caractère raisonnable de la décision des ministres d'interdire M. Harkat de territoire est susceptible de contrôle judiciaire sous le régime de la section 9 de la partie 1 de la *Loi sur l'immigration et la protection des réfugiés*, L.C. 2001, ch. 27 (le « régime établi par la *LIPR* »). Ce régime empêche M. Harkat de voir certains éléments de preuve et renseignements présentés contre lui, parce que leur divulgation porterait atteinte à la sécurité nationale.

[3] La question à trancher en l'espèce est celle de savoir si le régime établi par la *LIPR* est conforme à la Constitution et, plus particulièrement, s'il respecte la garantie incluse dans la *Charte canadienne des droits et libertés* contre toute atteinte injustifiable à la vie, à la liberté et à la sécurité de la personne. Plus précisément, il s'agit en l'espèce de déterminer si le régime établi par la *LIPR* permet réellement à M. Harkat de se défendre contre les allégations formulées par les ministres, même si des considérations relatives à la sécurité nationale l'empêchent de voir l'ensemble du dossier et de participer personnellement à toutes les audiences. La Cour doit donc déterminer jusqu'à quel point le principe de la publicité des débats judiciaires peut être tempéré pour contrer le danger posé par des non-citoyens susceptibles de se livrer au terrorisme.

[4] Je conclus que le régime établi par la *LIPR* est constitutionnel. Il n'est pas facile de concevoir un régime qui instaure un processus fondamentalement équitable tout en protégeant les renseignements confidentiels touchant la sécurité nationale. Un tel régime doit s'appliquer à un large éventail de cas faisant intervenir toute une gamme de considérations liées à la sécurité nationale. La réponse du législateur fut de conférer aux juges le pouvoir discrétionnaire et la latitude nécessaires pour leur permettre d'établir un processus équitable dans chaque affaire particulière dont ils sont saisis. Si cela s'avère impossible, ces juges ne doivent pas hésiter à conclure à une violation du droit à un processus équitable et à accorder toute réparation jugée appropriée, y compris un arrêt des procédures.

[5] In the present case, the process was fair and the Federal Court judge committed no reviewable errors in finding that the ministers' decision to declare Mr. Harkat inadmissible to Canada was reasonable.

I. History of the Legislation and of the Proceedings

A. *The Legislation*

[6] The purpose of the *IRPA* scheme "is to permit the removal of non-citizens living in Canada — permanent residents and foreign nationals — on various grounds, including connection with terrorist activities": *Charkaoui v. Canada (Citizenship and Immigration)*, 2007 SCC 9, [2007] 1 S.C.R. 350 ("*Charkaoui I*"), at para. 4. The ministers must decide whether the evidence against a non-citizen gives them reasonable grounds to declare him or her "inadmissible" to Canada — i.e. to issue a removal order. The resulting "certificate of inadmissibility" (also called a "security certificate") is then referred to the Federal Court for a review of its reasonableness. If a Federal Court judge (the "designated judge") finds the certificate to be reasonable, the non-citizen named in that certificate (the "named person") becomes subject to a removal order.

[7] The *IRPA* scheme was adopted by Parliament in 2001, as a successor to an analogous scheme contained in the *Immigration Act*, R.S.C. 1985, c. I-2. In the wake of the attacks of September 11, 2001, it increasingly came to be used as a means of detaining suspected terrorists and eliminating the perceived threat posed by them: K. Roach, "Sources and Trends in Post-9/11 Anti-terrorism Laws", in B. J. Goold and L. Lazarus, eds., *Security and Human Rights* (2007), 227, at p. 233. From a practical perspective, the *IRPA* scheme is in some respects more advantageous for the state than criminal proceedings. It has a lower standard of proof and is more protective of confidential national security information than the criminal law: *ibid.* As will be discussed further below, any information that would be injurious to national security or to the safety of

[5] En l'espèce, le processus a été équitable et le juge de la Cour fédérale n'a commis aucune erreur susceptible de contrôle en concluant au caractère raisonnable de la décision des ministres d'interdire M. Harkat de territoire au Canada.

I. Historique de la loi et des procédures

A. *La loi*

[6] Le régime établi par la *LIPR* « vis[e] à permettre le renvoi de non-citoyens qui vivent au Canada — résidents permanents et étrangers — pour divers motifs, y compris un lien avec des activités terroristes » : *Charkaoui c. Canada (Citoyenneté et Immigration)*, 2007 CSC 9, [2007] 1 R.C.S. 350 (« *Charkaoui I* »), par. 4. Les ministres doivent décider si la preuve accumulée contre un non-citoyen leur donne des motifs raisonnables de le déclarer « interdit de territoire » au Canada, c.-à-d. de prendre contre lui une mesure de renvoi. Le « certificat d'interdiction de territoire » qui en résulte (également appelé « certificat de sécurité ») est ensuite déposé à la Cour fédérale pour que celle-ci décide de son caractère raisonnable. Si le certificat est jugé raisonnable par un juge de cette cour (le « juge désigné »), la personne qui y est nommée (la « personne visée ») est dès lors assujettie à une mesure de renvoi.

[7] En 2001, le législateur a adopté le régime de la *LIPR*, qui succède au régime analogue anciennement établi par la *Loi sur l'immigration*, L.R.C. 1985, ch. I-2. À la suite des attaques du 11 septembre 2001, cette loi a de plus en plus servi de moyen pour détenir des personnes soupçonnées de terrorisme et éliminer le danger apparent qu'elles représentent : K. Roach, « Sources and Trends in Post-9/11 Anti-terrorism Laws », dans B. J. Goold et L. Lazarus, dir., *Security and Human Rights* (2007), 227, p. 233. D'un point de vue pratique, le régime établi par la *LIPR* est, à certains égards, plus avantageux pour l'État que celui applicable aux procédures criminelles. En effet, la norme de preuve qu'il prévoit est moins exigeante et les renseignements confidentiels liés à la sécurité nationale bénéficient, suivant ce régime,

any person is not disclosed to the named person. This information can nevertheless be presented to the designated judge in closed hearings and relied upon by her in assessing the security certificate's reasonableness.

d'une meilleure protection qu'en matière criminelle : *ibid*. Comme nous le verrons plus loin, les renseignements susceptibles de porter atteinte à la sécurité nationale ou à la sécurité d'autrui ne sont pas communiqués à la personne visée. Ils peuvent néanmoins être soumis à un juge désigné lors d'une audience tenue à huis clos, et être utilisés par celui-ci dans l'évaluation du caractère raisonnable du certificat de sécurité.

[8] The constitutionality of the *IRPA* scheme was challenged by Mr. Harkat and other non-citizens named in security certificates. In *Charkaoui I*, this Court found that the *IRPA* scheme deprived named persons of their life, liberty, and security of the person in a manner that was not in accordance with principles of fundamental justice, contrary to s. 7 of the *Charter*. It found that the *IRPA* scheme precluded the judge from making a decision based on all the relevant facts and law, because it did not provide for representation of the named person in the closed portion of the proceedings. It also held that the *IRPA* scheme violated the principle that a person must have the ability to know and meet the case against him, because there was not full disclosure of the government's case to the named person or any substantial substitute for full disclosure.

[8] M. Harkat et d'autres non-citoyens désignés dans des certificats de sécurité ont contesté la constitutionnalité du régime établi par la *LIPR*. Dans *Charkaoui I*, la Cour a conclu que ce régime portait atteinte au droit à la vie, à la liberté et à la sécurité des personnes visées d'une manière qui n'était pas conforme aux principes de justice fondamentale protégés par l'art. 7 de la *Charte*. Selon la Cour, le régime de la *LIPR* empêchait le juge de rendre une décision fondée sur l'ensemble des faits et du droit pertinents, parce qu'il ne permettait pas la représentation de la personne visée durant la partie de l'instance tenue à huis clos. De plus, comme la personne visée n'était pas pleinement informée ou informée pour l'essentiel de ce que lui reprochait le gouvernement, la Cour s'est dite d'avis que ce régime violait le principe selon lequel une personne doit être informée des allégations qui pèsent contre elle et avoir la possibilité d'y répondre.

[9] The Court concluded that these breaches could not be justified under s. 1 of the *Charter*, because the *IRPA* scheme did not minimally impair the named person's rights. Other types of closed proceedings, both in Canada and abroad, accomplished the goal of protecting confidential national security information less intrusively. For example, in the United Kingdom, special advocates were appointed to receive disclosure on an appellant's behalf and to defend his or her interests in closed hearings before the Special Immigration Appeals Commission. These special advocates were bound not to reveal confidential information to anyone or (subject to narrow exceptions) to communicate with the appellant. While that system was not without its drawbacks, this Court concluded that, "without

[9] La Cour a conclu dans cet arrêt que ces violations ne pouvaient être justifiées au regard de l'article premier de la *Charte*, parce que le régime établi par la *LIPR* ne portait pas minimalement atteinte aux droits de la personne visée. D'autres types d'audiences à huis clos, tant au Canada qu'à l'étranger, assurent en effet de façon moins attentatoire la protection de renseignements confidentiels liés à la sécurité nationale. Au Royaume-Uni, par exemple, des représentants spéciaux sont nommés pour recevoir communication de ces renseignements au nom de l'appelant et défendre les intérêts de celui-ci lors des audiences à huis clos tenues devant la Special Immigration Appeals Commission. Ces représentants spéciaux ne peuvent révéler à qui que ce soit l'information confidentielle qu'ils

compromising security, it better protects the named person's s. 7 interests": *Charkaoui I*, at para. 86.

[10] In response to this Court's ruling, Parliament made several amendments to the *IRPA* scheme: *An Act to amend the Immigration and Refugee Protection Act (certificate and special advocate) and to make a consequential amendment to another Act*, S.C. 2008, c. 3; the amended *IRPA* scheme is reproduced in the Appendix to these reasons. In particular, it created a role for special advocates, who protect the interests of the named person in closed hearings after having received disclosure of the entire record.

B. *The Proceedings*

[11] In 2002, the Solicitor General of Canada and the Minister of Citizenship and Immigration issued a first security certificate declaring Mr. Harkat inadmissible to Canada on national security grounds. After the successful constitutional challenge and the amendment of the *IRPA* scheme, the ministers issued a second security certificate against Mr. Harkat and commenced new proceedings before the Federal Court.

[12] Disclosure issues arose during the proceedings with respect to the individuals (the "human sources") who secretly provided information regarding Mr. Harkat to the Canadian Security Intelligence Service ("CSIS"). The special advocates sought to obtain disclosure of the identity of the CSIS human sources, as well as permission to interview and to cross-examine them in a closed hearing. Noël J. rejected this request. He reasoned that the common law police informer privilege, which is a rule against the disclosure of any information that might identify a police informer, should be extended to cover CSIS human sources: 2009 FC 204, [2009] 4 F.C.R. 370.

reçoivent et ne peuvent pas non plus (sous réserve de rares exceptions) communiquer avec l'appelant. Selon la Cour, bien qu'il ne soit pas sans faille, un tel système « protège mieux les droits de la personne désignée garantis par l'art. 7 et ce, sans compromettre la sécurité » : *Charkaoui I*, par. 86.

[10] À la suite de cet arrêt, le législateur a apporté plusieurs modifications au régime établi par la *LIPR* : *Loi modifiant la Loi sur l'immigration et la protection des réfugiés (certificat et avocat spécial) et une autre loi en conséquence*, L.C. 2008, ch. 3; le régime de la *LIPR* modifié est reproduit en annexe. Plus particulièrement, il a donné un rôle à des avocats spéciaux, soit celui de défendre les intérêts de la personne visée lors des audiences à huis clos, après avoir reçu communication de l'ensemble du dossier.

B. *Les procédures*

[11] En 2002, le solliciteur général du Canada et le ministre de la Citoyenneté et de l'Immigration ont signé un premier certificat de sécurité attestant que M. Harkat était interdit de territoire au Canada pour raison de sécurité nationale. Après la contestation constitutionnelle couronnée de succès du régime établi par la *LIPR* et la modification de celui-ci, les ministres ont délivré un deuxième certificat de sécurité contre M. Harkat et intenté une nouvelle procédure en Cour fédérale.

[12] Des questions liées à la communication de renseignements sur les personnes (les « sources humaines ») ayant fourni secrètement au Service canadien du renseignement de sécurité (« SCRS ») des renseignements relatifs à M. Harkat ont été soulevées au cours de la procédure. Les avocats spéciaux ont tenté d'obtenir la divulgation de l'identité de ces sources, ainsi que l'autorisation de les questionner et de les contre-interroger lors d'une audience à huis clos. Le juge Noël a rejeté cette demande. Selon lui, le privilège de common law relatif aux indicateurs de police — qui interdit la divulgation de toute information susceptible de permettre l'identification d'un indicateur de police — devrait être élargi et s'appliquer également aux sources humaines du SCRS : 2009 CF 204, [2009] 4 R.C.F. 370.

[13] At a later point during the disclosure process, it was discovered that the judge and the special advocates had been provided with an incomplete and misleading document regarding one of the CSIS human sources. The document provided to Mr. Harkat's special advocates failed to disclose that a 2002 polygraph test conducted on the relevant source initially revealed him or her to be untruthful. As a remedy, Noël J. ordered the disclosure of unredacted human source files to the special advocates: 2009 FC 553, 345 F.T.R. 143; 2009 FC 1050, [2010] 4 F.C.R. 149.

[14] The special advocates also sought to compel the ministers to obtain updated information from foreign intelligence agencies on several alleged terrorists with whom Mr. Harkat was claimed to have associated. They were ultimately dissatisfied with the efforts undertaken by the ministers and sought a stay of proceedings. Noël J. rejected this request, finding that the ministers took reasonable steps to get updated information from foreign intelligence agencies: 2010 FC 1243, 380 F.T.R. 255, at Annex "A".

[15] Mr. Harkat also sought to have the summaries of intercepted conversations excluded from the evidence on the ground that the original recordings and notes of these conversations, in which he allegedly participated or in which he was allegedly a subject of conversation, were destroyed pursuant to CSIS policy OPS-217. Alternatively, he sought a stay of proceedings in consideration of a number of breaches. Noël J. found that Mr. Harkat suffered no prejudice from the destruction of those original operational materials: 2010 FC 1243. He reasoned that the summaries of the conversations were prepared in a way that ensured their accuracy, and that they were corroborated by the overall narrative about Mr. Harkat which emerged during the hearings. Consequently, he refused to exclude them from the evidence against Mr. Harkat.

[13] Plus tard durant le processus de divulgation, on a découvert que le juge et les avocats spéciaux avaient reçu un document incomplet et trompeur en ce qui concerne une des sources humaines du SCRS. Le document remis aux avocats spéciaux de M. Harkat ne mentionnait pas qu'un test polygraphique administré en 2002 à la source concernée avait tout d'abord indiqué que cette personne ne disait pas la vérité. En guise de réparation, le juge Noël a ordonné la communication aux avocats spéciaux de copies non expurgées des dossiers de sources humaines en question : 2009 CF 553 (CanLII); 2009 CF 1050, [2010] 4 R.C.F. 149.

[14] Les avocats spéciaux ont également essayé de contraindre les ministres à obtenir d'organismes étrangers de renseignement des informations à jour sur plusieurs présumés terroristes avec lesquels M. Harkat se serait associé. Insatisfaits des efforts déployés par les ministres, les avocats spéciaux ont sollicité un arrêt des procédures. Le juge Noël a rejeté cette demande, concluant que les ministres avaient pris des mesures raisonnables pour obtenir des informations à jour des organismes étrangers de renseignement : 2010 CF 1243 (CanLII), annexe « A ».

[15] M. Harkat a également sollicité l'exclusion des résumés des conversations interceptées de la preuve au motif que les enregistrements originaux et les notes concernant ces conversations — auxquelles il aurait participé ou durant lesquelles on aurait parlé de lui — ont été détruits conformément à la politique OPS-217 du SCRS. Subsidiairement, il a demandé l'arrêt des procédures compte tenu d'un grand nombre de violations. Le juge Noël a conclu que M. Harkat n'avait subi aucun préjudice par suite de la destruction de ces documents opérationnels originaux : 2010 CF 1243. Selon lui, les résumés des conversations avaient été préparés de manière à assurer leur exactitude, et étaient corroborés par le récit global concernant M. Harkat présenté lors des audiences. En conséquence, il a refusé d'exclure ces résumés de la preuve pesant contre M. Harkat.

[16] Finally, Mr. Harkat challenged the constitutionality of the amended *IRPA* scheme. Noël J. found the regime to be constitutional: 2010 FC 1242, [2012] 3 F.C.R. 432. In his view, the special advocates provided a substantial substitute for full disclosure to Mr. Harkat and vigorously defended his interests during the closed portion of the proceedings.

[17] After consideration of evidence tendered in both public and closed hearings, Noël J. came to the conclusion that the certificate declaring Mr. Harkat inadmissible to Canada was reasonable: 2010 FC 1241, [2012] 3 F.C.R. 251. He made adverse findings of credibility against Mr. Harkat and found that the evidence provided reasonable grounds to believe that Mr. Harkat had been involved with terrorist organizations. He held that Mr. Harkat's behaviour and lies were consistent with the theory that he had come to Canada as a "sleeper" agent for terrorist organizations.

[18] Mr. Harkat appealed Noël J.'s conclusions. The Federal Court of Appeal (*per* Létourneau J.A.) allowed the appeal in part: 2012 FCA 122, [2012] 3 F.C.R. 635. It agreed with Noël J.'s conclusion that the amended *IRPA* scheme is constitutional. However, it found that the identity of CSIS human sources is not protected by privilege. It also excluded from the evidence the summaries of intercepted conversations to which Mr. Harkat had not been privy. It remitted the matter to Noël J. for redetermination on the basis of what remained of the record after the exclusion of the summaries.

II. Issues

[19] The ministers appeal to this Court, seeking the reinstatement of Noël J.'s conclusion that the security certificate was reasonable. They also ask for recognition of the CSIS human source privilege.

[16] Enfin, M. Harkat a contesté la constitutionnalité du régime de la *LIPR* modifié. Le juge Noël a toutefois conclu que le régime était constitutionnel : 2010 CF 1242, [2012] 3 R.C.F. 432. À son avis, les avocats spéciaux avaient remplacé pour l'essentiel la divulgation totale à M. Harkat et avaient défendu vigoureusement ses intérêts durant la partie de l'instance s'étant déroulée à huis clos.

[17] Après avoir examiné la preuve soumise aux audiences tant publiques qu'à huis clos, le juge Noël a conclu que le certificat attestant que M. Harkat était interdit de territoire au Canada était raisonnable : 2010 CF 1241, [2012] 3 R.C.F. 251. Il a tiré des conclusions défavorables quant à la crédibilité de M. Harkat et conclu que la preuve fournie donnait des motifs raisonnables de croire que celui-ci avait participé aux activités d'organisations terroristes. Selon le juge Noël, le comportement et les mensonges de M. Harkat étaient compatibles avec la thèse voulant qu'il soit entré au Canada comme agent « dormant » agissant pour des organisations terroristes.

[18] M. Harkat a interjeté appel des conclusions du juge Noël. La Cour d'appel fédérale (sous la plume du juge Létourneau) a accueilli l'appel en partie : 2012 CAF 122, [2012] 3 R.C.F. 635. Elle a convenu avec le juge Noël que le régime de la *LIPR* modifié était constitutionnel. Cependant, elle a conclu que l'identité des sources humaines du SCRS n'était pas protégée par un privilège. Elle a également exclu de la preuve les résumés des conversations interceptées auxquelles M. Harkat n'avait pas participé. Elle a renvoyé l'affaire au juge Noël pour que celui-ci rende un nouveau jugement en se fondant sur ce qu'il restait du dossier après l'exclusion des résumés.

II. Les questions en litige

[19] Les ministres ont interjeté appel devant la Cour, sollicitant le rétablissement de la conclusion du juge Noël selon laquelle le certificat de sécurité était raisonnable. Ils demandent aussi la reconnaissance du privilège des sources humaines du SCRS.

[20] Mr. Harkat cross-appeals. He asks this Court to find the amended *IRPA* scheme unconstitutional. Alternatively, he seeks a new reasonableness hearing before a new designated judge, the exclusion of the summaries of all the intercepted conversations for which the original CSIS operational materials were destroyed, and permission for his special advocates to interview and cross-examine the human sources. He also takes issue with Noël J.'s weighing of "open source" evidence (such as books on terrorism and publications in political science periodicals), which led him to conclude that the individuals with whom Mr. Harkat associated were members of terrorist organizations.

[20] M. Harkat a formé un pourvoi incident et demande à la Cour de conclure à l'inconstitutionnalité du régime de la *LIPR* modifié. Subsidiairement, il sollicite la tenue d'une nouvelle audition sur le caractère raisonnable du certificat de sécurité devant un autre juge, l'exclusion des résumés de toutes les conversations interceptées tirées des documents opérationnels originaux du SCRS qui ont été détruits, et l'autorisation pour ses avocats spéciaux de questionner et de contre-interroger les sources humaines. Il conteste aussi la façon dont le juge Noël a évalué la preuve provenant de « sources ouvertes » (par exemple des livres sur le terrorisme et des articles publiés dans des périodiques de sciences politiques), preuve l'ayant amené à conclure que les personnes avec lesquelles M. Harkat s'était associé étaient membres d'organisations terroristes.

[21] In addition, the special advocates contest Noël J.'s refusal to order a stay of proceedings. They contend that the ministers breached their duties of candour and utmost good faith, and that the proceedings did not allow them to meaningfully test the case brought against Mr. Harkat.

[21] Pour leur part, les avocats spéciaux contestent le refus du juge Noël d'ordonner l'arrêt des procédures. Ils font valoir que les ministres ont manqué à leurs obligations de franchise et de bonne foi la plus absolue, et que la procédure ne leur a pas permis de mettre en doute convenablement la preuve présentée contre M. Harkat.

[22] This appeal raises the following issues:

A. Does the *IRPA* scheme violate the *Charter*?

B. Are CSIS human sources covered by privilege and can they be cross-examined?

C. Did the designated judge err in refusing to exclude the summaries of intercepted conversations?

D. Did the ministers breach their duties of candour and utmost good faith?

E. Were the proceedings against Mr. Harkat fair?

F. Did the designated judge err in concluding that the security certificate was reasonable?

[22] Le présent pourvoi soulève les questions suivantes :

A. Le régime établi par la *LIPR* viole-t-il la *Charte*?

B. Les sources humaines du SCRS sont-elles protégées par un privilège et peuvent-elles être contre-interrogées?

C. Le juge désigné a-t-il commis une erreur en refusant d'exclure les résumés des conversations interceptées?

D. Les ministres ont-ils manqué à leurs obligations de franchise et de bonne foi la plus absolue?

E. Les procédures contre M. Harkat ont-elles été équitables?

F. Le juge désigné a-t-il commis une erreur en concluant que le certificat de sécurité était raisonnable?

III. Analysis

Preliminary Comment

[23] At the request of the ministers, this Court conducted two distinct hearings on this appeal. One was open to the public, while the second was held behind closed doors. Having heard the confidential submissions, it is my view that it was unnecessary to conduct a portion of the appeal hearing behind closed doors.

[24] The open court principle is "a hallmark of a democratic society and applies to all judicial proceedings": *Vancouver Sun (Re)*, 2004 SCC 43, [2004] 2 S.C.R. 332, at para. 23; see also D. M. Paciocco, "When Open Courts Meet Closed Government" (2005), 29 *S.C.L.R.* (2d) 385, at pp. 391-95; *Canadian Broadcasting Corp. v. New Brunswick (Attorney General)*, [1996] 3 S.C.R. 480, at para. 20. "National security does not negate the open court principle": C. Forcese, *National Security Law: Canadian Practice in International Perspective* (2008), at p. 402. The Supreme Court of the United Kingdom recently commented unfavourably on a hearing that it held behind closed doors at the request of the government, which had raised national security concerns: *Bank Mellat v. H. M. Treasury*, [2013] UKSC 38, [2013] 4 All E.R. 495, at para. 60, *per* Lord Neuberger P.S.C. It noted that closed evidence is factual in nature, whereas the points debated before appellate courts are essentially legal: *ibid.* Consequently, the Supreme Court found that closed hearings before it would rarely, if ever, be necessary for the proper disposition of an appeal.

[25] The issues in this appeal do not turn on confidential information and could have been debated fully in public without any serious risk of disclosure, supplemented where necessary by brief closed written submissions and by the closed record. The special advocates could have been given judicial permission to make public submissions, so long

III. Analyse

Remarque préliminaire

[23] À la demande des ministres, la Cour a tenu deux audiences distinctes en l'espèce. Une d'entre elles s'est déroulée publiquement, l'autre à huis clos. Après avoir entendu les observations confidentielles, j'estime que le huis clos n'était pas nécessaire.

[24] Le principe de la publicité des débats en justice est « une caractéristique d'une société démocratique et s'applique à toutes les procédures judiciaires » : *Vancouver Sun (Re)*, 2004 CSC 43, [2004] 2 R.C.S. 332, par. 23; voir aussi D. M. Paciocco, « When Open Courts Meet Closed Government » (2005), 29 *S.C.L.R.* (2d) 385, p. 391-395; *Société Radio-Canada c. Nouveau-Brunswick (Procureur général)*, [1996] 3 R.C.S. 480, par. 20. [TRADUCTION] « La sécurité nationale n'écarte pas le principe de la publicité des débats en justice » : C. Forcese, *National Security Law : Canadian Practice in International Perspective* (2008), p. 402. La Cour suprême du Royaume-Uni a récemment émis des commentaires défavorables relativement à une audience qu'elle avait tenue à huis clos à la demande du gouvernement, demande fondée sur des préoccupations liées à la sécurité nationale : *Bank Mellat c. H. M. Treasury*, [2013] UKSC 38, [2013] 4 All E.R. 495, par. 60, lord Neuberger P.C.S. Elle a souligné que les éléments de preuve confidentiels sont de nature factuelle, alors que les points débattus devant les tribunaux d'appel sont essentiellement des questions de droit : *ibid*. La Cour suprême du Royaume-Uni a donc conclu que des audiences à huis clos ne seraient que rarement, sinon jamais, nécessaires pour lui permettre de bien trancher un pourvoi.

[25] Les questions soulevées dans le présent pourvoi ne portent pas sur des renseignements confidentiels. Elles auraient donc pu être débattues totalement en public sans risque réel de divulgation, et ces débats être complétés, au besoin, de brèves observations confidentielles par écrit et du dossier confidentiel. Les avocats spéciaux auraient pu être autorisés à

as they refrained from disclosing confidential information: see s. 85.4(2) and (3) of the *Immigration and Refugee Protection Act* ("*IRPA*").

[26] The content of the closed hearing overlapped significantly with the open hearing and did not assist this Court in deciding the issues before it. It served only to foster an appearance of opacity of these proceedings, which runs contrary to the fundamental principles of transparency and accountability.

[27] I now turn to the issues on appeal.

A. *Does the IRPA Scheme Violate the Charter?*

[28] Mr. Harkat and his special advocates contend that the *IRPA* scheme fails to provide a fair process to the named person, as required by s. 7 of the *Charter*. They argue that the regime is unconstitutional because it provides insufficient disclosure to the named person, does not allow the special advocates to communicate freely with the named person, and allows for the admission of hearsay evidence.

[29] After providing a brief overview of the *IRPA* scheme, I will address in turn Mr. Harkat's rights under s. 7 of the *Charter*, the principles that guide the scheme, and the scheme's alleged defects.

(1) Overview of the *IRPA* Scheme

(a) *Commencement of Proceedings*

[30] A security certificate may be issued by the ministers for the removal from Canada of a non-citizen (whether a permanent resident or a foreign national) who is inadmissible on security grounds. The grounds for inadmissibility include engaging in terrorism, being a danger to the security of Canada, engaging in acts of violence that would or might

présenter des observations en audience publique, à condition de ne révéler aucun renseignement confidentiel : voir par. 85.4(2) et (3) de la *Loi sur l'immigration et la protection des réfugiés* (« *LIPR* »).

[26] Les renseignements communiqués lors des audiences publiques et à huis clos se recoupaient considérablement et n'ont pas aidé la Cour à trancher les questions dont elle était saisie. L'audience à huis clos n'a servi qu'à entretenir l'apparente opacité de l'instance, ce qui contrevient aux principes fondamentaux de transparence et de responsabilisation.

[27] Je passe maintenant à l'examen des questions soulevées dans le présent pourvoi.

A. *Le régime établi par la LIPR viole-t-il la Charte?*

[28] M. Harkat et ses avocats spéciaux soutiennent que le régime établi par la *LIPR* n'offre pas un processus équitable à la personne visée comme l'exige l'art. 7 de la *Charte*. Selon eux, ce régime est inconstitutionnel parce qu'il n'autorise qu'une communication insuffisante à la personne visée, ne permet pas aux avocats spéciaux de communiquer librement avec celle-ci, et permet l'admission d'une preuve par ouï-dire.

[29] Après avoir donné un aperçu du régime établi par la *LIPR*, j'examinerai successivement les droits garantis à M. Harkat par l'art. 7 de la *Charte*, les principes qui sous-tendent ce régime et les défauts qui lui sont reprochés.

(1) Aperçu du régime établi par la *LIPR*

a) *Introduction de l'instance*

[30] Les ministres peuvent délivrer un certificat de sécurité pour renvoyer du Canada un non-citoyen (qu'il soit un résident permanent ou un étranger) interdit de territoire pour raison de sécurité. Les motifs d'interdiction de territoire comprennent le fait de se livrer au terrorisme, de constituer un danger pour la sécurité du Canada, d'être l'auteur

endanger the lives or safety of persons in Canada, or being a member of an organization that engages in terrorism: s. 34, *IRPA*. The ministers must have reasonable grounds to believe that the facts giving rise to inadmissibility have occurred, are occurring, or may occur: s. 33, *IRPA*.

de tout acte de violence susceptible de mettre en danger la vie ou la sécurité d'autrui au Canada, ou d'être membre d'une organisation qui se livre au terrorisme : art. 34 *LIPR*. Les ministres doivent avoir des motifs raisonnables de croire que les faits emportant interdiction de territoire sont survenus, surviennent ou peuvent survenir : art. 33 *LIPR*.

[31] As a practical matter, the process commences when CSIS presents a Security Intelligence Report ("SIR") to the ministers. The SIR sets out in detail the allegations and evidence grounding inadmissibility. If the ministers conclude that the allegations in the SIR are reasonably grounded, they issue a security certificate.

[31] En pratique, le processus s'amorce lorsque le SCRS remet aux ministres un rapport secret en matière de sécurité (« RSS »). Le RSS expose en détail les allégations et les éléments de preuve fondant l'interdiction de territoire. Si les ministres sont d'avis que les allégations contenues dans le RSS reposent sur un fondement raisonnable, ils délivrent un certificat de sécurité.

[32] Once the certificate is issued, the ministers must refer it to the Federal Court: s. 77(1), *IRPA*. The Federal Court judge who is designated to hear the case "shall determine whether the certificate is reasonable and shall quash the certificate if he or she determines that it is not": s. 78, *IRPA*. If the designated judge deems the certificate to be reasonable, the named person is inadmissible and the certificate becomes a removal order in force: s. 80, *IRPA*. The named person may be arrested and detained for the duration of the proceedings before the Federal Court: s. 81, *IRPA*.

[32] Une fois le certificat délivré, les ministres doivent le déposer à la Cour fédérale : par. 77(1) *LIPR*. Le juge de la Cour fédérale désigné pour instruire l'affaire « décide du caractère raisonnable du certificat et l'annule s'il ne peut conclure qu'il est raisonnable » : art. 78 *LIPR*. Si le juge désigné estime le certificat raisonnable, la personne visée est interdite de territoire et le certificat devient une mesure de renvoi en vigueur : art. 80 *LIPR*. La personne visée peut être arrêtée et mise en détention pendant toute la durée de l'instance en Cour fédérale : art. 81 *LIPR*.

(b) *The Disclosure of Summaries to the Named Person*

b) *Communication de résumés à la personne visée*

[33] The named person must be given summaries of the information and evidence which allow him to be reasonably informed of the case against him: ss. 77(2) and 83(1)(*e*), *IRPA*. The summaries must "not include anything that, in the judge's opinion, would be injurious to national security or endanger the safety of any person if disclosed": s. 83(1)(*e*), *IRPA*.

[33] Il faut remettre à la personne visée des résumés des renseignements et des éléments de preuve qui lui permettent d'être suffisamment informée de la thèse contre elle : par. 77(2) et al. 83(1)*e*) *LIPR*. Les résumés ne doivent « comporte[r] aucun élément dont la divulgation porterait atteinte, selon [le juge], à la sécurité nationale ou à la sécurité d'autrui » : al. 83(1)*e*) *LIPR*.

(c) *Special Advocates*

c) *Avocats spéciaux*

[34] The judge must appoint one or more special advocates to protect the interests of the named person in closed hearings: s. 83(1)(*b*), *IRPA*. These hearings are held *in camera* and *ex parte*, in order

[34] Le juge nomme un ou plusieurs avocats spéciaux pour défendre les intérêts de la personne visée aux audiences à huis clos : al. 83(1)*b*) *LIPR*. Ces audiences se déroulent à huis clos et *ex parte*

to permit the Minister to present information and evidence the public disclosure of which could be injurious to national security or endanger the safety of a person: s. 83(1)(*c*), *IRPA*.

[35] Special advocates are security-cleared lawyers whose role is to protect the interests of the named person and "to make up so far as possible for the [named person's] own exclusion from the evidentiary process": S. Sedley, "Terrorism and security: back to the future?", in D. Cole, F. Fabbrini and A. Vedaschi, eds., *Secrecy, National Security and the Vindication of Constitutional Law* (2013), 13, at p. 16. During the closed hearings, they perform the functions that the named person's counsel (the "public counsel") performs in the open hearings. They do so by challenging the Minister's claims that information or evidence should not be disclosed, and by testing the relevance, reliability, and sufficiency of the secret evidence: s. 85.1(1) and (2), *IRPA*. They are active participants in the closed hearings. They may make submissions and cross-examine witnesses who appear in those hearings: s. 85.2(*a*) and (*b*), *IRPA*. The *IRPA* scheme also provides that the special advocates may "exercise, with the judge's authorization, any other powers that are necessary to protect the interests" of the named person: s. 85.2(*c*), *IRPA*.

[36] No solicitor-client relationship exists between the special advocates and the named person: s. 85.1(3), *IRPA*. However, solicitor-client privilege is deemed to apply to exchanges between the special advocates and the named person, provided that those exchanges would attract solicitor-client privilege at common law: s. 85.1(4), *IRPA*. As Lutfy C.J. put it, "[a]s between special advocates and named persons, Division 9 protects information and not relationships. . . . The information that passes between them, absent the solicitor and client relationship, is deemed to be protected": *Almrei (Re)*, 2008 FC 1216, [2009] 3 F.C.R. 497, at paras. 56-57.

pour que le ministre puisse présenter des renseignements et éléments de preuve dont la divulgation publique pourrait porter atteinte à la sécurité nationale ou à la sécurité d'autrui : al. 83(1)*c*) *LIPR*.

[35] Les avocats spéciaux possèdent une habilitation de sécurité et ont pour rôle de défendre les intérêts de la personne visée et [TRADUCTION] « de compenser autant que possible l'exclusion de [la personne visée] elle-même du processus de présentation de la preuve » : S. Sedley, « Terrorism and security : back to the future? », dans D. Cole, F. Fabbrini et A. Vedaschi, dir., *Secrecy, National Security and the Vindication of Constitutional Law* (2013), 13, p. 16. Au cours des audiences à huis clos, les avocats spéciaux exercent les fonctions remplies par le conseil de la personne visée (l'« avocat public ») durant les audiences publiques. Ils s'acquittent de ces fonctions en contestant les affirmations du ministre voulant que des renseignements ou des éléments de preuve ne doivent pas être divulgués, et en évaluant la pertinence, la fiabilité et la suffisance de la preuve secrète : par. 85.1(1) et (2) *LIPR*. En somme, ils participent activement aux audiences à huis clos. Ils peuvent présenter des observations et contre-interroger les témoins qui comparaissent lors de ces audiences : al. 85.2*a*) et *b*) *LIPR*. Le régime établi par la *LIPR* leur permet aussi d'« exercer, avec l'autorisation du juge, tout autre pouvoir nécessaire à la défense des intérêts » de la personne visée : al. 85.2*c*) *LIPR*.

[36] Aucune relation avocat-client n'existe entre les avocats spéciaux et la personne visée : par. 85.1(3) *LIPR*. Le secret professionnel liant l'avocat à son client est toutefois réputé s'appliquer à leurs échanges, pourvu que ces derniers soient de ceux qui seraient protégés par ce secret en common law : par. 85.1(4) *LIPR*. Comme l'a dit le juge en chef Lutfy, « [e]ntre avocats spéciaux et personnes désignées, la section 9 protège les renseignements et non les relations. [. . .] Leurs communications, sans qu'il existe une relation entre avocat et client, sont réputées être protégées » : *Almrei (Re)*, 2008 CF 1216, [2009] 3 R.C.F. 497, par. 56-57.

[37] Strict communication rules apply to special advocates, in order to prevent the inadvertent disclosure of sensitive information. After the special advocates are provided with the confidential information and evidence, they "may, during the remainder of the proceeding, communicate with another person about the proceeding only with the judge's authorization and subject to any conditions that the judge considers appropriate": s. 85.4(2), *IRPA*. Read plainly, "this prohibition covers all information about the proceeding from both public and private sessions, including any testimony given in the absence of the public and the named person and their counsel": *Almrei*, at para. 16. By contrast, any other person — such as the ministers' counsel or the court personnel in attendance at closed hearings — is subject to significantly fewer restrictions on communication. Other persons must refrain from communicating about the proceedings only (i) if they have had a court-authorized communication with the special advocates and the judge has specifically prohibited them from communicating with anyone else about the proceeding, or (ii) if the communication would disclose the content of a closed hearing: ss. 85.4(3), 85.5(*a*) and (*b*), *IRPA*.

[37] Des règles strictes de communication s'appliquent aux avocats spéciaux pour empêcher que des renseignements sensibles soient divulgués par inadvertance. Ainsi, après avoir reçu les renseignements et éléments de preuve confidentiels, ces avocats « ne peu[ven]t communiquer avec qui que ce soit au sujet de l'instance [jusqu'à la fin de celle-ci] si ce n'est avec l'autorisation du juge et aux conditions que celui-ci estime indiquées » : par. 85.4(2) *LIPR*. Interprétée selon son sens ordinaire, « cette interdiction englobe tous les renseignements relatifs à l'instance qui sont issus des audiences publiques ou à huis clos, notamment tout témoignage produit en l'absence du public, de la personne désignée et de son avocat » : *Almrei*, par. 16. À l'inverse, tous les autres intervenants — comme l'avocat des ministres ou les membres du personnel judiciaire assistant aux audiences à huis clos — sont assujettis à beaucoup moins de restrictions en matière de communication. Ils doivent éviter de communiquer de l'information à propos de l'instance uniquement (i) s'ils ont été autorisés par le tribunal à communiquer avec les avocats spéciaux et le juge leur a expressément interdit de communiquer avec qui que ce soit d'autre au sujet de l'instance, ou (ii) si la communication avait pour effet de révéler le contenu d'une audience à huis clos : par. 85.4(3) et al. 85.5*a*) et *b*) *LIPR*.

(d) *Admissibility of Evidence*

d) *Admissibilité de la preuve*

[38] The usual rules of evidence do not apply to the proceedings. Instead, "the judge may receive into evidence anything that, in the judge's opinion, is reliable and appropriate, even if it is inadmissible in a court of law, and may base a decision on that evidence": s. 83(1)(*h*), *IRPA*.

[38] Les règles ordinaires de preuve ne s'appliquent pas à l'instance. En effet, « [le juge] peut recevoir et admettre en preuve tout élément — même inadmissible en justice — qu'il estime digne de foi et utile et peut fonder sa décision sur celui-ci » : al. 83(1)*h*) *LIPR*.

[39] The *IRPA* scheme provides that the judge's decision can be based on information or evidence that is not disclosed in summary form to the named person: s. 83(1)(*i*). It does not specify expressly whether a decision can be based in whole, or only in part, on information and evidence that is not disclosed to the named person.

[39] D'après le régime établi par la *LIPR*, le juge peut fonder sa décision sur des renseignements ou éléments de preuve dont un résumé n'est pas fourni à la personne visée : al. 83(1)*i*). Le régime ne précise pas expressément si la décision peut reposer entièrement, ou seulement en partie, sur des renseignements et des éléments de preuve qui ne sont pas communiqués à la personne visée.

(2) The Section 7 *Charter* Right to a Fair Process

[40] In *Charkaoui I*, this Court found that the *IRPA* scheme engages significant life, liberty, and security of the person interests: paras. 12-16. Laws that interfere with these interests must conform to the principles of fundamental justice. If they fail to do so, they breach s. 7 of the *Charter* and fall to be justified under s. 1 of the *Charter*.

[41] Pursuant to the principles of fundamental justice, a named person must be provided with a fair process: *Charkaoui I*, at paras. 19-20. At issue in the present appeal are two interrelated aspects of the right to a fair process: the right to know and meet the case, and the right to have a decision made by the judge on the facts and the law. The named person must "be informed of the case against him or her, and be permitted to respond to that case": *Charkaoui I*, at para. 53. Correlatively, the named person's knowledge of the case and participation in the process must be sufficient to result in the designated judge being "exposed to the whole factual picture" of the case and having the ability to apply the relevant law to those facts: *ibid.*, at para. 51.

[42] This said, the assessment of whether a process is fair must take into account the legitimate need to protect information and evidence that is critical to national security. As I wrote in *Charkaoui I*, "[i]nformation may be obtained from other countries or from informers on condition that it not be disclosed. Or it may simply be so critical that it cannot be disclosed without risking public security": para. 61.

[43] Full disclosure of information and evidence to the named person may be impossible. However, the basic requirements of procedural justice must be met "in an alternative fashion appropriate to the context, having regard to the government's objective and the interests of the person affected": *Charkaoui I*, at para. 63. The alternative proceedings

(2) Le droit à un processus équitable garanti par l'art. 7 de la *Charte*

[40] La Cour a conclu dans *Charkaoui I* que le régime établi par la *LIPR* met en jeu les droits importants à la vie, à la liberté et à la sécurité de la personne : par. 12-16. Les lois portant atteinte à ces droits doivent être conformes aux principes de justice fondamentale, à défaut de quoi elles violent l'art. 7 de la *Charte* et doivent être justifiées au sens de l'article premier de cette dernière.

[41] Les principes de justice fondamentale exigent que la personne visée bénéficie d'un processus équitable : *Charkaoui I*, par. 19-20. En l'espèce, le litige porte sur deux aspects interreliés du droit à un processus équitable : celui de connaître la preuve et de la réfuter, et celui à ce que le juge statue sur les faits et le droit. La personne visée doit « [être] informé[e] des allégations formulées contre [elle] et a[voir] la possibilité d'y répondre » : *Charkaoui I*, par. 53. En corollaire, la personne visée doit suffisamment connaître l'affaire et participer au processus pour que le juge désigné « pren[n]e connaissance de tous les faits » en cause et soit à même d'appliquer les règles de droit applicables à ces faits : *ibid.*, par. 51.

[42] Cela dit, pour déterminer si un processus est équitable, il faut tenir compte du besoin légitime de protéger les renseignements et éléments de preuve critiques pour la sécurité nationale. Comme je l'ai dit dans *Charkaoui I*, « [d]es renseignements peuvent avoir été fournis par des pays ou des informateurs à la condition qu'ils ne soient pas divulgués. Il peut aussi arriver que des renseignements soient sensibles au point de ne pouvoir être communiqués sans que la sécurité publique soit compromise » : par. 61.

[43] Il peut s'avérer impossible de communiquer tous les renseignements et éléments de preuve à la personne visée. Par contre, les exigences fondamentales de la justice en matière de procédure doivent être respectées « d'une autre façon adaptée au contexte, compte tenu de l'objectif du gouvernement et des intérêts de la personne touchée » :

must constitute a substantial substitute to full disclosure. Procedural fairness does not require a perfect process — there is necessarily some give and take inherent in fashioning a process that accommodates national security concerns: *Ruby v. Canada (Solicitor General)*, 2002 SCC 75, [2002] 4 S.C.R. 3, at para. 46.

[44] The overarching question, therefore, is whether the amended *IRPA* scheme provides a named person with a fair process, taking into account the imperative of protecting confidential national security information.

(3) The Guiding Principles of the *IRPA* Scheme

[45] The alleged defects in the *IRPA* scheme must be assessed in light of the scheme's overall design. Two central principles guide the scheme.

[46] First, the designated judge is intended to play a gatekeeper role. The judge is vested with broad discretion and must ensure not only that the record supports the reasonableness of the ministers' finding of inadmissibility, but also that the overall process is fair: ". . . in a special advocate system, an unusual burden will continue to fall on judges to respond to the absence of the named person by pressing the government side more vigorously than might otherwise be the case" (C. Forcese and L. Waldman, "Seeking Justice in an Unfair Process: Lessons from Canada, the United Kingdom, and New Zealand on the Use of 'Special Advocates' in National Security Proceedings" (2007) (online), at p. 60). Indeed, the *IRPA* scheme expressly requires the judge to take into account "considerations of fairness and natural justice" when conducting the proceedings: s. 83(1)(*a*), *IRPA*. The designated judge must take an interventionist approach, while stopping short of assuming an inquisitorial role.

Charkaoui I, par. 63. L'autre procédure doit remplacer pour l'essentiel la divulgation complète. L'équité procédurale n'exige pas que le processus soit parfait; la conception d'un processus répondant aux préoccupations en matière de sécurité nationale implique nécessairement certains compromis : *Ruby c. Canada (Solliciteur général)*, 2002 CSC 75, [2002] 4 R.C.S. 3, par. 46.

[44] La principale question est donc celle de savoir si le régime modifié établi par la *LIPR* permet à la personne visée de bénéficier d'un processus équitable, compte tenu de l'impératif de protéger les renseignements confidentiels touchant la sécurité nationale.

(3) Les principes directeurs du régime établi par la *LIPR*

[45] Les vices dont serait entaché le régime établi par la *LIPR* doivent être examinés à la lumière de la structure globale de ce régime qui s'articule autour de deux principes fondamentaux.

[46] Premièrement, le juge désigné est censé jouer le rôle de gardien. Il est investi d'un large pouvoir discrétionnaire et doit s'assurer non seulement que le dossier étaie le caractère raisonnable de la conclusion d'interdiction de territoire tirée par les ministres, mais aussi que l'ensemble du processus est équitable : [TRADUCTION] « . . . dans un système d'avocats spéciaux, le juge se verra encore imposer le fardeau inhabituel de réagir à l'absence de la personne visée en talonnant la partie gouvernementale avec plus de vigueur qu'il ne le ferait en présence de cette personne » (C. Forcese et L. Waldman, « Seeking Justice in an Unfair Process : Lessons from Canada, the United Kingdom, and New Zealand on the Use of "Special Advocates" in National Security Proceedings » (2007) (en ligne), p. 60). D'ailleurs, le régime établi par la *LIPR* exige expressément du juge qu'il tienne compte des « considérations d'équité et de justice naturelle » dans l'instruction de l'instance : al. 83(1)*a*) *LIPR*. Le juge désigné doit adopter une approche interventionniste, sans pour autant jouer un rôle inquisitoire.

[47] Second, participation of the special advocates in closed hearings is intended to be a substantial substitute for personal participation by the named person in those hearings. With respect to the confidential portion of the case against the named person, the special advocates must be in a position to act as vigorously and effectively as the named person himself would act in a public proceeding. Indeed, Parliament added special advocates as a feature of the *IRPA* scheme in order to bring it into compliance with the substantive requirements of s. 7 of the *Charter*, as articulated in *Charkaoui I*. Whether the scheme allows for this intention to become a reality is the central constitutional issue in this appeal, to which I now turn.

(4) The Alleged Shortfalls of the *IRPA* Scheme

[48] In essence, Mr. Harkat alleges that the disclosure of public summaries and the representation of the interests of the named person by special advocates do not suffice to bring the *IRPA* scheme into compliance with the requirements of s. 7 of the *Charter*. I will address each of the alleged defects of the scheme in turn.

(a) *Does the Scheme Provide the Named Person With Sufficient Disclosure?*

[49] Mr. Harkat contends that the public summaries of the closed record are too vague and general. In his view, they do not allow a named person to know and meet the case against him or her. He argues that the essence of the right to know and meet a case is the ability to meet detail with detail. He also contends that the *IRPA* scheme takes too categorical an approach to disclosure: a named person will *never* obtain disclosure of information which would be injurious to national security or to the safety of any person, regardless of the importance of disclosure to the named person's case. A less rights-impairing alternative would be a balancing approach such as the one found in s. 38.06(2) of the *Canada Evidence Act*, R.S.C. 1985, c. C-5 ("*CEA*"), which permits

[47] Deuxièmement, la participation des avocats spéciaux aux audiences à huis clos vise à remplacer, pour l'essentiel, la participation personnelle de la personne visée à ces audiences. Quant au volet confidentiel de la preuve contre la personne visée, les avocats spéciaux doivent être à même d'agir avec autant de vigueur et d'efficacité que le ferait la personne visée elle-même au cours d'une instance publique. En fait, le législateur a intégré la participation des avocats spéciaux au régime établi par la *LIPR* pour le rendre conforme aux exigences de fond de l'art. 7 de la *Charte* telle qu'elles ont été décrites dans *Charkaoui I*. Le fait de savoir si le régime permet de réaliser cette intention est la question constitutionnelle au cœur du présent pourvoi, question que je vais maintenant aborder.

(4) Les carences dont serait entaché le régime établi par la *LIPR*

[48] M. Harkat allègue essentiellement que la communication de résumés publics et la protection des intérêts de la personne visée par des avocats spéciaux ne suffisent pas à rendre le régime établi par la *LIPR* conforme aux exigences de l'art. 7 de la *Charte*. J'examinerai à tour de rôle chacune des carences dont serait entaché ce régime.

a) *Le régime permet-il à la personne visée d'obtenir suffisamment de renseignements?*

[49] M. Harkat soutient que les résumés publics du dossier secret sont trop vagues et généraux. À son avis, ils ne permettent pas à la personne visée de connaître la preuve qui pèse contre elle et d'y répondre. M. Harkat plaide que le droit de connaître la preuve et d'y répondre consiste essentiellement à pouvoir réfuter les détails par des détails. Toujours selon lui, le régime établi par la *LIPR* aborde la divulgation de manière trop catégorique : la personne visée n'obtiendra *jamais* communication des renseignements qui porteraient atteinte à la sécurité nationale ou à la sécurité d'autrui, quelle que soit l'importance de la communication pour sa défense. Une solution de rechange moins attentatoire consisterait à ce que le juge désigné se livre à un exercice

the public interest in non-disclosure to be balanced against the public interest in disclosure.

[50] In my view, the *IRPA* scheme provides sufficient disclosure to the named person to be constitutionally compliant. I base this conclusion on the designated judge's statutory duty to ensure that the named person is reasonably informed of the Minister's case throughout the proceedings.

(i) The *IRPA* Scheme Requires an Incompressible Minimum Amount of Disclosure to the Named Person

[51] At first blush, the provisions of the *IRPA* scheme appear to give precedence to confidentiality of information over the named person's right to know and meet the case. Section 83(1)(*e*) provides that,

> throughout the proceeding, the judge shall ensure that the permanent resident or foreign national is provided with a summary of information and other evidence that enables them to be reasonably informed of the case made by the Minister in the proceeding but that does not include anything that, in the judge's opinion, would be injurious to national security or endanger the safety of any person if disclosed;

Thus, the content of the summaries must be tailored to satisfy the overriding proviso that no information or evidence injurious to national security or to the safety of any person may be disclosed.

[52] The *IRPA* scheme also provides, at s. 83(1)(*i*), that the judge may base his decision on information or evidence of which the named person has not been informed in summary form: "[T]he judge may base a decision on information or other evidence even if a summary of that information or other evidence is not provided to the permanent resident or foreign national . . .".

comme celui prévu au par. 38.06(2) de la *Loi sur la preuve au Canada*, L.R.C. 1985, ch. C-5 (« *LPC* »), qui permet de mettre en balance les raisons d'intérêt public qui justifient la divulgation et les raisons d'intérêt public qui justifient la non-divulgation.

[50] À mon avis, le régime établi par la *LIPR* prévoit la divulgation à la personne visée de suffisamment de renseignements pour respecter la Constitution. Je fonde cette conclusion sur l'obligation légale du juge désigné de veiller tout au long de l'instance à ce que la personne visée soit suffisamment informée de la thèse des ministres.

(i) Le régime établi par la *LIPR* exige la divulgation d'une quantité minimale incompressible de renseignements à la personne visée

[51] À première vue, les dispositions du régime établi par la *LIPR* semblent privilégier la confidentialité des renseignements aux dépens du droit de la personne visée de connaître la preuve qui pèse contre elle et d'y répondre. Selon l'al. 83(1)*e*),

> [le juge] veille tout au long de l'instance à ce que soit fourni à l'intéressé un résumé de la preuve qui ne comporte aucun élément dont la divulgation porterait atteinte, selon lui, à la sécurité nationale ou à la sécurité d'autrui et qui permet à l'intéressé d'être suffisamment informé de la thèse du ministre à l'égard de l'instance en cause;

Il faut donc rédiger les résumés de façon à ce qu'ils soient conformes à la disposition prépondérante interdisant de divulguer tout renseignement ou élément de preuve préjudiciable à la sécurité nationale ou à la sécurité d'autrui.

[52] Le régime établi par la *LIPR* dispose également, à l'al. 83(1)*i*), que le juge peut fonder sa décision sur des renseignements ou éléments de preuve dont un résumé n'a pas été fourni à la personne visée : « [I]l peut fonder sa décision sur des renseignements et autres éléments de preuve même si un résumé de ces derniers n'est pas fourni à l'intéressé . . . ».

[53] The combination of ss. 83(1)(*e*) and 83(1)(*i*) could conceivably lead to a situation where the judge makes a decision on the reasonableness of the security certificate despite the fact that the named person has only received severely truncated disclosure. Noël J. even contemplated a scenario where the named person receives virtually no disclosure: "There may come a time when the only evidence to justify inadmissibility on security ground originates from a very sensitive source, and that the disclosure of such evidence, even through a summary, would inevitably disclose the source" (2010 FC 1242, at para. 59). He nevertheless found the disclosure provisions of the *IRPA* scheme to be constitutional.

[54] In my view, Noël J. erred in interpreting the *IRPA* scheme in a manner that allows for that scenario. *Charkaoui I* makes clear that there is an incompressible minimum amount of disclosure that the named person must receive in order for the scheme to comply with s. 7 of the *Charter*. He or she must receive sufficient disclosure to know and meet the case against him or her.

[55] Parliament amended the *IRPA* scheme with the intent of making it compliant with the s. 7 requirements expounded in *Charkaoui I*, and it should be interpreted in light of this intention: *R. v. Ahmad*, 2011 SCC 6, [2011] 1 S.C.R. 110, at paras. 28-29. The *IRPA* scheme's requirement that the named person be "reasonably informed" ("*suffisamment informé*") of the Minister's case should be read as a recognition that the named person must receive an incompressible minimum amount of disclosure.

[56] Under the *IRPA* scheme, a named person is "reasonably informed" if he has personally received sufficient disclosure to be able to give meaningful instructions to his public counsel and meaningful guidance and information to his special advocates which will allow them to challenge the information and evidence relied upon by the Minister in the closed hearings. Indeed, the named person's ability

[53] L'application combinée des al. 83(1)*e*) et *i*) pourrait aboutir à une situation où le juge se prononce sur le caractère raisonnable du certificat de sécurité même si la personne visée n'a reçu que des renseignements considérablement tronqués. Le juge Noël a même envisagé un scénario où la personne visée ne recevrait pratiquement aucun renseignement : « Il se peut que, dans certaines affaires, la seule preuve justifiant l'interdiction de territoire pour des raisons de sécurité découle d'une source très sensible et que la divulgation d'une telle preuve, même au moyen d'un résumé, révélerait inévitablement la source » (2010 CF 1242, par. 59). Il a néanmoins jugé constitutionnelles les dispositions du régime établi par la *LIPR* concernant la divulgation.

[54] À mon avis, le juge Noël a commis une erreur en donnant au régime établi par la *LIPR* une interprétation qui ouvre la porte à ce scénario. Il ressort nettement de *Charkaoui I* que la personne visée doit recevoir une quantité minimale incompressible de renseignements pour que le régime soit conforme à l'art. 7 de la *Charte*. Elle doit recevoir des renseignements suffisants pour connaître la preuve qui pèse contre elle et y répondre.

[55] Le législateur a modifié le régime établi par la *LIPR* dans l'intention de le rendre conforme aux exigences de l'art. 7 exposées dans *Charkaoui I*, et il faut l'interpréter en fonction de cette intention : *R. c. Ahmad*, 2011 CSC 6, [2011] 1 R.C.S. 110, par. 28-29. L'exigence de ce régime voulant que la personne visée soit « suffisamment informée » (« *reasonably informed* ») de la thèse du ministre doit être considérée comme une reconnaissance de l'obligation de fournir à la personne visée une quantité minimale incompressible de renseignements.

[56] Suivant le régime établi par la *LIPR*, la personne visée est « suffisamment informée » si elle a reçu elle-même suffisamment de renseignements pour pouvoir donner des instructions utiles à ses avocats publics, mais aussi des indications et des renseignements utiles à ses avocats spéciaux qui permettront à ces derniers de contester l'information et la preuve invoquées par le ministre lors

to answer the Minister's case hinges on the effectiveness of the special advocates, which in turn depends on the special advocates being provided with meaningful guidance and information. As the House of Lords of the United Kingdom put it in referring to disclosure under the British special advocates regime, the named person

> must be given sufficient information about the allegations against him to enable him to give effective instructions in relation to those allegations. . . . Where . . . the open material consists purely of general assertions and the case . . . is based solely or to a decisive degree on closed materials the requirements of a fair trial will not be satisfied, however cogent the case based on the closed materials may be.

(*Secretary of State for the Home Department v. A.F. (No. 3)*, [2009] UKHL 28, [2009] 3 All E.R. 643, at para. 59, *per* Lord Phillips of Worth Matravers)

I would add that the named person need not only be given sufficient information about the allegations against him, but also about the evidence on the record.

[57] The level of disclosure required for a named person to be reasonably informed is case-specific, depending on the allegations and evidence against the named person. Ultimately, the judge is the arbiter of whether this standard has been met. At the very least, the named person must know the essence of the information and evidence supporting the allegations. This excludes the scenario where the named person receives no disclosure whatsoever of essential information or evidence.

[58] The *IRPA* scheme is silent as to what happens if there is an irreconcilable tension between the requirement that the named person be "reasonably informed", on the one hand, and the imperative that sensitive information not be disclosed, on the other. The *IRPA* scheme does not provide that the "reasonably informed" standard can be compromised. But nor does it provide that sensitive

des audiences à huis clos. En effet, l'aptitude de la personne visée à réfuter la thèse du ministre dépend de l'efficacité des avocats spéciaux, laquelle dépend à son tour de la réception d'indications et de renseignements utiles par ceux-ci. Comme l'a dit la Chambre des lords du Royaume-Uni en parlant de la divulgation prévue par le régime britannique des avocats spéciaux, la personne visée

> [TRADUCTION] doit obtenir suffisamment de renseignements au sujet des allégations formulées contre elle pour être en mesure de donner des instructions efficaces relativement à ces allégations. [. . .] Lorsque [. . .] les documents publics contiennent uniquement des affirmations générales et que l'affaire [. . .] est fondée exclusivement ou à un degré décisif sur des documents secrets, les exigences d'un procès équitable ne sont pas respectées, aussi convaincant que puisse être la cause fondée sur les documents secrets.

(*Secretary of State for the Home Department c. A.F. (No. 3)*, [2009] UKHL 28, [2009] 3 All E.R. 643, par. 59, lord Phillips of Worth Matravers)

J'ajouterais que la personne visée doit obtenir assez de renseignements non seulement au sujet des allégations formulées contre elle, mais également à propos de la preuve au dossier.

[57] L'étendue de la divulgation requise pour que la personne visée soit suffisamment informée varie d'une affaire à l'autre, selon les allégations et la preuve qui pèsent contre elle. En dernier ressort, c'est au juge qu'il appartient de décider si cette norme a été respectée. La personne visée doit à tout le moins connaître l'essentiel des renseignements et de la preuve à l'appui des allégations, ce qui exclut le scénario où elle ne reçoit aucune divulgation quelle qu'elle soit des renseignements ou éléments de preuve essentiels.

[58] Le régime établi par la *LIPR* n'indique pas ce qui arrive en cas de tension irréconciliable entre les exigences voulant que la personne visée soit « suffisamment informée », d'une part, et l'impératif de ne pas divulguer les renseignements sensibles, d'autre part. Le régime en cause ne permet pas de faire entorse à la norme de la personne « suffisamment informée », pas plus qu'il n'autorise à divulguer des

information can be disclosed where this is absolutely necessary in order for the "reasonably informed" standard to be met.

[59] In my view, the necessary outcome of situations where there is an irreconcilable tension is that the Minister must withdraw the information or evidence whose non-disclosure prevents the named person from being reasonably informed. In some cases, this may effectively compel the Minister to put an end to the proceedings.

[60] To hold that the Minister can rely on essential information and evidence of which the named person cannot be reasonably informed would force the judge to violate the responsibility expressly placed on him by the statute, i.e. his duty to ensure that the named person remain reasonably informed throughout the proceedings. It cannot have been Parliament's intent to design a scheme in which the judge is required to violate the responsibilities placed upon him. Consequently, the *IRPA* scheme must be interpreted as precluding the Minister from bringing a case in respect of which the named person cannot be kept reasonably informed. The scheme mandates that the named person remain reasonably informed — i.e. that he be able to give meaningful instructions to his public counsel and meaningful guidance and information to his special advocates — throughout the proceedings. If the named person is not reasonably informed, the proceedings will not have been in compliance with the *IRPA* scheme and the judge cannot confirm the certificate's reasonableness. In such a case, the judge must quash the certificate, pursuant to s. 78 of the *IRPA*.

(ii) Only Information or Evidence That Raises a Serious Risk Must Be Withheld

[61] Only information and evidence that raises a *serious* risk of injury to national security or danger to the safety of a person can be withheld from the named person. The judge must ensure throughout the proceedings that the Minister does not cast too wide a net with his claims of confidentiality.

renseignements sensibles lorsque leur divulgation est absolument nécessaire pour satisfaire à cette norme.

[59] J'estime qu'en cas de tension irréconciliable, le ministre doit retirer les renseignements ou les éléments de preuve dont la non-divulgation empêche la personne visée d'être suffisamment informée. Dans certains cas, cette tension irréconciliable pourrait, dans les faits, contraindre le ministre à mettre un terme à l'instance.

[60] Conclure à la possibilité pour le ministre d'invoquer des renseignements et éléments de preuve essentiels dont la personne visée ne peut pas être suffisamment informée obligerait le juge à faillir à la responsabilité que lui confie expressément la loi, soit veiller tout au long de l'instance à ce que la personne visée soit suffisamment informée. Le législateur ne peut avoir eu l'intention de concevoir un régime obligeant le juge à faillir aux responsabilités qui lui sont confiées. En conséquence, le régime établi par la *LIPR* doit être interprété comme interdisant au ministre d'engager une procédure à l'égard de laquelle la personne visée ne peut être tenue suffisamment informée. Le régime requiert que la personne visée demeure suffisamment informée — c.-à-d. qu'elle doit être en mesure de donner des instructions utiles à ses avocats publics et des indications et des renseignements utiles à ses avocats spéciaux — tout au long de l'instance. Si elle n'est pas suffisamment informée, l'instance ne respecte pas le régime établi par la *LIPR* et le juge ne peut confirmer le caractère raisonnable du certificat. En pareil cas, il doit annuler le certificat en application de l'art. 78 de la *LIPR*.

(ii) Seuls les renseignements et les éléments de preuve qui soulèvent un risque sérieux doivent être gardés confidentiels

[61] Seuls les renseignements et les éléments de preuve qui soulèvent un risque *sérieux* d'atteinte à la sécurité nationale ou à la sécurité d'autrui peuvent être soustraits à la connaissance de la personne visée. Tout au long de l'instance, il incombe au juge de garantir que le ministre ne vise pas trop large lorsqu'il invoque la confidentialité.

[62] While the *IRPA* scheme provides that closed hearings must be held when the disclosure of information *could* be injurious (s. 83(1)(*c*), *IRPA*), it mandates the withholding of information from public summaries only if its disclosure *would*, *in the judge's opinion*, be injurious (s. 83(1)(*e*), *IRPA*). The judge must err on the side of caution in ordering closed hearings during which he can ascertain the validity of the Minister's position with respect to the sensitivity of given information or evidence. However, once the judge has heard the parties, he must ensure that only information or evidence which *would* injure national security or endanger the safety of a person is withheld from the named person. "It is the Ministers who bear the burden of establishing that disclosure <u>not only could but would be injurious</u> to national security, or endanger the safety of any person": *Jaballah, Re*, 2009 FC 279, 340 F.T.R. 43, at para. 9, *per* Dawson J. (emphasis added).

[62] Le régime établi par la *LIPR* prévoit certes la tenue d'audiences à huis clos si la divulgation de renseignements *pouvait* porter atteinte à la sécurité nationale ou à la sécurité d'autrui (al. 83(1)*c*) *LIPR*); il intime toutefois de taire dans les résumés de la preuve seulement les renseignements dont la divulgation *porterait* atteinte, *selon le juge*, à la sécurité nationale ou à la sécurité d'autrui (al. 83(1)*e*) *LIPR*). Le juge doit privilégier la prudence lorsqu'il s'agit d'ordonner la tenue d'audiences à huis clos durant lesquelles il peut examiner la validité de la position du ministre quant au degré de sensibilité de certains renseignements ou éléments de preuve. Cela dit, après avoir entendu les parties, le juge doit garantir que seuls les renseignements ou les éléments de preuve qui *porteraient* atteinte à la sécurité nationale ou à celle d'autrui sont soustraits à la connaissance de la personne visée. « Il incombe aux ministres d'établir que la divulgation <u>non seulement pourrait porter atteinte mais qu'elle porterait effectivement atteinte</u> à la sécurité nationale ou à la sécurité d'autrui » : *Jaballah (Re)*, 2009 CF 279 (CanLII), par. 9, la juge Dawson (je souligne).

[63] The judge must be vigilant and skeptical with respect to the Minister's claims of confidentiality. Courts have commented on the government's tendency to exaggerate claims of national security confidentiality: *Canada (Attorney General) v. Almalki*, 2010 FC 1106, [2012] 2 F.C.R. 508, at para. 108; *Khadr v. Canada (Attorney General)*, 2008 FC 549, 329 F.T.R. 80, at paras. 73-77 and 98; see generally C. Forcese, "Canada's National Security 'Complex': Assessing the Secrecy Rules" (2009), 15:5 *IRPP Choices* 3. As Justice O'Connor commented in his report on the Arar inquiry,

> overclaiming exacerbates the transparency and procedural fairness problems that inevitably accompany any proceeding that can not be fully open because of [national security confidentiality] concerns. It also promotes public suspicion and cynicism about legitimate claims by the Government of national security confidentiality.

(Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar, *Report of*

[63] Le juge doit être vigilant et sceptique quant aux allégations du ministre relatives à la confidentialité. Les tribunaux ont formulé des commentaires quant à la propension du gouvernement à exagérer les réclamations de confidentialité fondées sur la sécurité nationale : *Canada (Procureur général) c. Almalki*, 2010 CF 1106, [2012] 2 R.C.F. 508, par. 108; *Khadr c. Canada (Procureur général)*, 2008 CF 549 (CanLII), par. 73-77 et 98; voir plus généralement C. Forcese, « Canada's National Security "Complex" : Assessing the Secrecy Rules » (2009), 15:5 *IRPP Choices* 3. Comme l'a affirmé le juge O'Connor dans son rapport sur la Commission Arar,

> la multiplication des réclamations aggrave les problèmes de transparence et d'équité procédurale accompagnant inévitablement toute enquête qui ne peut être totalement publique en raison des préoccupations [de confidentialité liées à la sécurité nationale]. En conséquence, le grand public n'en est que plus soupçonneux et cynique à l'égard des réclamations de confidentialité légitimes du gouvernement liées à la sécurité nationale.

(Commission d'enquête sur les actions des responsables canadiens relativement à Maher Arar, *the Events Relating to Maher Arar: Analysis and Recommendations* (2006), at p. 302)

[64] The judge is the gatekeeper against this type of overclaiming, which undermines the *IRPA* scheme's fragile equilibrium. Systematic overclaiming would infringe the named person's right to a fair process or undermine the integrity of the judicial system, requiring a remedy under s. 24(1) of the *Charter*.

(iii) The Absence of a Balancing Approach Does Not Make the Scheme Unconstitutional

[65] In addition, Mr. Harkat argues that the *IRPA* scheme's approach to disclosure is unconstitutional because it fails to provide for a balancing of countervailing interests. In his view, s. 7 of the *Charter* requires the adoption of an approach similar to the one found in s. 38.06(2) of the *CEA*, which allows the judge to order disclosure of national security information if "the public interest in disclosure outweighs in importance the public interest in non-disclosure".

[66] I would reject this contention. Section 7 of the *Charter* does not require a balancing approach to disclosure. Rather, it requires a fair process. "There is no free-standing principle of fundamental justice requiring a proper balancing of interests in general, or requiring the balancing of interests in decisions about disclosure": H. Stewart, *Fundamental Justice: Section 7 of the Canadian Charter of Rights and Freedoms* (2012), at p. 229. Parliament's choice to adopt a categorical prohibition against disclosure of sensitive information, as opposed to a balancing approach, does not as such constitute a breach of the right to a fair process.

Rapport sur les événements concernant Maher Arar : Analyse et recommandations (2006), p. 326-327)

[64] Le juge est le gardien qui doit nous prémunir contre la multiplication des réclamations qui menace le fragile équilibre qu'atteint le régime établi par la *LIPR*. La multiplication systématique des réclamations porterait atteinte au droit de la personne visée à un processus équitable ou minerait l'intégrité du système judiciaire, exigeant ainsi l'octroi d'une réparation en application du par. 24(1) de la *Charte*.

(iii) L'absence d'une mise en balance n'invalide pas le régime sur le plan constitutionnel

[65] De plus, selon M. Harkat, l'approche prévue par le régime établi par la *LIPR* en matière de divulgation est inconstitutionnelle parce qu'elle ne prévoit pas la mise en balance des intérêts contraires. À son avis, l'art. 7 de la *Charte* exige l'adoption d'une approche semblable à celle prévue au par. 38.06(2) de la *LPC* qui autorise un juge à ordonner la divulgation de renseignements relatifs à la sécurité nationale si « les raisons d'intérêt public qui justifient la divulgation l'emportent sur les raisons d'intérêt public qui justifient la non-divulgation ».

[66] Je suis d'avis de rejeter cette prétention. L'article 7 de la *Charte* n'exige pas l'existence d'une approche de mise en balance quant à la divulgation. Il exige plutôt que le processus soit équitable. [TRADUCTION] « Il n'existe pas de principe distinct de justice fondamentale exigeant une mise en balance en bonne et due forme des intérêts en général, ou exigeant la mise en balance des intérêts dans le contexte de décisions relatives à la divulgation » : H. Stewart, *Fundamental Justice : Section 7 of the Canadian Charter of Rights and Freedoms* (2012), p. 229. Le choix du législateur d'une interdiction totale de divulguer les renseignements sensibles — plutôt qu'une approche qui prévoit une mise en balance — ne constitue donc pas une atteinte au droit à un processus équitable.

(b) *Are the Special Advocates a "Substantial Substitute" to Participation by the Named Person?*

[67] As discussed, the named person and his public counsel do not have access to the closed record, nor can they participate in the closed hearings. Parliament added the role of special advocates to the *IRPA* scheme so that they could serve as a proxy for the named person in the closed portion of the proceedings. Mr. Harkat argues that the restrictions on the special advocates' ability to communicate with the named person prevent them from effectively protecting the named person's interests. Specifically, he claims that communications between the named person and the special advocates should not be subject to restrictions. He also contends that the special advocates will be unable to seek judicial authorization without breaching solicitor-client privilege. As a consequence, in his view, the addition of special advocates to the regime fails to address the concerns voiced by this Court in *Charkaoui I*.

[68] The communications restrictions imposed on special advocates are significant, requiring judicial authorization for *any* communication regarding the proceedings between the special advocates and the named person or a third party, after the special advocates have received confidential materials. However, they do not render the scheme unconstitutional. I come to this conclusion for three reasons.

[69] First, the restrictions on communications by the special advocates are not absolute. They can be lifted with judicial authorization, subject to conditions deemed appropriate by the designated judge: s. 85.4(2), *IRPA*. While this process is less fluid and efficient than the unfettered communications that prevail between a lawyer and his client, it should be remembered that s. 7 of the *Charter* does not guarantee a perfect process. The judicial authorization process gives the designated judge a sufficiently broad discretion to allow all communications that are necessary for the special advocates to perform their duties.

b) *Les avocats spéciaux remplacent-ils pour l'essentiel la participation de la personne visée?*

[67] Comme nous l'avons vu, la personne visée et ses avocats publics n'ont pas accès au dossier confidentiel et ne peuvent pas participer aux audiences à huis clos. Le législateur a ajouté au régime de la *LIPR* un rôle pour des avocats spéciaux de manière à ce qu'ils puissent défendre les intérêts de la personne visée durant la portion à huis clos des procédures. M. Harkat fait valoir que les restrictions aux communications entre la personne visée et les avocats spéciaux empêchent ces derniers de défendre efficacement les intérêts de cette personne. Plus précisément, il soutient que ces communications ne devraient faire l'objet d'aucune restriction. Il soutient en outre que les avocats spéciaux sont incapables de solliciter une autorisation judiciaire sans contrevenir à leur secret professionnel. Ainsi, selon lui, l'ajout au régime des avocats spéciaux ne règle en rien les préoccupations exprimées par la Cour dans *Charkaoui I*.

[68] Les restrictions aux communications auxquelles doivent se conformer les avocats spéciaux sont certes importantes. Après que ces derniers ont reçu des renseignements confidentiels, *toute* communication relative aux procédures, entre eux et la personne visée ou un tiers, doit faire l'objet d'une autorisation judiciaire préalable. Toutefois, elles ne rendent pas le régime inconstitutionnel. J'en arrive à cette conclusion pour trois raisons.

[69] Premièrement, les restrictions aux communications par les avocats spéciaux ne sont pas absolues. Elles peuvent être levées par une autorisation judiciaire, aux conditions que le juge désigné estime indiquées : par. 85.4(2) *LIPR*. Même si ce processus est moins fluide et efficace que celui des communications illimitées qui prévalent entre un avocat et son client, il ne faut pas oublier que l'art. 7 de la *Charte* ne garantit pas l'existence d'un processus parfait. Le recours à l'autorisation judiciaire donne au juge désigné un pouvoir discrétionnaire suffisamment vaste pour autoriser toutes les communications nécessaires afin que les avocats spéciaux s'acquittent de leurs fonctions.

[70] The broad discretion conferred by the *IRPA* scheme averts unfairness that might otherwise result from the communications restrictions. The designated judge can ensure that the special advocates function as closely as possible to ordinary counsel in a public hearing. The restrictions on communications are designed to avert *serious* risks of disclosure of information or evidence whose disclosure would be injurious to national security or to the safety of any person. While the *IRPA* scheme requires the judge to minimize risks of inadvertent disclosure of information, the judge must also give special advocates significant latitude. The special advocates are competent and security-cleared lawyers, who take their professional and statutory obligations seriously. They have the ability to distinguish between the public and confidential aspects of their case. The judge should take a liberal approach in authorizing communications and only refuse authorization where the Minister has demonstrated, on a balance of probabilities, a real — as opposed to a speculative — risk of injurious disclosure. As much as possible, the special advocates should be allowed to investigate the case and develop their strategy by communicating with the named person, the named person's public counsel, and third parties who may bring relevant insights and information.

[70] Le vaste pouvoir discrétionnaire conféré au juge par le régime de la *LIPR* prévient l'iniquité qui pourrait autrement découler des restrictions aux communications. Le juge désigné peut s'assurer que les avocats spéciaux agissent autant que possible comme le feraient des avocats ordinaires au cours d'audiences publiques. Les restrictions aux communications visent à éviter les risques *sérieux* rattachés à la divulgation de renseignements ou d'éléments de preuve qui porterait atteinte à la sécurité nationale ou à celle d'autrui. Bien que le régime établi par la *LIPR* exige que le juge minimise les risques de divulgation par inadvertance de renseignements, il doit aussi donner aux avocats spéciaux une grande latitude. Ces derniers sont des avocats compétents qui possèdent une habilitation de sécurité. Ils s'acquittent de leurs obligations professionnelles et légales avec sérieux. Ils ont la capacité de faire la différence entre les aspects publics et confidentiels de leur dossier. Le juge devrait donc adopter une approche libérale lorsqu'il est question d'autoriser les communications et ne refuser son autorisation que dans les cas où le ministre a fait la preuve, selon la prépondérance des probabilités, d'un risque réel — par opposition à un risque potentiel — de préjudice en cas de divulgation. Dans toute la mesure du possible, les avocats spéciaux devraient être autorisés à examiner le dossier et à élaborer leur stratégie en communiquant avec la personne visée et ses avocats publics, ainsi qu'avec des tiers qui pourraient leur fournir des points de vue et des renseignements pertinents.

[71] Second, the named person and his public counsel can send an unlimited amount of one-way communications to the special advocates at any time throughout the proceedings. This is significant. As discussed above, the public summaries provided on an ongoing basis to the named person will ensure that he or she is sufficiently informed to provide meaningful guidance and information to the special advocates. These summaries should elicit helpful one-way communications from the named person to the special advocates. And these one-way communications may in turn give rise to

[71] Deuxièmement, la personne visée et ses avocats publics peuvent, eux, transmettre aux avocats spéciaux, à tout moment durant les procédures, une quantité illimitée de renseignements. Cela est important. Comme nous l'avons mentionné, les résumés publics fournis de manière continue à la personne visée garantiront qu'elle est suffisamment informée pour être en mesure de donner des indications et des renseignements adéquats aux avocats spéciaux. Ces résumés devraient permettre à la personne visée de communiquer à sens unique utilement avec les avocats spéciaux. D'ailleurs, ces

requests from the special advocates for judicial permission to communicate with the named person in order to obtain needed clarifications or additional information.

communications pourraient en retour inciter les avocats spéciaux à demander la permission au juge de communiquer avec la personne visée de manière à obtenir des clarifications nécessaires ou des renseignements supplémentaires.

[72] Finally, the record does not support the conclusion that the *IRPA* scheme is unconstitutional on the basis that the special advocates must necessarily breach solicitor-client privilege in order to obtain judicial permission to communicate. As Noël J. noted, "[t]he question of assessing solicitor-client [privilege] remains theoretical in the case at hand. The requests to communicate presented did not directly or indirectly reveal such information": 2010 FC 1242, at para. 178. Moreover, the evolving practices of the Federal Court may substantially lessen the tension between judicial authorization and privilege. For example, the special advocates can minimize the risk of revealing their litigation strategy by seeking to make submissions to the designated judge in the absence of the ministers' lawyers: *Almrei*, 2008 FC 1216, at para. 65.

[72] Troisièmement, le dossier n'étaye pas la conclusion selon laquelle le régime établi par la *LIPR* est inconstitutionnel parce que les avocats spéciaux doivent nécessairement violer le secret professionnel avocat-client pour obtenir la permission judiciaire de communiquer avec la personne visée. Comme le juge Noël l'a souligné, « [l]a question de l'examen des renseignements protégés par le secret professionnel reste théorique en l'espèce. Les demandes de communication présentées n'ont pas directement ou indirectement révélé de tels renseignements » : 2010 CF 1242, par. 178. En outre, les pratiques en évolution de la Cour fédérale pourraient réduire considérablement la tension qui prévaut entre l'autorisation judiciaire et la sauvegarde du secret professionnel. À titre d'exemple, les avocats spéciaux peuvent minimiser le risque de révéler leur stratégie quant au dossier en demandant à présenter leurs observations au juge désigné en l'absence des avocats des ministres : *Almrei*, 2008 CF 1216, par. 65.

[73] The issue of how to reconcile the judicial authorization process with solicitor-client privilege should be decided if and when it arises on the facts of a case: *Almrei*, 2008 FC 1216, at para. 41; *Almrei, Re*, 2009 FC 322, 342 F.T.R. 11, at para. 24. It may be that an exception to solicitor-client privilege could be recognized in such circumstances: *Smith v. Jones*, [1999] 1 S.C.R. 455, at para. 53, *per* Cory J.; *Almrei*, 2008 FC 1216, at paras. 60-62. Or it may instead be necessary to recognize that, in cases where judicial authorization cannot be granted without a breach of solicitor-client privilege, the proceedings fail to meet the requirements of s. 7 of the *Charter* and that a remedy should be granted under s. 24(1) of the *Charter*.

[73] La question de savoir comment concilier le processus d'autorisation judiciaire et le secret professionnel de l'avocat devrait être tranchée si elle est soulevée par les faits d'un dossier et quand elle le sera : *Almrei*, 2008 CF 1216, par. 41; *Almrei (Re)*, 2009 CF 322 (CanLII), par. 24. Dans de telles circonstances, une exception à la règle du secret professionnel de l'avocat pourrait être reconnue : *Smith c. Jones*, [1999] 1 R.C.S. 455, par. 53, le juge Cory; *Almrei*, 2008 CF 1216, par. 60-62. Ou encore, il pourrait être nécessaire de reconnaître que, dans les cas où l'autorisation judiciaire ne peut être accordée sans que le secret professionnel de l'avocat soit violé, le processus ne satisfait pas aux exigences de l'art. 7 de la *Charte* et il y a lieu d'accorder une réparation en application du par. 24(1) de la *Charte*.

(c) *Does the Admission of Hearsay Evidence Render the Scheme Unconstitutional?*

[74] The *IRPA* scheme provides that the usual rules of evidence do not apply to the security certificate proceedings. Rather, any evidence that the judge determines to be "reliable and appropriate" is admissible: s. 83(1)(*h*), *IRPA*. It is argued that this denies the named person's s. 7 *Charter* rights, since the special advocates will be unable to meaningfully test the evidence.

[75] It is true that some evidence which is admissible under the *IRPA* scheme cannot be tested for reliability and accuracy in the usual manner. For example, the *IRPA* scheme would allow the admission of a foreign intelligence agency's report that the judge deems "reliable and appropriate", despite the fact that it is hearsay. The special advocates will not have had the opportunity to cross-examine the foreign sources quoted in the report or the operatives who compiled it.

[76] While s. 83(1)(*h*) of the *IRPA* may result in the admission of hearsay evidence and deny the special advocates the ability to cross-examine sources, it does not violate s. 7 of the *Charter*. As this Court recognized in *R. v. L. (D.O.)*, [1993] 4 S.C.R. 419, "the rules of evidence have not been constitutionalized into unalterable principles of fundamental justice": p. 453, *per* L'Heureux-Dubé J. As discussed, s. 7 guarantees a fundamentally fair process. The rule against hearsay evidence and the right to cross-examine witnesses simply provide a means towards such a process, by screening out unreliable evidence: *R. v. Khelawon*, 2006 SCC 57, [2006] 2 S.C.R. 787, at para. 48. The *IRPA* scheme achieves this purpose of excluding unreliable evidence by alternative means. It provides the designated judge with broad discretion to exclude evidence that is not "reliable and appropriate". This broad discretion allows the judge to exclude not only evidence that he or she finds, after a searching review, to be unreliable, but also evidence whose

c) *L'admission de preuve par ouï-dire rend-elle le régime inconstitutionnel?*

[74] Le régime établi par la *LIPR* prévoit que les règles de preuve habituelles ne s'appliquent pas aux procédures relatives aux certificats de sécurité intentées en vertu de cette loi. C'est plutôt tout élément de preuve que le juge estime « digne de foi et utile » qui est admissible : al. 83(1)*h*) *LIPR*. On fait valoir que cette règle prive la personne visée des droits que lui garantit l'art. 7 de la *Charte* puisque les avocats spéciaux seront incapables de mettre la preuve en doute utilement.

[75] Certains éléments de preuve admissibles en application du régime établi par la *LIPR* ne peuvent certes être mis en doute pour en vérifier comme d'habitude la fiabilité et l'exactitude. Par exemple, selon ce régime, le rapport d'un organisme étranger de renseignement serait admissible si le juge estimait qu'il est « digne de foi et utile », même s'il s'agit de ouï-dire. Les avocats spéciaux n'auraient l'occasion de contre-interroger ni les sources étrangères citées dans le rapport ni les agents secrets qui l'ont rédigé.

[76] Bien que l'al. 83(1)*h*) de la *LIPR* puisse entraîner l'admission de preuve par ouï-dire et empêcher les avocats spéciaux de contre-interroger les sources, il n'enfreint pas l'art. 7 de la *Charte*. Comme la Cour l'a reconnu dans *R. c. L. (D.O.)*, [1993] 4 R.C.S. 419, « les règles de preuve n'ont pas été érigées dans la Constitution en principes inaltérables de justice fondamentale » : p. 453, la juge L'Heureux-Dubé. Je le répète, l'art. 7 garantit un processus fondamentalement équitable. La règle qui interdit la preuve par ouï-dire et le droit de contre-interroger les témoins ne constituent que des moyens de parvenir à la fin recherchée, en écartant les éléments de preuve qui ne sont pas dignes de foi : *R. c. Khelawon*, 2006 CSC 57, [2006] 2 R.C.S. 787, par. 48. Le régime établi par la *LIPR* atteint cet objectif en écartant ces éléments de preuve par d'autres moyens. En effet, il confère au juge désigné le vaste pouvoir discrétionnaire d'exclure des éléments de preuve qui ne seraient pas « dignes de foi et utiles ». Ce vaste pouvoir discrétionnaire

probative value is outweighed by its prejudicial effect against the named person.

(5) Concluding Remarks on the Constitutionality of the *IRPA* Scheme

[77] I have concluded that the impugned provisions of the *IRPA* scheme are constitutional. They do not violate the named person's right to know and meet the case against him, or the right to have a decision made on the facts and the law. However, it must be acknowledged that these provisions remain an imperfect substitute for full disclosure in an open court. There may be cases where the nature of the allegations and of the evidence relied upon exacerbate the limitations inherent to the scheme, resulting in an unfair process. In light of this reality, the designated judge has an ongoing responsibility to assess the overall fairness of the process and to grant remedies under s. 24(1) of the *Charter* where appropriate — including, if necessary, a stay of proceedings.

B. *Are CSIS Human Sources Covered by Privilege and Can They Be Cross-Examined?*

[78] Mr. Harkat's special advocates ask the Court for an order permitting them to interview and cross-examine the CSIS human sources relied upon by the Minister in the case against him. Noël J. denied this order, holding that the identity of the sources and information which tends to reveal their identity is covered by a common law "class" privilege.

[79] The Federal Court of Appeal disagreed. It held that, unlike police informers, CSIS human sources are not protected by common law class

permet au juge d'exclure non seulement les éléments de preuve qu'il juge, après examen, indignes de foi, mais également ceux dont l'effet préjudiciable à l'endroit de la personne visée l'emporte sur leur valeur probante.

(5) Dernières remarques quant à la constitutionnalité du régime établi par la *LIPR*

[77] Je conclus que les dispositions contestées du régime établi par la *LIPR* sont constitutionnelles. Elles n'enfreignent pas le droit de la personne visée de connaître et de contester la preuve qui pèse contre elle, ni son droit à ce qu'une décision soit rendue compte tenu des faits et du droit. Cependant, il faut reconnaître que ces dispositions créent un régime qui demeure un substitut imparfait à la divulgation complète en audience publique. Dans certains cas, la nature des allégations et de la preuve à l'appui pourrait exacerber les limites inhérentes au régime et donner lieu à un processus inéquitable. Compte tenu de cette réalité, le juge désigné a la responsabilité tout au long de l'instance d'évaluer l'équité globale du processus et d'accorder des réparations en application du par. 24(1) de la *Charte* lorsqu'il est approprié de le faire — y compris, si nécessaire, un arrêt des procédures.

B. *Les sources humaines du SCRS sont-elles protégées par un privilège et peuvent-elles être contre-interrogées?*

[78] Les avocats spéciaux de M. Harkat demandent à la Cour de rendre une ordonnance les autorisant à questionner et à contre-interroger les sources humaines du SCRS sur lesquelles se fonde le ministre pour poursuivre celui dont ils défendent les intérêts. Le juge Noël a refusé de rendre cette ordonnance, estimant que l'identité des sources et les renseignements qui pourraient révéler cette identité sont protégés par un privilège « générique » en common law.

[79] La Cour d'appel fédérale a exprimé son désaccord et a conclu qu'à la différence des indicateurs de police, les sources humaines du SCRS

privilege. However, it did not deal with whether the human sources could be cross-examined.

[80] I agree with the Federal Court of Appeal that CSIS human sources are not protected by a class privilege. However, this is not to say that they are left entirely unprotected by the security certificate regime. The *IRPA* scheme provides a mechanism to protect their identity, as I will now discuss.

(1) Does Privilege Attach to CSIS Human Sources?

[81] It is important to note at the outset that the *IRPA* scheme provides protection for the identity of sources and of information that tends to reveal that identity. Indeed, the starting point under the *IRPA* scheme is that all information whose disclosure would be injurious to national security or endanger the safety of a person is protected from disclosure to the named person and to the public: s. 83(1)(*d*). In most cases, the disclosure of the identity of human sources would both be injurious to national security and endanger the safety of those sources. Consequently, their identity will generally be protected from disclosure under the *IRPA* scheme.

[82] As a limited exception to this general principle of non-disclosure, the *IRPA* scheme provides that special advocates get full disclosure of all the evidence provided by the Minister to the judge: s. 85.4(1). The Minister has no obligation, however, to disclose privileged materials to anyone.

[83] It thus becomes necessary to determine whether the identities of CSIS human sources, and related information, are privileged. But it is important to bear in mind that even if they are not privileged, the judge under the *IRPA* scheme has the duty to prevent disclosure to the public and to the named person of this information if it would be injurious to national security or the safety of the

ne sont pas protégées par un privilège générique en common law. Elle n'a cependant pas étudié la question de savoir s'il était possible de contre-interroger ces dernières.

[80] Je souscris à l'opinion de la Cour d'appel fédérale selon laquelle les sources humaines du SCRS ne sont pas protégées par un privilège générique. Cela ne veut toutefois pas dire que le régime de certificats de sécurité ne leur accorde aucune protection. En effet, le régime établi par la *LIPR* prévoit un mécanisme de protection de leur identité, comme je vais maintenant l'expliquer.

(1) Les sources humaines du SCRS sont-elles protégées par un privilège?

[81] Il importe de signaler d'entrée de jeu que le régime établi par la *LIPR* protège l'identité des sources et les renseignements qui pourraient révéler cette identité. D'ailleurs, ce régime part du postulat que les renseignements dont la divulgation porterait atteinte à la sécurité nationale ou à la sécurité d'autrui ne peuvent être divulgués à la personne visée ou au public : al. 83(1)*d*). Dans la plupart des cas, la divulgation de l'identité des sources humaines porterait atteinte tant à la sécurité nationale qu'à la sécurité de ces sources. C'est pourquoi le régime établi par la *LIPR* interdit généralement de dévoiler leur identité.

[82] Ce principe général de non-divulgation souffre d'une exception dont la portée est toutefois limitée : le régime établi par la *LIPR* prévoit la communication aux avocats spéciaux de tous les éléments de preuve fournis au juge par le ministre : par. 85.4(1). Par contre, ce dernier n'est nullement tenu de communiquer des documents protégés à qui que ce soit.

[83] Il devient dès lors nécessaire de décider si l'identité des sources humaines du SCRS et les renseignements connexes sont protégés. Il importe cependant de garder à l'esprit que même s'ils ne le sont pas, le régime établi par la *LIPR* impose au juge l'obligation d'empêcher que ces renseignements soient divulgués au public et à la personne visée si cela portait atteinte à la sécurité nationale ou à celle

sources. The information will thus generally remain within the confines of the closed circle formed by the designated judge, the special advocates — who, it bears repeating, are security-cleared lawyers — and the Minister's lawyers.

[84] Against this background, I come to the question: Are the identities of CSIS human sources and information that might reveal their identity protected by common law privilege?

[85] It is argued that police informer privilege attaches to CSIS human sources. I agree with the Federal Court of Appeal that it does not. Traditional police work involving informers, on the one hand, and the collection of security intelligence and information, on the other, are two different things. Indeed, Parliament created CSIS in recognition of this emerging distinction: *Charkaoui v. Canada (Citizenship and Immigration)*, 2008 SCC 38, [2008] 2 S.C.R. 326 ("*Charkaoui II*"), at paras. 21-22. Courts developed police informer privilege at a time when the police investigated crimes locally and collected evidence mainly for use in criminal trials. By contrast, the intelligence gathering conducted by CSIS takes place on a global scale and is geared towards prospectively preventing risks: K. Roach, "The eroding distinction between intelligence and evidence in terrorism investigations", in N. McGarrity, A. Lynch and G. Williams, eds., *Counter-Terrorism and Beyond: The Culture of Law and Justice after 9/11* (2010), 48. Police have an incentive not to promise confidentiality except where truly necessary, because doing so can make it harder to use an informer as a witness. CSIS, on the other hand, is not so constrained. It is concerned primarily with obtaining security intelligence, rather than finding evidence for use in court. While evidence gathered by the police was traditionally used in criminal trials that provide the accused with significant evidentiary safeguards, the intelligence gathered by CSIS may be used to establish criminal conduct in proceedings that — as is the case here — have relaxed rules of evidence and allow for the admission of hearsay evidence. The differences between traditional policing and modern intelligence

de ces sources. Ces renseignements ne sortent donc généralement pas du cercle fermé que forment le juge désigné, les avocats spéciaux — qui, faut-il le rappeler, possèdent une habilitation de sécurité — et les avocats du ministre.

[84] Dans ce contexte, je vais maintenant me pencher sur la question de savoir si l'identité des sources humaines du SCRS et les renseignements qui pourraient la révéler sont protégés par un privilège en common law.

[85] On fait valoir que le privilège relatif aux indicateurs de police vaut pour les sources humaines du SCRS. À l'instar de la Cour d'appel fédérale, j'estime que ce n'est pas le cas. Le travail classique des policiers auquel participent des indicateurs, d'une part, et la collecte de renseignements et d'informations de sécurité, d'autre part, sont deux choses différentes. En effet, le législateur a créé le SCRS du fait de cette nouvelle distinction : *Charkaoui c. Canada (Citoyenneté et Immigration)*, 2008 CSC 38, [2008] 2 R.C.S. 326 (« *Charkaoui II* »), par. 21-22. Les tribunaux ont établi le privilège relatif aux indicateurs de police à une époque où les policiers enquêtaient sur des crimes localement et recueillaient des éléments de preuve principalement pour les utiliser lors de procès criminels. À l'inverse, le SCRS recueille des renseignements à l'échelle mondiale afin de prévenir les risques de manière prospective : K. Roach, « The eroding distinction between intelligence and evidence in terrorism investigations », dans N. McGarrity, A. Lynch et G. Williams, dir., *Counter-Terrorism and Beyond : The Culture of Law and Justice after 9/11* (2010), 48. Les policiers ont intérêt à ne pas promettre l'anonymat à un indicateur sauf en cas de réelle nécessité, parce que s'ils le font, il sera plus difficile d'avoir recours à lui comme témoin. Le SCRS, quant à lui, ne fait pas face à une telle contrainte. Son premier souci est d'obtenir des renseignements relatifs à la sécurité, plutôt que de trouver des éléments de preuve à utiliser devant un tribunal. Les éléments de preuve recueillis par les policiers sont traditionnellement utilisés lors de procès criminels où l'accusé dispose de garanties importantes en matière de preuve, tandis que les

gathering preclude automatically applying traditional police informer privilege to CSIS human sources.

renseignements obtenus par le SCRS peuvent servir à établir l'existence d'une conduite criminelle dans une instance — comme c'est le cas en l'espèce — où les règles de preuve sont souples et permettent d'admettre une preuve par ouï-dire. Les différences entre le travail classique des policiers et la collecte moderne de renseignements empêchent d'appliquer systématiquement le privilège d'indicateur de police traditionnel aux sources humaines du SCRS.

[86] I have found no persuasive authority for the proposition that police informer privilege applies to CSIS human sources. In *R. v. Y. (N.)*, 2012 ONCA 745, 113 O.R. (3d) 347, cited as authority by Abella and Cromwell JJ., the issue was whether an informer who had worked successively for CSIS and the RCMP was a state agent for purposes of applying the *Charter*. The court remarked that one distinction between a state agent and a confidential informer is that privilege applies only to the latter (para. 122). The court's reasons can be read as assuming that privilege would attach to a CSIS informer, but that point was not squarely before the court and was not decided.

[86] Je n'ai trouvé aucun arrêt convaincant qui permet d'affirmer que le privilège d'indicateur de police s'applique aux sources humaines du SCRS. Dans *R. c. Y. (N.)*, 2012 ONCA 745, 113 O.R. (3d) 347, un précédent cité par les juges Abella et Cromwell, il s'agissait de savoir si un indicateur ayant travaillé successivement pour le SCRS et la GRC était un agent de l'État pour l'application de la *Charte*. La Cour d'appel a fait remarquer que le privilège ne s'applique qu'à l'indicateur anonyme, et non à l'agent de l'État (par. 122). On peut bien considérer que la Cour d'appel tient pour acquis dans ses motifs que le privilège s'appliquerait à un indicateur du SCRS, mais elle n'était pas directement saisie de ce point, qui n'a pas été tranché.

[87] Nor, in my view, should this Court create a new privilege for CSIS human sources. This Court has stated that "[t]he law recognizes very few 'class privileges'" and that "[i]t is likely that in future such 'class' privileges will be created, if at all, only by legislative action": *R. v. National Post*, 2010 SCC 16, [2010] 1 S.C.R. 477, at para. 42. The wisdom of this applies to the proposal that privilege be extended to CSIS human sources: *Canada (Attorney General) v. Almalki*, 2011 FCA 199, [2012] 2 F.C.R. 594, at paras. 29-30, *per* Létourneau J.A. If Parliament deems it desirable that CSIS human sources' identities and related information be privileged, whether to facilitate coordination between police forces and CSIS or to encourage sources to come forward to CSIS (see reasons of Abella and Cromwell JJ.), it can enact the appropriate protections. Finally, the question arises whether judges should have the power to shield the identity of human sources from special advocates on a case-by-case basis where they conclude that

[87] À mon avis, la Cour ne devrait pas non plus créer un nouveau privilège pour les sources humaines du SCRS. En effet, elle a mentionné que « [l]e droit reconnaît très peu de "privilèges génériques" » et qu'« [i]l est probable qu'à l'avenir, tout nouveau privilège "générique" sera créé, le cas échéant, par une intervention législative » : *R. c. National Post*, 2010 CSC 16, [2010] 1 R.C.S. 477, par. 42. La sagesse de ces remarques vaut pour la proposition d'étendre un privilège aux sources humaines du SCRS : *Canada (Procureur général) c. Almalki*, 2011 CAF 199, [2012] 2 R.C.F. 594, par. 29-30, le juge Létourneau. Si le législateur juge souhaitable de protéger au moyen d'un privilège l'identité des sources humaines du SCRS et les renseignements connexes, que ce soit pour faciliter la coordination du travail entre les forces policières et le SCRS ou pour inciter les sources humaines à fournir des renseignements à ce dernier (voir les motifs des juges Abella et Cromwell), il peut adopter les mesures de protection voulues. Enfin, la

public interests in non-disclosure outweigh the benefits of disclosure. This question was not argued by the parties, and I offer no comment on it, other than to note that the *IRPA* scheme already affords broad protection to human sources by precluding the public disclosure of information that would injure national security or endanger a person.

(2) Should the Special Advocates Be Authorized to Interview and Cross-Examine the Human Sources?

[88] The special advocates ask this Court to rule that they may interview and cross-examine the CSIS human sources who have provided information used against Mr. Harkat.[1] I have concluded that the identity of CSIS human sources is not privileged. However, it does not follow from the absence of a privilege that special advocates have an unlimited ability to interview and cross-examine human sources. As discussed above, the designated judge may admit information provided by these sources as hearsay evidence, if he concludes that the evidence is "reliable and appropriate": s. 83(1)(*h*), *IRPA*. The Minister has no obligation to produce CSIS human sources as witnesses, although the failure to do so may weaken the probative value of his evidence.

[89] This said, the special advocates may "exercise, with the judge's authorization, any other powers that are necessary to protect the interests" of the named person: s. 85.2(*c*), *IRPA*. The designated judge has the discretion to allow the special

1 The special advocates have already had access to the complete human source files. Although the designated judge found that privilege applied to CSIS human sources, he nevertheless ordered disclosure of unredacted versions of the relevant files to the special advocates as a remedy for breaches by the ministers of their obligations towards Mr. Harkat. See 2009 FC 553 and 2009 FC 1050.

question se pose de savoir si le juge devrait disposer du pouvoir de dissimuler aux avocats spéciaux l'identité des sources humaines dans les cas où il conclut que les raisons d'intérêt public qui justifient la non-divulgation de l'identité l'emportent sur les avantages de sa divulgation. La question n'a pas été débattue par les parties et je ne ferai aucun commentaire à ce sujet, sauf pour signaler que le régime établi par la *LIPR* accorde déjà aux sources humaines une grande protection en interdisant de rendre publics des renseignements dont la divulgation porterait atteinte à la sécurité nationale ou à la sécurité d'autrui.

(2) Les avocats spéciaux devraient-ils être autorisés à questionner et à contre-interroger les sources humaines?

[88] Les avocats spéciaux demandent à la Cour d'ordonner qu'ils puissent questionner et contre-interroger les sources humaines du SCRS qui ont fourni des renseignements utilisés contre M. Harkat[1]. J'ai conclu que l'identité des sources humaines du SCRS n'est pas protégée par un privilège. Cela dit, les avocats spéciaux n'ont pas pour autant un droit illimité de questionner et de contre-interroger ces sources. Comme je l'ai déjà mentionné, le juge désigné peut admettre en preuve des renseignements fournis par ces sources comme de la preuve par ouï-dire s'il estime qu'ils sont « digne[s] de foi et utile[s] » : al. 83(1)*h*) *LIPR*. Le ministre n'a aucunement l'obligation d'assigner à témoigner les sources humaines du SCRS, quoique la décision de ne pas le faire pourrait affaiblir la valeur probante de sa preuve.

[89] Cela dit, les avocats spéciaux peuvent « exercer, avec l'autorisation du juge, tout autre pouvoir nécessaire à la défense des intérêts » de la personne visée : al. 85.2*c*) *LIPR*. Ainsi, le juge désigné a le pouvoir discrétionnaire de les autoriser

1 Les avocats spéciaux ont déjà eu accès aux dossiers complets relatifs aux sources humaines. Même si le juge désigné a conclu qu'un privilège s'appliquait aux sources humaines du SCRS, il a ordonné la communication aux avocats spéciaux de versions non expurgées des dossiers pertinents à titre de réparation pour les manquements par les ministres aux obligations qui leur incombaient à l'endroit de M. Harkat. Voir 2009 CF 553 et 2009 CF 1050.

advocates to interview and cross-examine human sources in a closed hearing. This discretion should be exercised as a last resort. The record before us establishes that a generalized practice of calling CSIS human sources before a court, even if only in closed hearings, may have a chilling effect on potential sources and hinder CSIS's ability to recruit new sources. In most cases, disclosure to the special advocates of the human source files and other relevant information regarding the human sources will suffice to protect the interests of the named person.

à questionner et à contre-interroger les sources humaines lors d'audiences à huis clos. Ce pouvoir discrétionnaire devrait être exercé en dernier recours. Le dossier porté à notre connaissance démontre qu'une pratique qui consisterait à assigner systématiquement les sources humaines du SCRS à témoigner devant un tribunal, même uniquement lors d'audiences à huis clos, pourrait refroidir les ardeurs de sources potentielles et nuire à la capacité du SCRS d'en recruter de nouvelles. Dans la plupart des cas, la communication aux avocats spéciaux des dossiers relatifs aux sources humaines et d'autres renseignements pertinents au sujet de ces dernières suffira à protéger les droits de la personne visée.

[90] The case at hand is not one of those rare cases in which it is necessary to give special advocates permission to interview and cross-examine CSIS human sources. The special advocates contend that cross-examination is necessary in order to test the credibility of the human sources, to cross-examine them on Mr. Harkat's motives for coming to Canada in the mid-1990s, and to undermine the allegation that Mr. Harkat traveled to Afghanistan. In my view, Mr. Harkat and his special advocates have had sufficient opportunity to pursue those objectives, and the designated judge's weighing of the relevant evidence took into account the fact that it was hearsay. Indeed, the evidence on the record allowed the special advocates to undermine the credibility of one of the human sources and led Noël J. to rely on information originating from this source only when corroborated: see 2010 FC 1241, at footnote 1. Moreover, Mr. Harkat testified with respect to his motives for coming to Canada and denied the allegations that he visited Afghanistan. Noël J. made a strong adverse finding of credibility against Mr. Harkat on these issues: it is highly improbable that cross-examination of the human sources could have bolstered his credibility. There is therefore no need for this Court to authorize the exceptional measure of interviewing and cross-examining human sources.

[90] La présente espèce n'est pas du type de celles, rares, où il est nécessaire d'autoriser les avocats spéciaux à questionner et à contre-interroger les sources humaines du SCRS. Les avocats spéciaux prétendent qu'il est nécessaire de contre-interroger ces sources pour mettre leur crédibilité à l'épreuve, pour les questionner sur les motifs de la venue de M. Harkat au Canada au milieu des années 90 et pour miner l'allégation selon laquelle M. Harkat a voyagé en Afghanistan. À mon avis, M. Harkat et ses avocats spéciaux ont eu suffisamment l'occasion de poursuivre ces objectifs et, lorsqu'il a soupesé les éléments de preuve pertinents, le juge désigné a tenu compte du fait qu'il s'agissait de ouï-dire. En effet, la preuve au dossier a permis aux avocats spéciaux de miner la crédibilité d'une des sources humaines et a incité le juge Noël à se fonder sur les renseignements fournis par elle uniquement lorsqu'ils étaient corroborés : voir 2010 CF 1241, première note de bas de page. De plus, M. Harkat a témoigné quant aux motifs qui l'ont poussé à venir au Canada et a nié les allégations selon lesquelles il a visité l'Afghanistan. Le juge Noël a conclu très fermement au manque de crédibilité de M. Harkat quant à ces questions et il est hautement improbable que le contre-interrogatoire des sources humaines ait pu rehausser sa crédibilité. Il est donc inutile que la Cour autorise la mesure exceptionnelle qui consiste à questionner et à contre-interroger les sources humaines.

C. *Did the Designated Judge Err in Refusing to Exclude the Summaries of Intercepted Conversations?*

[91] Mr. Harkat seeks the exclusion of summaries of intercepted conversations that were tendered as evidence by the ministers, pursuant to s. 24(1) of the *Charter*. He argues that CSIS prejudiced his ability to know and meet the case against him by destroying the original operational notes and recordings that were the source materials for the summaries. Noël J. found the summaries to be reliable and concluded that the destruction of the operational materials did not prejudice Mr. Harkat. The Federal Court of Appeal disagreed, finding that the destruction of the materials prejudiced Mr. Harkat's ability to challenge the reliability and accuracy of the summaries. As a remedy, it excluded the summaries of intercepted conversations to which Mr. Harkat was not privy.

(1) Did the Destruction of Source Materials Result in a Breach of Section 7 of the *Charter*?

[92] The original CSIS operational materials were destroyed in accordance with CSIS internal policy OPS-217, which required the systematic destruction of operational materials after operatives had completed their final reports and summaries. In *Charkaoui II*, this Court found that both the *Canadian Security Intelligence Service Act*, R.S.C. 1985, C-23 ("*CSIS Act*"), and the right to procedural fairness of the named person required CSIS "to retain all the information in its possession and to disclose it to the ministers and the designated judge": para. 62.

[93] As a result of policy OPS-217, the original operational notes and recordings are lost evidence. Where the Minister loses evidence that should have been disclosed, he has a duty to explain what happened to it: *R. v. La*, [1997] 2 S.C.R. 680, at paras. 18-20. Where the Minister is unable to satisfy

C. *Le juge désigné a-t-il commis une erreur en refusant d'exclure les résumés de conversations interceptées?*

[91] M. Harkat demande, en application du par. 24(1) de la *Charte*, l'exclusion des résumés des conversations interceptées produits en preuve par les ministres. Il soutient que le SCRS a porté atteinte à sa capacité de prendre connaissance de la preuve qui pèse contre lui et d'y répondre lorsque ses agents ont détruit les notes opérationnelles originales et les enregistrements qui ont servi de source pour préparer les résumés. Le juge Noël a jugé que les résumés étaient dignes de foi et a conclu que la destruction des documents opérationnels n'avait pas porté préjudice à M. Harkat. La Cour d'appel fédérale a exprimé son désaccord et plutôt estimé que la destruction des documents en question a porté atteinte à la capacité de M. Harkat de contester la fiabilité et l'exactitude des résumés. À titre de réparation, elle a exclu les résumés des conversations interceptées auxquelles M. Harkat n'avait pas participé.

(1) La destruction des documents à l'origine des résumés a-t-elle entraîné une violation de l'art. 7 de la *Charte*?

[92] Les documents opérationnels originaux du SCRS ont été détruits conformément à la politique interne OPS-217 du Service qui exige la destruction systématique de ce type de documents dès lors que les agents ont mis la dernière touche à leurs rapports finaux et à leurs résumés. Dans *Charkaoui II*, la Cour a conclu que tant la *Loi sur le Service canadien du renseignement de sécurité*, L.R.C. 1985, ch. C-23 (« *Loi sur le SCRS* ») que le droit à l'équité procédurale de la personne visée exigent que le SCRS « conserv[e] l'ensemble des renseignements dont il dispose et [. . .] les divulgu[e] aux ministres ainsi qu'au juge désigné » : par. 62.

[93] En conséquence de l'application de la politique OPS-217, les notes opérationnelles originales et les enregistrements sont des éléments de preuve perdus. Lorsque le ministre perd des éléments de preuve qui auraient dû être communiqués, il est tenu d'expliquer ce qui s'est produit : *R. c. La*,

the judge that the evidence was not destroyed owing to unacceptable negligence, he has failed to meet his disclosure obligations and there has been a breach of s. 7 of the *Charter*: *ibid.*, at para. 20. In the present case, the destruction of operational notes pursuant to policy OPS-217 constitutes unacceptable negligence, within the meaning of *La*. Indeed, no reasonable steps were taken to preserve the evidence: *ibid.*, at para. 21. Quite the contrary. CSIS destroyed the materials in violation of the *CSIS Act*, and, in so doing, compromised "the very function of judicial review": *Charkaoui II*, at para. 62. Consequently, the ministers failed to meet their disclosure obligations towards Mr. Harkat and breached s. 7 of the *Charter*.

(2) What Is the Appropriate Remedy?

[94] The finding that CSIS operational materials were destroyed through unacceptable negligence does not necessarily mean that the summaries of those materials must be excluded from the evidence. The appropriate remedy for the destruction of materials pursuant to policy OPS-217 must be assessed on a case-by-case basis, and must be tailored to address the prejudicial effect on the named person's case: *Charkaoui II*, at para. 46.

[95] The summaries of materials destroyed pursuant to policy OPS-217 should only be excluded under s. 24(1) of the *Charter* if their admission "would result in an unfair trial or would otherwise undermine the integrity of the justice system": *R. v. Bjelland*, 2009 SCC 38, [2009] 2 S.C.R. 651, at para. 3. "[T]he appropriate focus in most cases of late or insufficient disclosure under s. 24(1) is the remediation of prejudice to the accused" and the "safeguarding of the integrity of the justice system": *ibid.*, at para. 26. Since the exclusion of evidence impedes the truth-seeking function of trials, it should only be resorted to if lesser remedies are inadequate to achieve those two purposes: *ibid.*, at para. 24.

[1997] 2 R.C.S. 680, par. 18-20. S'il est incapable de convaincre le juge que la destruction n'est pas le fruit d'une négligence inacceptable, il n'a pas satisfait à ses obligations en matière de communication et il y a violation de l'art. 7 de la *Charte* : *ibid.*, par. 20. En l'espèce, la destruction des notes opérationnelles conformément à la politique OPS-217 constitue une négligence inacceptable au sens de *La*. En effet, aucune mesure raisonnable n'a été prise pour conserver la preuve : *ibid.*, par. 21. Au contraire, le SCRS a détruit la documentation en contravention de la *Loi sur le SCRS* et, ce faisant, a compromis « la fonction même du contrôle judiciaire » : *Charkaoui II*, par. 62. En conséquence, les ministres n'ont pas satisfait aux obligations en matière de communication dont ils devaient s'acquitter envers M. Harkat et ont violé l'art. 7 de la *Charte*.

(2) Quelle est la réparation appropriée?

[94] La conclusion selon laquelle les documents opérationnels du SCRS ont été détruits par suite d'une négligence inacceptable ne signifie pas nécessairement pour autant que les résumés de ces documents doivent être exclus de la preuve. La réparation qu'il convient d'accorder pour la destruction des documents en application de la politique OPS-217 doit être évaluée au cas par cas et doit être conçue pour remédier à l'effet préjudiciable qu'elle a eu sur la cause de la personne visée : *Charkaoui II*, par. 46.

[95] Les résumés des documents détruits en application de la politique OPS-217 ne devraient être exclus en application du par. 24(1) de la *Charte* que lorsque leur utilisation « rendrait le procès inéquitable ou minerait autrement l'intégrité du système de justice » : *R. c. Bjelland*, 2009 CSC 38, [2009] 2 R.C.S. 651, par. 3. « [D]ans la plupart des cas de communication tardive ou insuffisante, l'analyse fondée sur le par. 24(1) doit être centrée sur la réparation du préjudice causé à l'accusé » et « la sauvegarde de l'intégrité du système de justice » : *ibid.*, par. 26. Puisque l'exclusion d'éléments de preuve entrave la fonction de recherche de la vérité du procès, il ne faut y avoir recours que si les réparations moins drastiques ne conviennent pas pour atteindre ces deux objectifs : *ibid.*, par. 24.

[96] Thus, the question here is whether the exclusion of the summaries is necessary to remedy the prejudice to Mr. Harkat's ability to know and meet the case against him, or to safeguard the integrity of the justice system. In my view, it is not.

[96] Ainsi, la question à trancher en l'espèce est celle de savoir si l'exclusion des résumés est nécessaire pour remédier à l'atteinte à la capacité de M. Harkat de connaître la preuve qui pèse contre lui et d'y répondre ou pour sauvegarder l'intégrité du système de justice. À mon avis, ce n'est pas le cas.

[97] The disclosure of the summaries in an abridged version to Mr. Harkat and in an unredacted form to his special advocates was sufficient to prevent significant prejudice to Mr. Harkat's ability to know and meet the case against him. It is true, as the Federal Court of Appeal noted, that the destruction of the originals makes it impossible to ascertain with complete certainty whether the summaries contain errors or inaccuracies: para. 133. "An assessment of prejudice is problematic where, as in this case, the relevant information has been irretrievably lost": *R. v. Bero* (2000), 137 O.A.C. 336, at para. 49. However, the impact of the loss of evidence on trial fairness must be considered "in the context of the rest of the evidence and the position taken by the defence": *R. v. J.G.B.* (2001), 139 O.A.C. 341, at para. 38.

[97] La communication d'une version caviardée des résumés à M. Harkat et d'une version intégrale à ses avocats spéciaux était suffisante pour empêcher qu'il soit porté atteinte de manière importante à la capacité de M. Harkat de connaître la preuve qui pèse contre lui et d'y répondre. Certes, comme l'a souligné la Cour d'appel fédérale, la destruction des originaux empêche de vérifier avec une certitude absolue si les résumés contiennent des erreurs ou des inexactitudes : par. 133. [TRADUCTION] « L'évaluation du préjudice pose problème lorsque, comme en l'espèce, les renseignements pertinents sont irrémédiablement perdus » : *R. c. Bero* (2000), 137 O.A.C. 336, par. 49. Cependant, l'incidence de la perte d'éléments de preuve sur l'équité du procès doit être examinée [TRADUCTION] « dans le contexte de l'ensemble de la preuve et de la position adoptée par la défense » : *R. c. J.G.B.* (2001), 139 O.A.C. 341, par. 38.

[98] The destruction of the original operational materials did not significantly prejudice Mr. Harkat's ability to know and meet the case against him. As Noël J. noted, reliable summaries of the original materials pertaining to the intercepted conversations were disclosed to Mr. Harkat. Mr. Harkat's position was to deny the very occurrence of most of those conversations rather than to challenge their specifics. And the content of the summaries is corroborated by the overall narrative of Mr. Harkat's life which emerged during the proceedings: 2010 FC 1243, at paras. 66-67.

[98] Or, en l'espèce, la destruction des documents opérationnels originaux n'a pas porté atteinte de manière importante à la capacité de M. Harkat de connaître la preuve qui pèse contre lui et d'y répondre. Comme l'a fait remarquer le juge Noël, des résumés fiables des documents originaux relatifs aux conversations interceptées ont été communiqués à M. Harkat. Ce dernier a néanmoins choisi de nier l'existence même de la plupart de ces conversations plutôt que d'en contester les éléments précis. En outre, le contenu des résumés a été corroboré par le récit d'ensemble de la vie de M. Harkat telle qu'elle a été décrite lors des audiences : 2010 CF 1243, par. 66-67.

[99] Moreover, I am satisfied that the admission of the summaries does not undermine the integrity of the justice system. While the destruction of CSIS operational materials was a serious breach of the duty to preserve evidence, it was not carried out for the purpose of deliberately defeating the Minister's

[99] En outre, je suis convaincue que l'admission en preuve des résumés ne mine pas l'intégrité du système de justice. Même si la destruction des documents opérationnels du SCRS a constitué une violation grave de l'obligation de conserver les éléments de preuve, elle n'a pas été menée pour

obligation to disclose. It must also be recognized that, prior to this Court's holding in *Charkaoui II*, the existence and scope of CSIS's legal obligation to preserve operational materials had not been definitively settled by the courts. It cannot be said that CSIS's application of policy OPS-217 evidenced a systematic disregard for the law. Since the admission of the summaries would neither deny procedural fairness to Mr. Harkat nor undermine the integrity of the justice system, I conclude that Noël J. made no reviewable errors in refusing to exclude the impugned summaries of intercepted conversations.

délibérément soustraire le ministre à son obligation de communiquer la preuve. Il faut aussi admettre que, avant que la Cour ne se prononce dans *Charkaoui II*, la question de l'existence et de la portée de l'obligation légale du SCRS de conserver ses documents opérationnels n'avait pas été définitivement tranchée par les tribunaux. On ne peut prétendre que l'application de la politique OPS-217 par le SCRS met en évidence un mépris systématique de la loi. Puisque l'admission en preuve des résumés n'a ni privé M. Harkat de l'équité procédurale ni miné l'intégrité du système de justice, je conclus que le juge Noël n'a commis aucune erreur susceptible de révision en refusant d'exclure les résumés de conversations interceptées dont l'admissibilité a été contestée.

D. *Did the Ministers Breach Their Duties of Candour and Utmost Good Faith?*

D. *Les ministres ont-ils manqué à leurs obligations de franchise et de bonne foi la plus absolue?*

[100] The special advocates argue that duties of candour and utmost good faith required the ministers to make extensive inquiries of foreign intelligence agencies for information and evidence regarding several alleged terrorists with whom they claim that Mr. Harkat had associated. They contend that the ministers failed to discharge these duties. The courts below found that the ministers made reasonable efforts to obtain information sought by the special advocates.

[100] Les avocats spéciaux ont soutenu que leurs obligations de franchise et de bonne foi la plus absolue exigent des ministres qu'ils demandent aux organismes étrangers de renseignement de leur fournir l'ensemble des renseignements et des éléments de preuve relatifs à plusieurs présumés terroristes avec qui, selon eux, M. Harkat a été associé. Ils font valoir que les ministres ne se sont pas acquittés de ces obligations. Pour leur part, les tribunaux d'instances inférieures ont conclu que les ministres avaient fourni des efforts raisonnables pour obtenir les renseignements demandés par les avocats spéciaux.

[101] In *Ruby*, this Court recognized that duties of candour and utmost good faith apply when a party relies upon evidence in *ex parte* proceedings: "The evidence presented must be complete and thorough and no relevant information adverse to the interest of that party may be withheld" (para. 27). The Federal Court added, in *Almrei (Re)*, 2009 FC 1263, [2011] 1 F.C.R. 163, at para. 500, that "[t]he duties of utmost good faith and candour imply that the party relying upon the presentation of *ex parte* evidence will conduct a thorough review of the information in its possession and make representations based on all of the information including that which is unfavourable to their case."

[101] Dans *Ruby*, la Cour a reconnu que les obligations de franchise et de bonne foi la plus absolue s'appliquent lorsqu'une partie se fonde sur des éléments de preuve durant des procédures *ex parte* : « Elle doit offrir une preuve complète et détaillée, et n'omettre aucune donnée pertinente qui soit défavorable à son intérêt » (par. 27). La Cour fédérale a ajouté, dans *Almrei (Re)*, 2009 CF 1263, [2011] 1 R.C.F. 163, par. 500, que « [l]es obligations de bonne foi la plus absolue et de franchise impliquent que la partie s'appuyant sur une preuve *ex parte* effectuera un examen approfondi des renseignements en sa possession et présentera des observations fondées sur tous les renseignements, y compris ceux qui ne sont pas favorables à sa thèse. »

[102] The duties of candour and utmost good faith require an ongoing effort to update, throughout the proceedings, the information and evidence regarding the named person: see, for example, *Almrei*, 2009 FC 1263, at para. 500. The special advocates argue that, pursuant to these duties, the ministers must send detailed requests to foreign intelligence agencies. In their view, those requests must explain the context of security certificate hearings, the purposes for which the information will be used, and the consequences for the named person if the information is not provided.

[102] Les obligations de franchise et de bonne foi la plus absolue supposent que la partie qui y est tenue fasse des efforts constants pour mettre à jour les renseignements et la preuve relatifs à la personne visée et ce, tout au long des procédures : voir, à titre d'exemple, *Almrei*, 2009 CF 1263, par. 500. Les avocats spéciaux soutiennent que, compte tenu de ces obligations, les ministres doivent faire parvenir des demandes détaillées aux organismes étrangers de renseignement. À leur avis, ces demandes doivent préciser le contexte des audiences sur les certificats de sécurité, les fins auxquelles les renseignements seront utilisés de même que les conséquences pour la personne visée si ces derniers ne sont pas fournis.

[103] The position advocated by the special advocates is tantamount to requiring the ministers to conduct an investigation under the instructions of the special advocates. The ministers have no general obligation to provide disclosure of evidence or information that is beyond their control: *R. v. Chaplin*, [1995] 1 S.C.R. 727, at para. 21; *R. v. Stinchcombe*, [1995] 1 S.C.R. 754, at para. 2. With respect to evidence and information held by foreign intelligence agencies, the ministers' duty is to make reasonable efforts to obtain updates and provide disclosure. What constitutes reasonable efforts will turn on the facts of each case. In the present appeal, I agree with Noël J. that reasonable efforts were made by the ministers: see 2010 FC 1243, Annex "A", at paras. 6-7. The ministers sent letters of request to the relevant foreign intelligence agencies. The outcome of those requests may not have been satisfactory to the special advocates, but this fact alone is not enough to conclude that the efforts made by the ministers were insufficient.

[103] La position que préconisent les avocats spéciaux revient à demander aux ministres de mener une enquête suivant leurs directives. Or, les ministres n'ont aucune obligation générale de communiquer des éléments de preuve ou des renseignements dont ils n'ont pas le contrôle : *R. c. Chaplin*, [1995] 1 R.C.S. 727, par. 21; *R. c. Stinchcombe*, [1995] 1 R.C.S. 754, par. 2. Il leur incombe de faire des efforts raisonnables pour obtenir des mises à jour quant aux éléments de preuve et aux renseignements détenus par les organismes étrangers de renseignement et de les communiquer. Ce qui équivaut à des efforts raisonnables dépendra des faits de chaque cas. Dans le présent pourvoi, je suis d'accord avec le juge Noël qui a estimé que les ministres avaient fait des efforts raisonnables : voir 2010 CF 1243, annexe « A », par. 6-7. Ils ont expédié des demandes écrites, par courrier, aux organismes étrangers de renseignement, à qui il était pertinent de s'adresser. La réponse à ces demandes a bien pu ne pas satisfaire les avocats spéciaux, mais ce fait, en soi, ne suffit pas à conclure que les efforts fournis par les ministres étaient insuffisants.

E. *Were the Proceedings Against Mr. Harkat Fair?*

E. *Les procédures menées contre M. Harkat ont-elles été équitables?*

[104] The special advocates ask this Court to find that, even if the statutory scheme is constitutional in the abstract, Mr. Harkat was not afforded a fair process in the case at hand and should be granted a stay of proceedings. They contend that they were

[104] Les avocats spéciaux demandent à la Cour de conclure que, même si le régime légal est constitutionnel dans l'abstrait, M. Harkat n'a pas eu droit à un processus équitable en l'espèce et devrait obtenir un arrêt des procédures. Ils prétendent

not given sufficient opportunities to test the reliability and accuracy of the summaries of intercepted conversations and the information provided by foreign intelligence agencies, nor to test the credibility of the human sources.

[105] I would not grant a stay of proceedings. As discussed above, Noël J. did not err in admitting the summaries of intercepted conversations or in refusing to allow the cross-examination of human sources. The special advocates also fail to demonstrate any reviewable errors in his conclusions that the foreign intelligence he admitted was reliable and appropriate, or in the probative value that he accorded to that evidence.

[106] A stay of proceedings is a remedy of last resort, to be granted only in the clearest of cases: *R. v. O'Connor*, [1995] 4 S.C.R. 411, at para. 82; *La*, at para. 23; *Charkaoui II*, at para. 76; *R. v. Babos*, 2014 SCC 16, [2014] 1 S.C.R. 309, at para. 31. The special advocates have failed to demonstrate that Mr. Harkat's security certificate proceedings were an unfair process or that state conduct undermined the integrity of the judicial system. Mr. Harkat is not entitled to a stay of proceedings.

F. *Did the Designated Judge Err in Concluding That the Security Certificate Was Reasonable?*

[107] Having concluded that Mr. Harkat received a fair process, the only remaining issue is whether Noël J. committed any reviewable errors in concluding that the security certificate referred to him by the ministers was reasonable. Mr. Harkat raises a single argument: that the trial judge erred in his weighing of the evidence.

[108] The designated judge's weighing of the factual evidence on the record is entitled to appellate deference and should only be interfered

qu'ils n'ont pas eu suffisamment l'occasion de mettre en doute la fiabilité et l'exactitude des résumés des conversations interceptées et des renseignements fournis par les organismes étrangers de renseignement de même que la crédibilité des sources humaines.

[105] Je suis d'avis de ne pas accorder un arrêt des procédures. Comme je l'ai mentionné précédemment, le juge Noël n'a pas commis d'erreur en admettant en preuve les résumés des conversations interceptées ou en refusant de permettre le contre-interrogatoire des sources humaines. En outre, les avocats spéciaux n'ont pas réussi à établir l'existence d'erreurs susceptibles de révision dans ses conclusions selon lesquelles les renseignements de sécurité provenant de l'étranger qu'il a admis en preuve étaient dignes de foi et utiles, ou en ce qui a trait à la valeur probante qu'il a attribuée à ces éléments de preuve.

[106] L'arrêt des procédures est une réparation de dernier recours, à n'accorder que dans les cas les plus manifestes : *R. c. O'Connor*, [1995] 4 R.C.S. 411, par. 82; *La*, par. 23; *Charkaoui II*, par. 76; *R. c. Babos*, 2014 CSC 16, [2014] 1 R.C.S. 309, par. 31. Les avocats spéciaux n'ont pas réussi à démontrer que les procédures relatives au certificat de sécurité visant M. Harkat ont été inéquitables ou que la conduite de l'État a miné l'intégrité du système de justice. M. Harkat n'a pas droit à l'arrêt des procédures.

F. *Le juge désigné a-t-il commis une erreur en concluant que le certificat de sécurité était raisonnable?*

[107] Après avoir conclu que M. Harkat a fait l'objet d'un processus équitable, il ne reste qu'à déterminer si le juge Noël a commis des erreurs susceptibles de révision en concluant que le certificat de sécurité qui a été déposé par les ministres était raisonnable. M. Harkat fait valoir un seul argument : soit que le juge de première instance a mal soupesé la preuve.

[108] Les tribunaux d'appel doivent faire preuve de déférence lorsqu'ils sont appelés à se prononcer sur la mise en balance de la preuve factuelle

with if he committed a palpable and overriding error: *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235. Mr. Harkat identifies only one specific instance where the judge, in his view, committed a palpable and overriding error. He contends that Noël J. erred in finding that an individual named Ibn Khattab facilitated terrorist activities, since a judge in another security certificate case found that Ibn Khattab could not be characterized as engaging in or facilitating terrorism: see *Almrei*, 2009 FC 1263. I cannot accept that submission. In the *Almrei* case, the designated judge was careful to qualify his findings on Ibn Khattab as limited to the facts and the record before him. Indeed, he stated that "[t]he weight of the evidence before me in this case favours a finding that he [i.e. Ibn Khattab] was not a terrorist in his own right or a terrorist patron but I accept that there are reasonable grounds to believe the contrary": para. 457 (emphasis added).

[109] Noël J. was entitled to make his own assessment of whether Ibn Khattab was involved in terrorist activities, based on evidence that he found to be reliable and appropriate. I would not interfere with his assessment. Nor do I find any palpable and overriding error in Noël J.'s weighing of the evidence or in his assessment of Mr. Harkat's credibility, both of which in his view provided reasonable grounds to establish Mr. Harkat's inadmissibility.

IV. Conclusion

[110] The *IRPA* scheme does not provide a perfect process. However, it meets the requirements of procedural fairness that are guaranteed by s. 7 of the *Charter*. The discretion granted to designated judges is the crucial ingredient that allows the proceedings to remain fair from beginning to end. Designated judges must ensure that the named person receives sufficient disclosure of the information and evidence to be able to give meaningful instructions to his public counsel and meaningful guidance to his

par le juge désigné et n'intervenir à cet égard que si ce dernier a commis une erreur manifeste et dominante : *Housen c. Nikolaisen*, 2002 CSC 33, [2002] 2 R.C.S. 235. Selon les prétentions de M. Harkat, le juge aurait commis une seule erreur de ce type, soit lorsqu'il a conclu qu'un individu nommé Ibn Khattab avait facilité des activités terroristes. Cela serait erroné, selon lui, parce qu'un juge qui s'est prononcé dans une autre cause relative à un certificat de sécurité a conclu qu'Ibn Khattab n'avait pas participé à des activités terroristes ou n'en avait pas facilitées : voir *Almrei*, 2009 CF 1263. Je ne peux pas accepter cet argument. Dans la cause *Almrei*, le juge désigné a pris soin de préciser que ses conclusions relatives à Ibn Khattab étaient fondées exclusivement sur les faits et le dossier portés à sa connaissance. En effet, il a mentionné que « [l]a preuve dont je dispose en l'espèce me porte à conclure qu'il [c.-à-d. Ibn Khattab] n'était pas lui-même un terroriste ou un parrain du terrorisme, mais je reconnais qu'il y a des motifs raisonnables de croire le contraire » : par. 457 (je souligne).

[109] Le juge Noël avait le pouvoir de faire sa propre évaluation quant à l'implication d'Ibn Khattab dans des activités terroristes, en se fondant sur les éléments de preuve qu'il a jugé dignes de foi et utiles. Je suis donc d'avis de ne pas intervenir dans son évaluation. J'estime en outre que le juge Noël n'a commis aucune erreur manifeste et dominante lorsqu'il a soupesé les éléments de preuve ou évalué la crédibilité de M. Harkat, deux éléments qui, à ses yeux, donnaient des motifs raisonnables de conclure à l'interdiction de territoire de M. Harkat.

IV. Conclusion

[110] Le régime établi par la *LIPR* n'instaure pas un processus parfait, mais il répond aux exigences de l'équité procédurale garanties par l'art. 7 de la *Charte*. Le pouvoir discrétionnaire conféré au juge désigné est l'ingrédient primordial qui permet à l'instance de rester équitable du début à la fin. Le juge désigné doit veiller à ce que la personne visée soit suffisamment informée des renseignements et des éléments de preuve pour être en mesure de donner des instructions utiles à ses avocats publics

special advocates, must refuse to admit evidence that is unreliable or whose probative value is outweighed by its prejudicial effects, and must take a liberal approach towards authorizing communications by the special advocates. And in cases where the inherent limitations of the *IRPA* scheme create procedural unfairness, designated judges must exercise their discretion under s. 24(1) of the *Charter* to grant an appropriate remedy.

et des indications utiles à ses avocats spéciaux; il doit refuser d'admettre des éléments de preuve qui ne sont pas dignes de foi ou dont les effets préjudiciables l'emportent sur leur valeur probante; enfin, il doit faire preuve de souplesse lorsqu'il s'agit d'autoriser les communications faites par les avocats spéciaux. En outre, dans les cas où les limites inhérentes au régime établi par la *LIPR* sont à l'origine d'une iniquité procédurale, le juge désigné doit exercer le pouvoir discrétionnaire que lui confère le par. 24(1) de la *Charte* pour accorder une réparation appropriée.

[111] In the present case, Mr. Harkat benefited from a fair process. The designated judge did not err in refusing to exclude summaries of intercepted conversations and to allow the cross-examination of human sources. In addition, he did not commit a palpable and overriding error in concluding that the record provided reasonable grounds to find that Mr. Harkat was inadmissible on security grounds. Consequently, I would allow the appeal in part and dismiss the cross-appeal. Noël J.'s conclusion that the security certificate was reasonable is reinstated.

[111] En l'espèce, M. Harkat a bénéficié d'un processus équitable. Le juge désigné n'a pas commis d'erreur en refusant d'écarter les résumés de conversations interceptées et d'autoriser le contre-interrogatoire des sources humaines. Il n'a pas non plus commis d'erreur manifeste et dominante en concluant que le dossier fournissait des motifs raisonnables de juger que M. Harkat était interdit de territoire pour raison de sécurité. Par conséquent, je suis d'avis d'accueillir le pourvoi en partie et de rejeter le pourvoi incident. La conclusion du juge Noël selon laquelle le certificat de sécurité était raisonnable est rétablie.

[112] At the closed hearing, the ministers requested that they be allowed to review these reasons before they are released to Mr. Harkat and to the public. I would not allow this. The information contained within these reasons has already been publicly disclosed in the reasons of the courts below; it poses no risk to national security.

[112] Lors de l'audience à huis clos, les ministres ont demandé l'autorisation d'examiner les présents motifs avant qu'ils ne soient communiqués à M. Harkat et au public. Je ne leur en accorderais pas l'autorisation. Les renseignements qui figurent dans les présents motifs ont déjà été rendus publics dans les motifs des juridictions d'instances inférieures; ils ne posent aucun risque pour la sécurité nationale.

The following are the reasons delivered by

Version française des motifs rendus par

[113] ABELLA AND CROMWELL JJ. (dissenting in part on the appeal) — An individual who comes forward with information about a potential terrorist threat, often risks his or her life in doing so if his or her identity is disclosed. Offering the possibility of anonymity only if a court subsequently agrees to protect the source's identity, requires the source to choose between risk of personal harm if his identity is not protected, or risk of harm to the public if the information is not disclosed. That is the inevitable

[113] LES JUGES ABELLA ET CROMWELL (dissidents en partie quant au pourvoi) — La personne qui offre des renseignements au sujet d'une menace terroriste le fait souvent au péril de sa vie si son identité est dévoilée. Lui offrir la possibilité de garder l'anonymat uniquement si un tribunal accepte par la suite de protéger son identité, c'est l'obliger à choisir entre courir le risque de subir un préjudice personnel si son identité n'est pas protégée et risquer de mettre en danger la population en s'abstenant de

result of a case-by-case approach as suggested by the majority. In our view, with respect, this choice is not only an unacceptable one from the point of view of the public's safety, it is unnecessary.

[114] Like Noël J., in our view, CSIS informants who provide national security information based on a promise of confidentiality are entitled to the assurance that the confidentiality will be protected. This can only be guaranteed by a class privilege, as is done in criminal law cases. A case-by-case approach results in a source not knowing the likelihood the promise will be kept until a judge engages in a retrospective assessment as to whether the promise will be kept. This is hardly conducive to encouraging informants to risk their lives by coming forward to offer highly sensitive information in terrorism cases. While we otherwise agree with the reasons of the Chief Justice, therefore, we do not share her view of what protection national security sources are entitled to.

Analysis

[115] Informer privilege has been judicially recognized for more than two centuries and has a dual purpose: protection of a channel of information and the safety of those supplying it (Stanley Schiff, *Evidence in the Litigation Process* (4th ed. 1993), at pp. 1550-56). As Professor Schiff explains:

> The rationale of the privilege makes it available in all manner of proceedings, including those before commissions of enquiry and administrative tribunals. *The rationale also makes it available if the informant spoke to a public agency other than the police, so long as the agency has law enforcement authority.* . . . By the same token, the privilege is not available if the public official to whom the informer spoke has no law enforcement authority . . . . [Emphasis added; pp. 1551-52.]

divulguer les renseignements. Voilà le résultat que donne inévitablement l'approche au cas par cas proposée par les juges majoritaires. À notre avis, ce choix est non seulement inacceptable du point de vue de la sécurité publique, mais également inutile.

[114] À l'instar du juge Noël, nous estimons que les indicateurs du SCRS qui fournissent des renseignements relatifs à la sécurité nationale après avoir reçu une promesse d'anonymat ont droit à l'assurance que leur identité sera protégée. Seul un privilège générique peut offrir une telle garantie, comme c'est le cas dans le contexte des causes en matière criminelle. Avec une approche au cas par cas, la source ignore la probabilité que la promesse soit tenue jusqu'à ce qu'un juge procède à un examen rétrospectif pour déterminer si elle le sera. Cela ne concourt guère à encourager les indicateurs à risquer leur vie en offrant des renseignements hautement sensibles dans des causes relatives au terrorisme. En conséquence, bien que nous souscrivions par ailleurs aux motifs de la Juge en chef, nous ne partageons pas son avis sur la protection à laquelle ont droit les sources de renseignements touchant la sécurité nationale.

Analyse

[115] Le privilège relatif aux indicateurs est reconnu par la jurisprudence depuis plus de deux siècles et vise un double objectif : la protection d'un canal d'information, d'une part, et la sécurité de ceux qui fournissent les renseignements, d'autre part (Stanley Schiff, *Evidence in the Litigation Process* (4e éd. 1993), p. 1550-1556). Comme l'explique le professeur Schiff :

> [TRADUCTION] Compte tenu de la logique qui soustend le privilège, il peut être invoqué dans le cadre de tous les types de procédures, y compris celles qui se déroulent devant des commissions d'enquête et des tribunaux administratifs. *Toujours selon cette logique, un indicateur qui s'adresse à un organisme public autre que la police peut invoquer le privilège, à condition que l'organisme en question soit doté du pouvoir de faire appliquer la loi.* [. . .] Corollairement, si l'indicateur s'adresse à un fonctionnaire qui n'a pas ce pouvoir de faire appliquer la loi, l'indicateur ne peut pas ensuite invoquer le privilège . . . [Italique ajouté; p. 1551-1552.]

[116] It has therefore been applied in settings other than criminal prosecutions, including commissions of inquiry: *Bisaillon v. Keable*, [1983] 2 S.C.R. 60. Numerous decisions of the Federal Court have applied informer privilege to sources who provided confidential information to a parole board (see *Rice v. National Parole Board* (1985), 16 Admin. L.R. 157 (T.D.), at pp. 167-68; *Wilson v. National Parole Board* (1985), 10 Admin. L.R. 171 (T.D.), at p. 188; *Cadieux v. Director of Mountain Institution*, [1985] 1 F.C. 378 (T.D.), at pp. 397-98). It has also been applied to an informer of a securities regulator: *A. v. Drapeau*, 2012 NBCA 73, 393 N.B.R. (2d) 76.

[117] Wigmore refers to the informer privilege as one relating to

> the identity of persons supplying the government with information concerning the commission of crimes. . . .
>
> . . .
>
> . . . the principle is a large and flexible one. It applies wherever the situation is one where without this encouragement the citizens who have special information of a violation of law might be deterred otherwise from voluntarily reporting it to the appropriate official. [Emphasis deleted.]

(John Henry Wigmore, *Evidence in Trials at Common Law* (McNaughton rev. 1961), vol. 8, at pp. 761 and 767-68)

[118] This Court has repeatedly held that unlike Crown privilege or privileges based on Wigmore's four-part test, the police informer privilege does not permit a balancing of the benefits of protecting the privileged information against countervailing benefits: *Bisaillon*, at pp. 93-98. This recognizes that the danger to the safety of the informer and to the intelligence-gathering process is considered to be too great to permit the consideration of countervailing factors: *R. v. Leipert*, [1997] 1 S.C.R. 281, at para. 12; *Named Person v. Vancouver Sun*, [2007] 3

[116] Ce privilège a aussi été appliqué dans d'autres contextes que les poursuites criminelles, dont celui des commissions d'enquête : *Bisaillon c. Keable*, [1983] 2 R.C.S. 60. De nombreuses décisions de la Cour fédérale ont appliqué le privilège relatif aux indicateurs à des sources qui ont fourni des renseignements confidentiels à une commission des libérations conditionnelles (voir *Rice c. National Parole Board* (1985), 16 Admin. L.R. 157 (1re inst.), p. 167-168; *Wilson c. National Parole Board* (1985), 10 Admin. L.R. 171 (1re inst.), p. 188; *Cadieux c. Directeur de l'établissement Mountain*, [1985] 1 C.F. 378 (1re inst.), p. 397-398). Il a aussi été appliqué à un indicateur auprès d'une commission des valeurs mobilières : *A. c. Drapeau*, 2012 NBCA 73, 393 R.N.-B. (2e) 76.

[117] Le professeur Wigmore réfère au privilège de l'indicateur en disant qu'il s'agit d'un privilège qui concerne

> [TRADUCTION] l'identité de personnes qui fournissent des renseignements au gouvernement concernant la commission de crimes. . .
>
> . . .
>
> . . . le principe est large et souple. Il s'applique dès lors que, sans cet incitatif, les citoyens qui détiennent des renseignements particuliers concernant la violation d'une loi pourraient autrement être dissuadés de les révéler volontairement aux autorités concernées. [Italique omis.]

(John Henry Wigmore, *Evidence in Trials at Common Law* (McNaughton rév. 1961), vol. 8, p. 761 et 767-768)

[118] La Cour a conclu à plusieurs reprises que, contrairement au privilège de la Couronne ou aux privilèges qui découlent du test à quatre volets de Wigmore, le privilège relatif aux indicateurs de police ne saurait être assujetti à une mise en balance des avantages découlant de la protection des renseignements confidentiels, d'une part, et des avantages de leur divulgation, d'autre part : *Bisaillon*, p. 93-98. C'est là reconnaître que le danger qui pèse sur la sécurité de l'indicateur et sur le processus de collecte de renseignements est jugé

S.C.R. 253, at paras. 19-22. In *Bisaillon*, this Court stated:

This procedure, designed to implement Crown privilege, is pointless in the case of secrecy regarding a police informer. In this case, the law gives the Minister, and the Court after him, no power of weighing or evaluating various aspects of the public interest which are in conflict, since it has already resolved the conflict itself. It has decided once and for all, subject to the law being changed, that information regarding police informers' identity will be, because of its content, a *class of information which it is in the public interest to keep secret*, and that this interest will prevail over the need to ensure the highest possible standard of justice. [Emphasis added; pp. 97-98.]

[119] In *R. v. Basi*, [2009] 3 S.C.R. 389, at para. 44, this Court went so far as to conclude that allowing counsel to participate in an *in camera* hearing involving a police informant was impermissible, even if they undertook not to disclose any privileged information:

No one outside the circle of privilege may access information over which the privilege has been claimed until a judge has determined that the privilege does not exist or that an exception applies.

[120] The privilege for informers in the context of state officials investigating matters of national security is not a "new" privilege, but a well-established one. The Ontario Court of Appeal has recognized a common law CSIS source privilege: *R. v. Y. (N.)*, 2012 ONCA 745, 113 O.R. (3d) 347. This case involved the transfer of Shaikh, an informant, from CSIS to the RCMP. One issue before the court was whether the informant had at some point become a state agent for the purposes of entrapment and abuse of process analyses. The court accepted that Shaikh had informant status while working with CSIS: see paras. 12 and 120. The court's conclusion that Shaikh was not a state agent was premised in part on the fact that he had not intended to waive the confidentiality

trop important pour autoriser la prise en compte de facteurs opposés : *R. c. Leipert*, [1997] 1 R.C.S. 281, par. 12; *Personne désignée c. Vancouver Sun*, [2007] 3 R.C.S. 253, par. 19-22. Dans *Bisaillon*, la Cour a affirmé que :

Cette procédure propre à la mise en œuvre du privilège de la Couronne se trouve sans objet dans le cas du secret relatif à l'indicateur de police. Dans ce cas en effet, la loi ne laisse au ministre et au juge après lui aucun pouvoir d'appréciation ou d'évaluation des divers aspects de l'intérêt public qui entrent en conflit puisqu'elle a déjà elle-même tranché ce conflit. Elle a déjà décidé une fois pour toutes, et sous réserve d'un changement apporté à la loi, que les renseignements relatifs à l'identité des indicateurs de police forment, à cause de leur contenu, une *classe de renseignements qu'il est dans l'intérêt public de garder secrets* et que cet intérêt l'emporte sur la nécessité de rendre une justice plus parfaite. [Italique ajouté; p. 97-98.]

[119] Dans *R. c. Basi*, [2009] 3 R.C.S. 389, par. 44, la Cour est allée jusqu'à conclure qu'il ne serait pas acceptable d'autoriser des avocats à participer à une audience tenue à huis clos à laquelle prendrait part un indicateur de police, même s'ils s'engageaient à ne rien divulguer des renseignements protégés :

Nul en dehors du cercle du privilège ne peut accéder aux renseignements à l'égard desquels le privilège est revendiqué tant qu'un juge n'a pas déterminé que le privilège n'existe pas ou qu'une exception s'applique.

[120] Le privilège qui protège les indicateurs dans le contexte d'enquêtes menées par des représentants de l'État quant à des questions de sécurité nationale n'est pas un « nouveau » privilège; il s'agit en fait d'un privilège bien établi. La Cour d'appel de l'Ontario a reconnu l'existence d'un privilège de common law pour les sources du SCRS : *R. c. Y. (N.)*, 2012 ONCA 745, 113 O.R. (3d) 347. Dans cette affaire, il était question du transfert d'un indicateur, M. Shaikh, du SCRS à la GRC. La cour devait notamment décider si l'indicateur était devenu, à un moment donné, un agent de l'État pour les besoins de l'analyse de la provocation policière et de l'abus de procédure. Elle a reconnu que M. Shaikh bénéficiait du statut d'indicateur lorsqu'il travaillait pour le SCRS : voir les par. 12

protections associated with his informant status: paras. 123-25. The court defined a "confidential informant" as a "voluntary source of information to police or security authorities": para. 122 (emphasis added).

et 120. La conclusion de la cour selon laquelle M. Shaikh n'était pas un agent de l'État reposait en partie sur la prémisse qu'il n'avait pas voulu renoncer aux garanties d'anonymat associées à son statut d'indicateur : par. 123-125. La cour a défini [TRADUCTION] l'« informateur confidentiel » comme étant une « source volontaire de renseignements pour la police ou pour les services de sécurité » : par. 122 (nous soulignons).

[121] The common law's protection of informer privilege is based on the common sense recognition that engaging in a case-by-case balancing of interests would frustrate the rationale of informer privilege by discouraging the cooperation of informants. As the U.S. Supreme Court explained in a related context, leaving disclosure to individual judges would cause national security sources to "close up like a clam": *Central Intelligence Agency v. Sims*, 471 U.S. 159 (1985), at p. 175.

[121] La protection accordée par la common law au moyen du privilège de l'indicateur est fondée sur la reconnaissance, selon le gros bon sens, qu'une mise en balance des intérêts au cas par cas minerait la logique qui sous-tend l'existence de ce privilège en décourageant les indicateurs de coopérer. Comme l'a expliqué la Cour suprême des É.-U. dans un contexte de même nature, si les juges devaient décider de l'opportunité ou non de la divulgation de l'identité des sources, celles qui fournissent des informations relatives à la sécurité nationale [TRADUCTION] « se fermeraient comme une huître » : *Central Intelligence Agency c. Sims*, 471 U.S. 159 (1985), p. 175.

[122] This Court recognized the breadth of the privilege in *Solicitor General of Canada v. Royal Commission of Inquiry into the Confidentiality of Health Records in Ontario*, [1981] 2 S.C.R. 494. The issue was whether RCMP officers could be compelled to disclose to the Commission the identities of individuals who, based on an assurance of confidentiality, gave information to police officials. The Court concluded that the privilege prevented disclosure. The Court held that the immunity from disclosure is "general in scope", applying not only in criminal proceedings but also in civil proceedings, before commissions of inquiry and in "forensic investigations" generally (pp. 535-36). Writing for the majority, Martland J. emphasized that the rationale which supports the privilege applies with even more cogency in the national security context:

[122] Notre Cour a reconnu la portée du privilège dans *Solliciteur général du Canada c. Commission royale d'enquête sur la confidentialité des dossiers de santé en Ontario*, [1981] 2 R.C.S. 494. Il s'agissait de savoir si les agents de la GRC pouvaient être contraints de divulguer à la Commission l'identité des personnes de qui, après leur avoir donné une garantie de confidentialité, ils avaient obtenu des renseignements. La Cour a conclu que le privilège empêchait la divulgation. Elle a statué que l'immunité contre la divulgation est « de portée générale » et qu'elle s'applique non seulement dans le contexte d'instances criminelles, mais aussi en matière civile, devant les commissions d'enquête et lorsqu'il s'agit d'« examen judiciaire » en général (p. 535-536). Au nom des juges majoritaires, le juge Martland a souligné que le fondement qui sous-tend le privilège s'applique d'autant plus lorsqu'il est question de sécurité nationale :

A large number of the instances in which, in the present case, it was sought to obtain from the police the names of their informants concerned police investigation into potential violence against officers of the state, including heads of state. These investigations were admittedly proper police functions. *The rule of law which protects against the disclosure of informants in the police investigation of crime has even greater justification in relation to the protection of national security against violence and terrorism.* [Emphasis added; p. 537.]

[123] Before CSIS was created as an independent agency, the intelligence function it now carries out was performed by the RCMP Security Service: see Commission of Inquiry Concerning Certain Activities of the Royal Canadian Mounted Police (the "McDonald Commission"), First Report, *Security and Information* (1979), and Second Report, *Freedom and Security under the Law*, vols. 1 and 2 (1981). The McDonald Commission, which led to the creation of an independent intelligence agency in Canada, was of the view that informer privilege applied to RCMP officers performing intelligence work: see Second Report, vol. 2, at pp. 1162-63. It explained the importance of preserving informant confidentiality as follows:

Security and intelligence activities cannot be carried out effectively without the use of informants. Informants are the main source of information for security and intelligence agencies. Whether the informants are paid or voluntary they invariably provide the information on the basis that their identity will be kept secret and that every effort will be made to ensure that it remains so. Their reasons for wanting their identity to remain secret are myriad and include fear of physical retaliation, harassment or ostracism. Any uncertainty about the ability of agencies to keep sources confidential will result in a "drying up" of such sources.

(First Report, at p. 42)

[124] The mandate of the RCMP Security Service was set out in a cabinet directive of 1975 as being to "'discern, monitor, investigate, deter, prevent and

Dans bon nombre de cas où, en l'espèce, on a tenté d'obtenir de la police les noms de ses informateurs, il était question d'une enquête policière sur la possibilité de violence contre des fonctionnaires de l'État, y compris des chefs d'État. On reconnaît que ces enquêtes sont du ressort de la police. *Le principe de droit qui protège contre la divulgation de l'identité des personnes qui fournissent des renseignements dans le cadre d'une enquête policière sur le crime se justifie d'autant plus lorsqu'il s'agit de la protection de la sécurité nationale contre la violence et le terrorisme*. [Italique ajouté; p. 537.]

[123] Avant que le SCRS ne soit créé à titre d'organisme indépendant, la fonction en matière de renseignement dont il s'acquitte maintenant était assumée par le Service de sécurité de la GRC : voir la Commission d'enquête sur certaines activités de la Gendarmerie royale du Canada (la « Commission McDonald »), premier rapport, *Sécurité et Information* (1979), et deuxième rapport, *La liberté et la sécurité devant la loi*, vol. 1 et 2 (1981). Selon la Commission McDonald — qui a mené à la création d'un service de renseignement indépendant — le privilège relatif aux indicateurs s'appliquait aux agents de la GRC qui travaillaient dans le renseignement : voir le deuxième rapport, vol. 2, p. 1227-1228. Elle a expliqué comme suit l'importance de préserver l'anonymat des indicateurs :

Les activités liées à la sécurité et aux services de renseignements ne peuvent être menées à bien sans l'aide d'informateurs. Principale source d'information des services de sécurité et de renseignements, les informateurs, qu'ils soient rémunérés ou non, fournissent les renseignements à la condition que leur identité soit tenue secrète et que tout soit mis en œuvre pour qu'elle le demeure. Les raisons qui les poussent à formuler une telle exigence sont innombrables et vont de la crainte des sévices à la peur de se voir harceler et ostraciser. Ces sources de renseignements se tariraient bientôt si les informateurs venaient à douter de l'aptitude des services en question à taire leur identité.

(Premier rapport, p. 42)

[124] Selon le libellé de la directive du Cabinet de 1975 qui en a énoncé le mandat, le Service de sécurité de la GRC était responsable de « décel[er],

counter' persons engaging in subversive or other activity inimical to national security": Parliamentary Research Branch, "The Canadian Security Intelligence Service" (2000), Current Issue Review 84-27E, at p. 4. Those functions are now found in s. 12 of the *Canadian Security Intelligence Service Act*, R.S.C. 1985, c. C-23, which states that "[t]he Service shall collect, by investigation or otherwise, to the extent that it is strictly necessary, and analyse and retain information and intelligence respecting activities that may on reasonable grounds be suspected of constituting threats to the security of Canada and, in relation thereto, shall report to and advise the Government of Canada."

surveill[er], décourage[r], préven[ir] et contrecar-r[er] les activités de personnes qui se livrent à des activités subversives ou préjudiciables à la sécurité nationale » : Direction de la recherche parlementaire, « Le Service canadien du renseignement de sécurité » (2000), Bulletin d'actualité 84-27F, p. 5. Ces fonctions figurent maintenant à l'art. 12 de la *Loi sur le Service canadien du renseignement de sécurité*, L.R.C. 1985, ch. C-23, qui prévoit que « [l]e Service recueille, au moyen d'enquêtes ou autrement, dans la mesure strictement nécessaire, et analyse et conserve les informations et renseignements sur les activités dont il existe des motifs raisonnables de soupçonner qu'elles constituent des menaces envers la sécurité du Canada; il en fait rapport au gouvernement du Canada et le conseille à cet égard. »

[125] As this Court pointed out in *Charkaoui v. Canada (Citizenship and Immigration)*, [2008] 2 S.C.R. 326 ("*Charkaoui II*"), "the activities of the RCMP and those of CSIS have in some respects been converging": para. 26. There is no doubt that informer privilege applied to RCMP Security Service informants. While it is true that the functions of CSIS and the RCMP are distinct, the rationale for the informer privilege applies equally to the work of both. The transfer of functions from the RCMP Security Service to CSIS should have no bearing on whether the privilege continues to exist. The investigatory and monitoring services CSIS performs are those previously carried out by the RCMP. There has been a statutory transfer, but not a functional one.

[125] Comme la Cour l'a souligné dans *Charkaoui c. Canada (Citoyenneté et Immigration)*, [2008] 2 R.C.S. 326 (« *Charkaoui II* »), « des convergences se développent entre les activités de la GRC et celles du SCRS » : par. 26. Il ne fait aucun doute que le privilège relatif aux indicateurs s'appliquait aux indicateurs du Service de sécurité de la GRC. S'il est vrai que les fonctions du SCRS et celles de la GRC sont distinctes, le fondement de l'existence du privilège relatif aux indicateurs s'applique tout autant au travail de l'un qu'à celui de l'autre. Le transfert des fonctions du Service de sécurité de la GRC au SCRS ne devrait avoir aucune incidence sur la poursuite ou non de l'existence du privilège. Les fonctions d'enquête et de surveillance dont s'acquitte le SCRS sont celles dont la GRC s'occupait antérieurement. Il y a bien eu un transfert légal de responsabilité, mais pas de changement quant aux fonctions à assumer.

[126] The erection of an artificial boundary between them could lead to absurd results. A source who began supplying information to the police regarding a suspected terrorist threat and then later provided information to CSIS would be entitled to the privilege with respect to the former but not the latter interaction, even if the same assurances of privilege had been given by both agencies. This is

[126] L'édification d'une frontière artificielle entre les deux organismes pourrait mener à des résultats absurdes. Une source qui a commencé à fournir des renseignements à la police relativement à des soupçons quant à une menace terroriste et qui aurait ensuite fourni d'autres renseignements au SCRS serait protégée par le privilège relativement à la première phase de ses échanges avec les autorités, mais

not an abstract problem, given the frequent cooperation between the two agencies.

pas quant à la seconde, et ce, en dépit du fait que les mêmes garanties de privilège lui auraient été données par les deux organismes. Compte tenu de la coopération fréquente entre les deux organismes, il ne s'agit pas d'un problème théorique.

[127] Two recent cases illustrate the way sources are shared in national security investigations: *R. v. Ahmad*, 2009 CanLII 84776 (Ont. S.C.J.), at paras. 31-34; *Y. (N.)*, at para. 120. *Ahmad* involved information obtained by CSIS and shared with the RCMP, which led to criminal prosecutions for terrorism offences. *Y. (N.)* involved the transfer of a human source from CSIS to the RCMP. In *Ahmad*, Dawson J. made the following observation about the nature of the relationship between CSIS and the RCMP:

> . . . situations will arise where some sharing of information must occur if each organization is to fulfill its mandate. For example, where CSIS comes into possession of information of a real threat to national security, or learns of serious criminal activity, it must notify the RCMP. As Mr. Brooks indicated at para. 15 of his affidavit, CSIS will normally be engaged in the investigation of threats to the security of Canada before the police would have sufficient evidence to commence an investigation on their own. He also points out in his evidence that intelligence gathering investigations are very open ended and wide ranging, with the focus on looking for trends and relationships to help predict emerging or future threats. Such investigations are not oriented towards prosecution. It is the function of the police to react to any information provided by CSIS and to determine how best to proceed from a police perspective. [para. 34]

[127] Deux affaires récentes illustrent comment les sources sont partagées dans le contexte des enquêtes sur la sécurité nationale : *R. c. Ahmad*, 2009 CanLII 84776 (C.S.J. Ont.), par. 31-34, et *Y. (N.)*, par. 120. Dans *Ahmad*, des renseignements obtenus par le SCRS avaient été partagés avec la GRC, ce qui a mené à des poursuites criminelles pour des infractions relatives au terrorisme. Dans *Y. (N.)*, une source humaine du SCRS a été transférée à la GRC. Dans *Ahmad*, le juge Dawson a formulé la remarque suivante quant à la nature de la relation entre le SCRS et la GRC :

> [TRADUCTION] . . . il survient des situations qui nécessitent un partage de renseignements pour que chaque organisation s'acquitte de son mandat. Par exemple, lorsque le SCRS obtient des renseignements selon lesquels il existe une menace réelle à la sécurité nationale, ou lorsqu'il est informé d'une activité criminelle grave, il doit en aviser la GRC. Comme l'a indiqué M. Brooks au par. 15 de son affidavit, le SCRS enquête sur les menaces à la sécurité du Canada avant que la police n'ait suffisamment d'éléments de preuve pour commencer sa propre enquête. Il souligne aussi dans son témoignage écrit que les enquêtes menées pour colliger du renseignement ne visent pas un but précis et ratissent large. En outre, elles mettent l'accent sur la recherche de tendances et de relations afin d'aider à prévoir la survenance de menaces ou les menaces futures. Ces enquêtes ne visent pas le dépôt de poursuite. Il revient à la police de réagir à tout renseignement que lui fournit le SCRS et de déterminer comment agir au mieux du point de vue policier. [par. 34]

[128] To argue that it is unjust for the ministers to claim privilege over the identity of CSIS human sources while continuing to rely on the information obtained from them, is to forget the significant distinction between whether the privilege exists and whether the information provided by the human source can be used to establish the reasonableness of the certificate. Where the information has been redacted and anonymized so that the identity of

[128] Prétendre qu'il est injuste que les ministres revendiquent un privilège relativement à l'identité des sources humaines du SCRS tout en continuant à se fonder sur les renseignements que fournissent ces dernières revient à oublier l'importante différence entre la question de savoir si le privilège existe et celle de savoir si les renseignements fournis par la source humaine peuvent être utilisés pour faire la preuve du caractère raisonnable du certificat. Si

the human source cannot be ascertained, there is no reason that it must always be eliminated from consideration by the designated judge. There is an obvious analogy to the well-settled law that permits confidential informant information to be considered, for example, in an information to obtain a search warrant and in a wiretap authorization: *R. v. Debot*, [1989] 2 S.C.R. 1140; *R. v. Garofoli*, [1990] 2 S.C.R. 1421, at p. 1456. In these contexts, the law has developed some protections, but under certain conditions it nonetheless allows the confidential source material to be considered without the cross-examination of the source.

[129] Noël J. found that "the recruitment of human sources would be harmed if the guarantees of confidentiality given by the Service were not upheld by this Court": 2009 FC 204, at para. 28. He set out some possible safeguards and lines of inquiry that could help ensure that anonymous source material is sufficiently reliable that it could fairly be considered as part of the review of the reasonableness of the certificate: paras. 64-67. In addition, if a reviewing judge were of the view that consideration of confidential source material would result in a review hearing that does not meet the *Charkaoui II* standard, the judge could exclude that information from consideration.

[130] There may also be limited circumstances in which the special advocates could be granted access to the privileged information, namely where it is necessary so that the validity of the claim of privilege can be tested. In a criminal trial, the trial judge can look at privileged information where doing so is necessary to establish that the privilege is properly claimed. In *Vancouver Sun* and in *Basi*, at para. 57, it was held that in certain circumstances an *amicus curiae* may be considered to be part of the "circle of privilege".

l'information a été caviardée ou anonymisée de manière à ce que l'identité de la source humaine ne puisse pas être établie, rien ne justifie qu'elle soit systématiquement soustraite à l'examen du juge désigné. Il existe une analogie manifeste entre ce principe et le droit bien établi qui permet de prendre en compte les renseignements confidentiels fournis par un indicateur, par exemple, pour obtenir un mandat de perquisition et l'autorisation de faire de l'écoute électronique : *R. c. Debot*, [1989] 2 R.C.S. 1140; *R. c. Garofoli*, [1990] 2 R.C.S. 1421, p. 1456. Le droit a créé des mesures de protection adaptées à ce type de contextes, mais, sous réserve de certaines conditions, il autorise malgré tout la prise en compte de renseignements fournis par une source confidentielle sans que cette dernière puisse être contre-interrogée.

[129] Le juge Noël a conclu que « le recrutement de sources humaines serait compromis si notre Cour ne respectait pas les garanties de confidentialité données par le Service » : 2009 CF 204, par. 28. Il a énuméré certaines mesures de protection potentielles ainsi que certaines questions qui pourraient aider à assurer que les renseignements obtenus de sources confidentielles sont suffisamment dignes de foi pour qu'ils puissent équitablement être pris en compte dans l'examen du caractère raisonnable du certificat : par. 64-67. En outre, si un juge chargé d'un contrôle judiciaire était d'avis que la prise en compte de renseignements fournis par une source confidentielle entraînerait la tenue d'une audience en révision qui ne satisfaisait pas à la norme établie par *Charkaoui II*, il pourrait les écarter et ne pas en tenir compte.

[130] Il pourrait aussi y avoir un certain nombre de circonstances limitées dans lesquelles les avocats spéciaux pourraient avoir accès aux renseignements protégés, notamment lorsque cela s'avère nécessaire pour que la validité de la revendication du privilège soit testée. Durant un procès en matière criminelle, le juge peut prendre connaissance de renseignements protégés lorsque cela s'avère nécessaire pour établir le bien-fondé de la revendication de privilège. Dans *Vancouver Sun* et dans *Basi*, par. 57, la Cour a affirmé que, dans certaines circonstances, un *amicus curiae* peut être désigné pour être membre du « cercle du privilège ».

[131] The special advocates may play a similar role in closed proceedings. While this Court held in *Basi* that it was impermissible for the accused's counsel to view privileged information based on the need to preserve the integrity of the solicitor-client relationship, different considerations apply to special advocates. The special advocate is not in a solicitor-client relationship. Furthermore, he or she is subject to heightened security clearance requirements which reduce the risk that disclosure may pose. As a result, if the designated judge believes that submissions by special advocates could assist in determining whether a privilege claim is valid, they may be entitled to view the privileged information. Submissions based on information identifying the human source should be limited to the validity of the privilege claim and not extend to the reliability of the information.

[131] Les avocats spéciaux peuvent jouer un rôle similaire lors d'audiences à huis clos. S'il est vrai que la Cour a conclu dans *Basi* qu'il était interdit pour l'avocat de l'accusé de prendre connaissance des renseignements protégés sur le fondement du besoin de préserver l'intégrité de la relation avocat-client, ce sont d'autres considérations qui prévalent en ce qui a trait aux avocats spéciaux. Ces derniers n'agissent pas dans le cadre d'une relation avocat-client. De plus, ils doivent satisfaire à des exigences accrues en matière d'habilitation de sécurité, ce qui réduit le risque que peut poser la communication des renseignements. En conséquence, si le juge désigné estime que les avocats spéciaux pourraient faire des observations utiles pour juger du bien-fondé de la revendication de privilège, ceux-ci pourraient être autorisés à prendre connaissance des renseignements protégés. Les observations fondées sur des renseignements qui identifient une source humaine devraient porter exclusivement sur la question du bien-fondé de la revendication de privilège et ne pas traiter de la fiabilité des renseignements en question.

[132] Nor do we think the privilege is abrogated by statute. The Federal Court of Appeal was of the view that when Parliament enacted the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 ("*IRPA*"), it comprehensively legislated the disclosure obligations of the Minister in the security certificate context such that there was no room for importing common law privileges to qualify the disclosure obligations of the Minister. Since ss. 77(2) and 83(1)(*c*) to (*e*) of *IRPA* specify that the Minister and judge may not disclose information which is injurious to national security or which puts the safety of any person at risk, recognizing a class privilege would mean that disclosure could be withheld in a case where neither of these two factors was present.

[132] Nous ne croyons pas non plus que le privilège a été abrogé par la loi. La Cour d'appel fédérale a exprimé l'opinion que lorsqu'il a adopté la *Loi sur l'immigration et la protection des réfugiés*, L.C. 2001, ch. 27 (« *LIPR* »), le Parlement a légiféré sur toutes les facettes des obligations qui incombent au ministre en matière de divulgation dans le contexte des certificats de sécurité, de sorte qu'il n'y aurait plus lieu d'importer des privilèges de common law pour circonscrire les obligations du ministre en matière de divulgation. Puisque le par. 77(2) et les al. 83(1)*c*) à *e*) de la *LIPR* précisent que le ministre et le juge ne peuvent divulguer de renseignements si cela est susceptible de porter atteinte à la sécurité nationale ou à la sécurité d'autrui, la reconnaissance d'un privilège générique signifierait qu'il pourrait ne pas y avoir de divulgation, même en l'absence de ces deux facteurs.

[133] We are unpersuaded that the common law has been ousted by these provisions. In order to abrogate a common law privilege, Parliament must clearly express an intention to do so: see *Canada (Privacy Commissioner) v. Blood Tribe Department*

[133] Nous ne sommes pas convaincus que la common law a été évincée par ces dispositions. Pour abroger un privilège reconnu par la common law, le législateur doit exprimer clairement son intention de le faire : voir *Canada (Commissaire à la protection*

of Health, [2008] 2 S.C.R. 574, at para. 26. *IRPA* makes no reference to informer privilege and, as discussed later in these reasons, does not evince a clear intention to deprive CSIS human sources of its benefit.

de la vie privée) c. Blood Tribe Department of Health, [2008] 2 R.C.S. 574, par. 26. La *LIPR* ne fait pas référence au privilège relatif aux indicateurs et, comme nous le verrons ultérieurement dans les présents motifs, elle n'exprime pas une intention claire de priver les sources humaines du SCRS des avantages qu'il procure.

[134] *IRPA* also fails to distinguish between what disclosure means in the context of ss. 77(2) and 83(1)(*c*) to (*e*) and what it means in the context of disclosing privileged information to the special advocates. Section 77(2) of *IRPA* provides that the Minister must file with the court the information and other evidence on which the security certificate is based. On the other hand, disclosure of information subject to informer privilege raises different considerations. This information will generally not have been provided to the judge under s. 77(2) and so will not form part of the judge's decision on the reasonableness of the issuance of the security certificate. The only provision of *IRPA* which would govern such a scenario is s. 85.2, which sets out the powers of a special advocate, and, in particular, s. 85.2(*c*), which states that a special advocate may "exercise, with the judge's authorization, any other powers that are necessary to protect the interests of the permanent resident or foreign national". The same analysis applies with respect to ss. 37 and 38 of the *Canada Evidence Act*, R.S.C. 1985, c. C-5. This Court held in *Basi* that where a claim of informer privilege falls under s. 37 of the *Canada Evidence Act*, the usual public interest balancing exercise under s. 37(5) is displaced by the common law privilege: paras. 23-24. Additional protection is therefore provided for national security secrets but without abrogating the underlying common law privileges.

[134] La *LIPR* ne fait pas non plus la distinction entre ce que signifie la divulgation dans le contexte du par. 77(2) et des al. 83(1)*c*) à *e*) et ce qu'elle signifie lorsqu'il est question de révéler des renseignements protégés aux avocats spéciaux. Le paragraphe 77(2) de la *LIPR* prévoit que le ministre doit déposer auprès de la cour les renseignements et autres éléments de preuve sur lesquels est fondé un certificat de sécurité. Par ailleurs, la divulgation de renseignements visés par le privilège relatif aux indicateurs soulève d'autres considérations. En règle générale, ces renseignements ne sont pas fournis au juge en application du par. 77(2) et ils ne sont pas pris en compte par le juge lorsqu'il est appelé à décider du caractère raisonnable de la délivrance du certificat de sécurité. L'article 85.2, qui énonce les pouvoirs dévolus à l'avocat spécial et, plus particulièrement, l'al. 85.2*c*), qui précise que l'avocat spécial peut « exercer, avec l'autorisation du juge, tout autre pouvoir nécessaire à la défense des intérêts du résident permanent ou de l'étranger », est de fait la seule disposition de la *LIPR* qui régirait une telle situation. La même analyse s'applique quant aux art. 37 et 38 de la *Loi sur la preuve au Canada*, L.R.C. 1985, ch. C-5. La Cour a statué dans *Basi* que lorsqu'une revendication de privilège de l'indicateur est régie par l'art. 37 de la *Loi sur la preuve au Canada*, l'exercice habituel de mise en balance de l'intérêt public prévu au par. 37(5) est supplanté par le privilège de common law : par. 23-24. Il existe donc une protection supplémentaire pour les secrets relatifs à la sécurité nationale sans pour autant que les privilèges de common law sous-jacents soient abrogés.

[135] The final question relates to whether an exception to the privilege should apply in the security certificate context. Noël J. was of the view that

[135] La dernière question à trancher est celle de l'opportunité d'appliquer une exception au privilège dans le contexte des certificats de sécurité.

there was a "need to know" exception, analogous to the "innocence at stake" exception to the police informer privilege. This exception means that the privilege can be set aside in cases where maintaining it would undermine the accused's ability to raise a reasonable doubt. The "need to know" exception would similarly be engaged when abrogating the privilege is necessary to prevent a serious breach of procedural fairness that would impugn the administration of justice. On the facts before him, Noël J. held that the requirements of the "need to know" exception had not been met and therefore denied the special advocates' request.

Le juge Noël était d'avis qu'il existait une exception en cas de « besoin de connaître », analogue à l'exception au privilège de l'indicateur de police relative à la « démonstration de l'innocence de l'accusé ». L'existence de cette exception signifie que le privilège peut être écarté dans les cas où son maintien minerait la capacité de l'accusé de soulever un doute raisonnable. De même, l'exception fondée sur le « besoin de connaître » serait applicable lorsqu'il serait nécessaire d'écarter le privilège pour éviter une atteinte sérieuse à l'équité procédurale qui minerait l'administration de la justice. À la lumière des faits portés à sa connaissance, le juge Noël a conclu qu'il n'avait pas été satisfait aux exigences de l'exception fondée sur le « besoin de connaître » et il a donc rejeté la demande des avocats spéciaux.

[136] In our view, the "need to know" exception outlined by Noël J. is overly broad: 2009 FC 204, at para. 46. We agree with the ministers that this exception is broader than the "innocence at stake" exception because the latter applies only where there is a risk of an unjust outcome, whereas the "need to know" exception applies where there is an unjust procedure. It also appears to overlook the considerable procedural flexibility that is available to the reviewing judge and the particular role of the special advocate.

[136] Selon nous, l'exception fondée sur le « besoin de connaître » décrite par le juge Noël a une portée trop large : 2009 CF 204, par. 46. Comme les ministres, nous estimons que cette exception a une portée plus large que celle relative à la « démonstration de l'innocence de l'accusé ». En effet, cette dernière s'applique seulement lorsqu'il existe un risque que l'issue de l'affaire soit injuste tandis que l'exception fondée sur le « besoin de connaître » s'applique en présence d'une procédure injuste. L'exception telle qu'elle est circonscrite par le juge Noël semble aussi négliger de prendre en compte la souplesse procédurale considérable dont dispose le juge siégeant en révision et le rôle particulier de l'avocat spécial.

[137] But given the intensity of the interests at stake in the security certificate context, we acknowledge that it would be appropriate to recognize a limited exception specifically crafted for the security certificate process which would address only disclosure to the special advocate, not to the subject of the proceedings. Identity should be disclosed only if the reviewing judge is satisfied that other measures, including withdrawing the substance of the informant's evidence from consideration in support of the certificate, are not sufficient to ensure a just outcome. Noël J. ordered generous disclosure of material to the special advocates concerning the credibility of informers

[137] Cela dit, compte tenu de l'importance des intérêts en jeu dans le contexte des certificats de sécurité, nous admettons qu'il serait approprié de reconnaître l'existence d'une exception limitée, conçue spécifiquement pour le processus applicable aux certificats de sécurité et dont la portée se limiterait à la divulgation à l'avocat spécial et ne viserait pas le sujet des procédures. L'identité des sources ne devrait être communiquée que si le juge siégeant en révision est convaincu que d'autres mesures, y compris le retrait de l'essentiel du témoignage de l'indicateur des éléments pris en compte au soutien du certificat, ne sont pas suffisantes pour garantir une issue équitable. Le

and the information they supplied. He allowed cross-examination of CSIS witnesses on the value, reliability and usefulness of informer information. In some circumstances, he relied on informer information only where it had been corroborated. If these measures are not considered adequate, the reviewing judge also has discretion under s. 83(1)(*h*) of *IRPA* to refuse to rely on evidence that he or she does not consider to be reliable and appropriate. Only if resort to these measures would not ensure a just outcome should identity be disclosed.

juge Noël a ordonné une divulgation généreuse de documents aux avocats spéciaux concernant la crédibilité des sources et des renseignements qu'elles ont fournis. Il a autorisé le contre-interrogatoire des témoins du SCRS sur la valeur, la fiabilité et l'utilité des renseignements fournis par les indicateurs. Dans certaines circonstances, il s'est fondé sur ces renseignements uniquement s'ils avaient été corroborés. Si ces mesures ne sont pas jugées adéquates, le juge siégeant en révision dispose aussi du pouvoir discrétionnaire, prévu à l'al. 83(1)*h*) de la *LIPR*, de refuser de fonder sa décision sur des éléments de preuve qu'il ne juge pas dignes de foi et utiles. Ce n'est que si le recours à ces mesures ne permettait pas de garantir une issue équitable que l'identité de la source devrait être communiquée.

[138] Even when disclosure of identity is ordered, there should be no cross-examination of the source by the special advocate. Requiring a human source to testify will have a profound chilling effect on the willingness of other sources to come forward, and will undoubtedly damage the relationship between CSIS and the source compelled to testify. CSIS operatives must be able to provide confident assurances to their sources that their identities will not be revealed, not vague assurances hedged with qualifications. Moreover, the human sources themselves, who are not subject to the necessary security clearance, may learn sensitive material in the closed proceedings which CSIS will then be unable to control.

[138] Même lorsque la communication de l'identité est ordonnée, la source ne devrait pas être contre-interrogée par l'avocat spécial. En effet, exiger qu'une source humaine témoigne refroidirait considérablement la volonté d'autres sources de collaborer avec les autorités et mettrait sans aucun doute à mal la relation entre le SCRS et la source assignée à témoigner. Les agents du SCRS doivent pouvoir donner à leurs sources l'assurance ferme que leur identité ne sera pas révélée et non pas des assurances vagues assorties de conditions. En outre, les sources humaines elles-mêmes, qui ne sont pas assujetties à l'habilitation de sécurité obligatoire, pourraient prendre connaissance d'information sensible durant les procédures à huis clos et le SCRS serait dès lors incapable d'en assurer le contrôle.

[139] We would therefore allow the ministers' appeal on the informant privilege issue and restore Noël J.'s disposition of this issue.

[139] Nous sommes donc d'avis d'accueillir le pourvoi des ministres en ce qui a trait à la question du privilège relatif à l'indicateur et de rétablir la décision du juge Noël à cet égard.

APPENDIX

Immigration and Refugee Protection Act, S.C. 2001, c. 27

33. The facts that constitute inadmissibility under sections 34 to 37 include facts arising from omissions

ANNEXE

Loi sur l'immigration et la protection des réfugiés, L.C. 2001, ch. 27

33. Les faits — actes ou omissions — mentionnés aux articles 34 à 37 sont, sauf disposition contraire, appréciés and, unless otherwise provided, include facts for which there are reasonable grounds to believe that they have occurred, are occurring or may occur.

34. (1) A permanent resident or a foreign national is inadmissible on security grounds for

(*a*) engaging in an act of espionage that is against Canada or that is contrary to Canada's interests;

(*b*) engaging in or instigating the subversion by force of any government;

(*b.1*) engaging in an act of subversion against a democratic government, institution or process as they are understood in Canada;

(*c*) engaging in terrorism;

(*d*) being a danger to the security of Canada;

(*e*) engaging in acts of violence that would or might endanger the lives or safety of persons in Canada; or

(*f*) being a member of an organization that there are reasonable grounds to believe engages, has engaged or will engage in acts referred to in paragraph (*a*), (*b*), (*b.1*) or (*c*).

. . .

77. (1) The Minister and the Minister of Citizenship and Immigration shall sign a certificate stating that a permanent resident or foreign national is inadmissible on grounds of security, violating human or international rights, serious criminality or organized criminality, and shall refer the certificate to the Federal Court.

(2) When the certificate is referred, the Minister shall file with the Court the information and other evidence on which the certificate is based, and a summary of information and other evidence that enables the person who is named in the certificate to be reasonably informed of the case made by the Minister but that does not include anything that, in the Minister's opinion, would be injurious to national security or endanger the safety of any person if disclosed.

(3) Once the certificate is referred, no proceeding under this Act respecting the person who is named in the certificate — other than proceedings relating to sections 82 to 82.3, 112 and 115 — may be commenced or continued until the judge determines whether the certificate is reasonable.

sur la base de motifs raisonnables de croire qu'ils sont survenus, surviennent ou peuvent survenir.

34. (1) Emportent interdiction de territoire pour raison de sécurité les faits suivants :

a) être l'auteur de tout acte d'espionnage dirigé contre le Canada ou contraire aux intérêts du Canada;

b) être l'instigateur ou l'auteur d'actes visant au renversement d'un gouvernement par la force;

b.1) se livrer à la subversion contre toute institution démocratique, au sens où cette expression s'entend au Canada;

c) se livrer au terrorisme;

d) constituer un danger pour la sécurité du Canada;

e) être l'auteur de tout acte de violence susceptible de mettre en danger la vie ou la sécurité d'autrui au Canada;

f) être membre d'une organisation dont il y a des motifs raisonnables de croire qu'elle est, a été ou sera l'auteur d'un acte visé aux alinéas *a*), *b*), *b.1*) ou *c*).

. . .

77. (1) Le ministre et le ministre de la Citoyenneté et de l'Immigration déposent à la Cour fédérale le certificat attestant qu'un résident permanent ou qu'un étranger est interdit de territoire pour raison de sécurité ou pour atteinte aux droits humains ou internationaux, grande criminalité ou criminalité organisée.

(2) Le ministre dépose en même temps que le certificat les renseignements et autres éléments de preuve justifiant ce dernier, ainsi qu'un résumé de la preuve qui permet à la personne visée d'être suffisamment informée de sa thèse et qui ne comporte aucun élément dont la divulgation porterait atteinte, selon le ministre, à la sécurité nationale ou à la sécurité d'autrui.

(3) Il ne peut être procédé à aucune instance visant la personne au titre de la présente loi tant qu'il n'a pas été statué sur le certificat. Ne sont pas visées les instances relatives aux articles 82 à 82.3, 112 et 115.

78. The judge shall determine whether the certificate is reasonable and shall quash the certificate if he or she determines that it is not.

. . .

80. A certificate that is determined to be reasonable is conclusive proof that the person named in it is inadmissible and is a removal order that is in force without it being necessary to hold or continue an examination or admissibility hearing.

81. The Minister and the Minister of Citizenship and Immigration may issue a warrant for the arrest and detention of a person who is named in a certificate if they have reasonable grounds to believe that the person is a danger to national security or to the safety of any person or is unlikely to appear at a proceeding or for removal.

. . .

83. (1) The following provisions apply to proceedings under any of sections 78 and 82 to 82.2:

(*a*) the judge shall proceed as informally and expeditiously as the circumstances and considerations of fairness and natural justice permit;

(*b*) the judge shall appoint a person from the list referred to in subsection 85(1) to act as a special advocate in the proceeding after hearing representations from the permanent resident or foreign national and the Minister and after giving particular consideration and weight to the preferences of the permanent resident or foreign national;

(*c*) at any time during a proceeding, the judge may, on the judge's own motion — and shall, on each request of the Minister — hear information or other evidence in the absence of the public and of the permanent resident or foreign national and their counsel if, in the judge's opinion, its disclosure could be injurious to national security or endanger the safety of any person;

(*d*) the judge shall ensure the confidentiality of information and other evidence provided by the Minister if, in the judge's opinion, its disclosure would be injurious to national security or endanger the safety of any person;

78. Le juge décide du caractère raisonnable du certificat et l'annule s'il ne peut conclure qu'il est raisonnable.

. . .

80. Le certificat jugé raisonnable fait foi de l'interdiction de territoire et constitue une mesure de renvoi en vigueur, sans qu'il soit nécessaire de procéder au contrôle ou à l'enquête.

81. Le ministre et le ministre de la Citoyenneté et de l'Immigration peuvent lancer un mandat pour l'arrestation et la mise en détention de la personne visée par le certificat dont ils ont des motifs raisonnables de croire qu'elle constitue un danger pour la sécurité nationale ou la sécurité d'autrui ou qu'elle se soustraira vraisemblablement à la procédure ou au renvoi.

. . .

83. (1) Les règles ci-après s'appliquent aux instances visées aux articles 78 et 82 à 82.2 :

a) le juge procède, dans la mesure où les circonstances et les considérations d'équité et de justice naturelle le permettent, sans formalisme et selon la procédure expéditive;

b) il nomme, parmi les personnes figurant sur la liste dressée au titre du paragraphe 85(1), celle qui agira à titre d'avocat spécial dans le cadre de l'instance, après avoir entendu l'intéressé et le ministre et accordé une attention et une importance particulières aux préférences de l'intéressé;

c) il peut d'office tenir une audience à huis clos et en l'absence de l'intéressé et de son conseil — et doit le faire à chaque demande du ministre — si la divulgation des renseignements ou autres éléments de preuve en cause pourrait porter atteinte, selon lui, à la sécurité nationale ou à la sécurité d'autrui;

d) il lui incombe de garantir la confidentialité des renseignements et autres éléments de preuve que lui fournit le ministre et dont la divulgation porterait atteinte, selon lui, à la sécurité nationale ou à la sécurité d'autrui;

(*e*) throughout the proceeding, the judge shall ensure that the permanent resident or foreign national is provided with a summary of information and other evidence that enables them to be reasonably informed of the case made by the Minister in the proceeding but that does not include anything that, in the judge's opinion, would be injurious to national security or endanger the safety of any person if disclosed;

(*f*) the judge shall ensure the confidentiality of all information or other evidence that is withdrawn by the Minister;

(*g*) the judge shall provide the permanent resident or foreign national and the Minister with an opportunity to be heard;

(*h*) the judge may receive into evidence anything that, in the judge's opinion, is reliable and appropriate, even if it is inadmissible in a court of law, and may base a decision on that evidence;

(*i*) the judge may base a decision on information or other evidence even if a summary of that information or other evidence is not provided to the permanent resident or foreign national; and

(*j*) the judge shall not base a decision on information or other evidence provided by the Minister, and shall return it to the Minister, if the judge determines that it is not relevant or if the Minister withdraws it.

(1.1) For the purposes of paragraph (1)(*h*), reliable and appropriate evidence does not include information that is believed on reasonable grounds to have been obtained as a result of the use of torture within the meaning of section 269.1 of the *Criminal Code*, or cruel, inhuman or degrading treatment or punishment within the meaning of the Convention Against Torture.

. . .

85.1 (1) A special advocate's role is to protect the interests of the permanent resident or foreign national in a proceeding under any of sections 78 and 82 to 82.2 when information or other evidence is heard in the absence of the public and of the permanent resident or foreign national and their counsel.

(2) A special advocate may challenge

(*a*) the Minister's claim that the disclosure of information or other evidence would be injurious to national security or endanger the safety of any person; and

e) il veille tout au long de l'instance à ce que soit fourni à l'intéressé un résumé de la preuve qui ne comporte aucun élément dont la divulgation porterait atteinte, selon lui, à la sécurité nationale ou à la sécurité d'autrui et qui permet à l'intéressé d'être suffisamment informé de la thèse du ministre à l'égard de l'instance en cause;

f) il lui incombe de garantir la confidentialité des renseignements et autres éléments de preuve que le ministre retire de l'instance;

g) il donne à l'intéressé et au ministre la possibilité d'être entendus;

h) il peut recevoir et admettre en preuve tout élément — même inadmissible en justice — qu'il estime digne de foi et utile et peut fonder sa décision sur celui-ci;

i) il peut fonder sa décision sur des renseignements et autres éléments de preuve même si un résumé de ces derniers n'est pas fourni à l'intéressé;

j) il ne peut fonder sa décision sur les renseignements et autres éléments de preuve que lui fournit le ministre et les remet à celui-ci s'il décide qu'ils ne sont pas pertinents ou si le ministre les retire.

(1.1) Pour l'application de l'alinéa (1)*h*), sont exclus des éléments de preuve dignes de foi et utiles les renseignements dont il existe des motifs raisonnables de croire qu'ils ont été obtenus par suite du recours à la torture, au sens de l'article 269.1 du *Code criminel*, ou à d'autres peines ou traitements cruels, inhumains ou dégradants, au sens de la Convention contre la torture.

. . .

85.1 (1) L'avocat spécial a pour rôle de défendre les intérêts du résident permanent ou de l'étranger lors de toute audience tenue à huis clos et en l'absence de celui-ci et de son conseil dans le cadre de toute instance visée à l'un des articles 78 et 82 à 82.2.

(2) Il peut contester :

a) les affirmations du ministre voulant que la divulgation de renseignements ou autres éléments de preuve porterait atteinte à la sécurité nationale ou à la sécurité d'autrui;

(*b*) the relevance, reliability and sufficiency of information or other evidence that is provided by the Minister and is not disclosed to the permanent resident or foreign national and their counsel, and the weight to be given to it.

(3) For greater certainty, the special advocate is not a party to the proceeding and the relationship between the special advocate and the permanent resident or foreign national is not that of solicitor and client.

(4) However, a communication between the permanent resident or foreign national or their counsel and the special advocate that would be subject to solicitor-client privilege if the relationship were one of solicitor and client is deemed to be subject to solicitor-client privilege. For greater certainty, in respect of that communication, the special advocate is not a compellable witness in any proceeding.

85.2 A special advocate may

(*a*) make oral and written submissions with respect to the information and other evidence that is provided by the Minister and is not disclosed to the permanent resident or foreign national and their counsel;

(*b*) participate in, and cross-examine witnesses who testify during, any part of the proceeding that is held in the absence of the public and of the permanent resident or foreign national and their counsel; and

(*c*) exercise, with the judge's authorization, any other powers that are necessary to protect the interests of the permanent resident or foreign national.

. . .

85.4 (1) The Minister shall, within a period set by the judge, provide the special advocate with a copy of all information and other evidence that is provided to the judge but that is not disclosed to the permanent resident or foreign national and their counsel.

(2) After that information or other evidence is received by the special advocate, the special advocate may, during the remainder of the proceeding, communicate with another person about the proceeding only with the judge's authorization and subject to any conditions that the judge considers appropriate.

(3) If the special advocate is authorized to communicate with a person, the judge may prohibit that person from communicating with anyone else about the

b) la pertinence, la fiabilité et la suffisance des renseignements ou autres éléments de preuve fournis par le ministre, mais communiqués ni à l'intéressé ni à son conseil, et l'importance qui devrait leur être accordée.

(3) Il est entendu que l'avocat spécial n'est pas partie à l'instance et que les rapports entre lui et l'intéressé ne sont pas ceux qui existent entre un avocat et son client.

(4) Toutefois, toute communication entre l'intéressé ou son conseil et l'avocat spécial qui serait protégée par le secret professionnel liant l'avocat à son client si ceux-ci avaient de tels rapports est réputée être ainsi protégée, et il est entendu que l'avocat spécial ne peut être contraint à témoigner à l'égard d'une telle communication dans quelque instance que ce soit.

85.2 L'avocat spécial peut :

a) présenter au juge ses observations, oralement ou par écrit, à l'égard des renseignements et autres éléments de preuve fournis par le ministre, mais communiqués ni à l'intéressé ni à son conseil;

b) participer à toute audience tenue à huis clos et en l'absence de l'intéressé et de son conseil, et contre-interroger les témoins;

c) exercer, avec l'autorisation du juge, tout autre pouvoir nécessaire à la défense des intérêts du résident permanent ou de l'étranger.

. . .

85.4 (1) Il incombe au ministre de fournir à l'avocat spécial, dans le délai fixé par le juge, copie de tous les renseignements et autres éléments de preuve qui ont été fournis au juge, mais qui n'ont été communiqués ni à l'intéressé ni à son conseil.

(2) Entre le moment où il reçoit les renseignements et autres éléments de preuve et la fin de l'instance, l'avocat spécial ne peut communiquer avec qui que ce soit au sujet de l'instance si ce n'est avec l'autorisation du juge et aux conditions que celui-ci estime indiquées.

(3) Dans le cas où l'avocat spécial est autorisé à communiquer avec une personne, le juge peut interdire à cette dernière de communiquer avec qui que ce soit d'autre

proceeding during the remainder of the proceeding or may impose conditions with respect to such a communication during that period.

85.5 With the exception of communications authorized by a judge, no person shall

(*a*) disclose information or other evidence that is disclosed to them under section 85.4 and that is treated as confidential by the judge presiding at the proceeding; or

(*b*) communicate with another person about the content of any part of a proceeding under any of sections 78 and 82 to 82.2 that is heard in the absence of the public and of the permanent resident or foreign national and their counsel.

Canada Evidence Act, R.S.C. 1985, c. C-5, as am. by S.C. 2013, c. 9, s. 20

38.06 (1) Unless the judge concludes that the disclosure of the information or facts referred to in subsection 38.02(1) would be injurious to international relations or national defence or national security, the judge may, by order, authorize the disclosure of the information or facts.

(2) If the judge concludes that the disclosure of the information or facts would be injurious to international relations or national defence or national security but that the public interest in disclosure outweighs in importance the public interest in non-disclosure, the judge may by order, after considering both the public interest in disclosure and the form of and conditions to disclosure that are most likely to limit any injury to international relations or national defence or national security resulting from disclosure, authorize the disclosure, subject to any conditions that the judge considers appropriate, of all or part of the information or facts, a summary of the information or a written admission of facts relating to the information.

Appeal allowed in part, ABELLA *and* CROMWELL JJ. *dissenting in part. Cross-appeal dismissed.*

Solicitor for the appellants/respondents on cross-appeal: Attorney General of Canada, Toronto and Ottawa.

au sujet de l'instance, et ce jusqu'à la fin de celle-ci, ou assujettir à des conditions toute communication de cette personne à ce sujet, jusqu'à la fin de l'instance.

85.5 Sauf à l'égard des communications autorisées par tout juge, il est interdit à quiconque :

a) de divulguer des renseignements et autres éléments de preuve qui lui sont communiqués au titre de l'article 85.4 et dont la confidentialité est garantie par le juge présidant l'instance;

b) de communiquer avec toute personne relativement au contenu de tout ou partie d'une audience tenue à huis clos et en l'absence de l'intéressé et de son conseil dans le cadre d'une instance visée à l'un des articles 78 et 82 à 82.2.

Loi sur la preuve au Canada, L.R.C. 1985, ch. C-5, telle que mod. par L.C. 2013, ch. 9, art. 20

38.06 (1) Le juge peut rendre une ordonnance autorisant la divulgation des renseignements ou des faits visés au paragraphe 38.02(1), sauf s'il conclut qu'elle porterait préjudice aux relations internationales ou à la défense ou à la sécurité nationales.

(2) Si le juge conclut que la divulgation des renseignements ou des faits porterait préjudice aux relations internationales ou à la défense ou à la sécurité nationales, mais que les raisons d'intérêt public qui justifient la divulgation l'emportent sur les raisons d'intérêt public qui justifient la non-divulgation, il peut par ordonnance, compte tenu des raisons d'intérêt public qui justifient la divulgation ainsi que de la forme et des conditions de divulgation les plus susceptibles de limiter le préjudice porté aux relations internationales ou à la défense ou à la sécurité nationales, autoriser, sous réserve des conditions qu'il estime indiquées, la divulgation de tout ou partie des renseignements ou des faits, d'un résumé des renseignements ou d'un aveu écrit des faits qui y sont liés.

Pourvoi accueilli en partie, les juges ABELLA *et* CROMWELL *sont dissidents en partie. Pourvoi incident rejeté.*

Procureur des appelants/intimés au pourvoi incident : Procureur général du Canada, Toronto et Ottawa.

Solicitors for the respondent/appellant on cross-appeal: Webber Schroeder Goldstein Abergel, Ottawa; Bayne, Sellar, Boxall, Ottawa.

Solicitor for the intervener the Attorney General of Ontario: Attorney General of Ontario, Toronto.

Solicitors for the intervener the British Columbia Civil Liberties Association: Ruby Shiller Chan Hasan, Toronto.

Solicitors for the intervener the Canadian Council of Criminal Defence Lawyers: John Norris, Toronto; Poupart, Dadour, Touma & Associés, Montréal.

Solicitors for the intervener the Canadian Civil Liberties Association: Kapoor Barristers, Toronto.

Solicitors for the intervener the Canadian Bar Association: Waldman & Associates, Toronto; Edelmann & Co., Vancouver.

Solicitors for the intervener the Canadian Association of Refugee Lawyers: Sack Goldblatt Mitchell, Toronto.

Solicitors for the interveners the Canadian Council for Refugees and the International Civil Liberties Monitoring Group: Jackman Nazami & Associates, Toronto; Queen's University, Kingston; Refugee Law Office, Toronto.

Solicitors for the intervener the Canadian Council on American-Islamic Relations (now known as National Council of Canadian Muslims): Office Khalid Elgazzar, Barrister, Ottawa; Osgoode Law School of York University, Toronto.

Solicitors for the intervener Amnesty International: Community Legal Services Ottawa Centre, Ottawa; Amnesty International Canada, Ottawa.

Procureurs de l'intimé/appelant au pourvoi incident : Webber Schroeder Goldstein Abergel, Ottawa; Bayne, Sellar, Boxall, Ottawa.

Procureur de l'intervenant le procureur général de l'Ontario : Procureur général de l'Ontario, Toronto.

Procureurs de l'intervenante l'Association des libertés civiles de la Colombie-Britannique : Ruby Shiller Chan Hasan, Toronto.

Procureurs de l'intervenant le Conseil canadien des avocats de la défense : John Norris, Toronto; Poupart, Dadour, Touma & Associés, Montréal.

Procureurs de l'intervenante l'Association canadienne des libertés civiles : Kapoor Barristers, Toronto.

Procureurs de l'intervenante l'Association du barreau canadien : Waldman & Associates, Toronto; Edelmann & Co., Vancouver.

Procureurs de l'intervenante l'Association canadienne des avocats et avocates en droit des réfugiés : Sack Goldblatt Mitchell, Toronto.

Procureurs des intervenants le Conseil canadien pour les réfugiés et la Coalition pour la surveillance internationale des libertés civiles : Jackman Nazami & Associates, Toronto; Université Queen's, Kingston; Refugee Law Office, Toronto.

Procureurs de l'intervenant Canadian Council on American-Islamic Relations (maintenant connu sous le nom de Conseil national des musulmans canadiens) : Office Khalid Elgazzar, Barrister, Ottawa; Osgoode Law School of York University, Toronto.

Procureurs de l'intervenante l'Amnistie internationale : Clinique juridique communautaire Ottawa Centre, Ottawa; Amnistie internationale Canada, Ottawa.

Solicitors for the intervener the Criminal Lawyers' Association (Ontario): Breese Davies Law, Toronto; Di Luca Copeland, Toronto.

Solicitors for the Special Advocates: Cavalluzzo Shilton McIntyre Cornish, Toronto; Copeland, Duncan, Toronto.

Procureurs de l'intervenante Criminal Lawyers' Association (Ontario) : Breese Davies Law, Toronto; Di Luca Copeland, Toronto.

Procureurs des avocats spéciaux : Cavalluzzo Shilton McIntyre Cornish, Toronto; Copeland, Duncan, Toronto.

COURT OF APPEAL FOR ONTARIO

Please see in particular paras. 10-11 and 15

CITATION: Canada (Attorney General) v. Lalonde, 2016 ONCA 923
DATE: 20161208
DOCKET: C61456

Doherty, Blair and Epstein JJ.A.

BETWEEN

Attorney General of Canada

Appellant

and

Rodney Lalonde

Respondent

Elizabeth Kikuchi, for the appellant

Brian A. Callender, for the respondent

Heard: November 3, 2016

On appeal from the order of Justice Robert F. Scott of the Superior Court of Justice, dated November 26, 2015, with reasons reported at 2015 ONSC 6937.

Doherty J.A.:

I

OVERVIEW

[1] The respondent, Rodney Lalonde, pled guilty to and was convicted of one count of conspiracy to traffic in cocaine and one count of conspiracy to traffic in marihuana. Both offences were alleged to have occurred between March 20,

2011 and July 7, 2011. On November 5, 2013, Mr. Lalonde received five-year concurrent sentences on each charge.

[2] Mr. Lalonde met the statutory eligibility criteria for accelerated parole under the *Corrections and Conditional Release Act*, S.C. 1992, c. 20 ("*CCRA*"). Under the *CCRA's* accelerated parole provisions, Mr. Lalonde would have been eligible for day parole in September 2014, 10 months after he was sentenced. Under the normal parole provisions, Mr. Lalonde was not eligible for day parole until January 2015 after serving 14 months of his sentence.

[3] The Corrections authorities took the position that the *Abolition of Early Parole Act*, S.C. 2011, c. 11 ("*AEPA*"), enacted on March 28, 2011, had repealed the provisions providing for accelerated parole. Section 10 of the *AEPA* made the repeal of the accelerated parole provisions retrospective and eliminated eligibility for accelerated parole for all offenders serving penitentiary sentences on or after March 28, 2011. Mr. Lalonde began his five-year sentence in November 2013.

[4] Section 10 clearly rendered Mr. Lalonde ineligible for accelerated parole. However, in March 2014, in *Canada (Attorney General) v. Whaling*, 2014 SCC 20, [2014] 1 S.C.R. 392, the Supreme Court struck down s. 10 as contrary to s. 11(h) of the *Charter* insofar as it purported to apply to persons who had been sentenced before the repeal of the accelerated parole provisions.

[5] *Whaling* did not have direct application to Mr. Lalonde as he had been sentenced after the repeal. However, in 2015, this court held that the abolition of eligibility for accelerated parole amounted to an increase in punishment, making the application of the *AEPA* to persons who committed offences before the repeal of accelerated parole on March 28, 2011 contrary to s. 11(i) of the *Charter*: *Canada (Attorney General) v. Lewis*, 2015 ONCA 379, 126 O.R. (3d) 289, leave to appeal refused, [2015] S.C.C.A. No. 325; see also *Liang v. Canada (Attorney General)*, 2014 BCCA 190, 311 C.C.C. (3d) 159, leave to appeal refused, [2014] S.C.C.A. No. 298.

[6] The holdings in *Liang* and *Lewis* created administrative difficulties for the Correctional authorities. Under the *CCRA*, parole eligibility is determined by reference to the date of sentence and not the date of the offence. After *Lewis* and *Liang*, the Correctional authorities had to decide early parole eligibility based on the date of the offence for which the person was sentenced, rather than the date of sentence. Unlike the date of sentence, which can be easily determined by reference to the warrant of committal, there can be uncertainty as to the date on which an offence was committed. Some indictments allege offences that occur between dates that span weeks, months or even years. A transcript of the trial proceedings may not assist in fixing the date of the offence, as often the date of the offence is irrelevant for trial purposes as long as the offence occurred within the timeframe of the indictment.

[7] This case provides a good example of a situation in which the date on which an offence was committed may be unclear. The indictment alleging the two conspiracy offences against Mr. Lalonde referred to a time period that straddled March 28, 2011, the date on which the accelerated parole provisions were repealed. According to the affidavit material filed by the Attorney General of Canada, sentence managers had been instructed to treat persons whose offences were committed prior to March 28, 2011 and continued after that date as ineligible for accelerated parole. Based on that policy, Mr. Lalonde was not eligible for early parole.

[8] Mr. Lalonde moved for a declaration that he was eligible for accelerated parole. He also brought an application for habeas corpus with certiorari in aid. The application judge dealt only with the request for declaratory relief. He held that he had jurisdiction to grant that relief (paras. 4-6), and that as the conspiracies were committed before the repeal of the accelerated parole provisions on March 28, 2011, Mr. Lalonde was eligible for accelerated parole. The application judge made a declaration to that effect.

[9] The Attorney General of Canada appeals from that order. On the appeal, the Attorney General accepts that the application judge had the jurisdiction to grant the declaratory relief that he ordered. The parties also agree that the appeal is moot in that Mr. Lalonde has been released on day parole. The parties accept, however, that this is an appropriate case for the court to exercise its

discretion in favour of hearing the moot appeal. As pointed out in the material filed by the Attorney General, the determination of the applicability of the accelerated parole provisions, despite their repeal, continues to have relevance for about 200 offenders serving sentences in penitentiaries across Canada. The parties agree that by addressing the merits of the appeal, the court can provide guidance to the Correctional authorities charged with the responsibility of determining parole eligibility dates.

II

WHEN IS A CRIME COMMITTED FOR THE PURPOSES OF SECTION 11(I) OF THE *CHARTER*?

[10] Section 11(i) of the *Charter* provides:

> 11. Any person charged with an offence has the right
>
> …
>
> (i) if found guilty of the offence and if the punishment for the offence has been varied between the time of commission and the time of sentencing, to the benefit of the lesser punishment.

[11] Section 11(i) of the *Charter*, like s. 11(g) and s. 11(h), reflects a constitutional aversion to retrospective criminal legislation. Retrospective criminal laws are viewed as unfair and undermining the rule of law because they effectively change the rules in the middle of the "game" to the detriment of the individual affected by those rules. Fairness and respect for the rule of law

require that a person's maximum exposure to punishment for a criminal act be fixed as of "the time of commission" of the criminal act for which he or she is to be punished: see *R. v. K.R.J.*, 2016 SCC 31, 337 C.C.C. (3d) 285, at paras. 20-27.

[12] The abolition of eligibility for accelerated parole increased the punishment imposed on Mr. Lalonde: *Lewis*, at paras. 20-24. Consequently, if Mr. Lalonde committed his crimes before the punishment for those crimes was varied on March 28, 2011 by the elimination of eligibility for accelerated parole, Mr. Lalonde was constitutionally entitled to the benefit of "the lesser punishment", that is the parole scheme that included eligibility to be considered for early parole.

[13] Counsel for the Attorney General submits that while the crime of conspiracy is committed when two or more persons enter into an agreement to commit a crime, intending to carry out that agreement, the crime continues until the criminal object is achieved or the agreement is frustrated, usually by the arrest of the co-conspirators: see *R. v. J.F.*, 2013 SCC 12, [2013] 1 S.C.R. 565, at paras. 21, 44, 58; and *R. v. Bell*, [1983] 2 S.C.R. 471, at p. 488. Counsel submits that as long as a conspiracy continues, it is not completed and should not be treated as committed for the purposes of s. 11(i). On that approach, Mr. Lalonde continued to commit the offence of conspiracy beyond March 28, 2011 to July 2011 when he and his fellow conspirators were arrested. If the Attorney General's interpretation is correct, there is no variation in the penalty for the

offence between "the time of commission" and "the time of sentencing". Section 11(i) would have no application.

[14] Counsel for Mr. Lalonde does not take issue with counsel for the Attorney General's description of the crime of conspiracy as a continuing offence. He submits, however, that conspiracy, like all crimes, is committed when the requisite *actus reus* and *mens rea* coexist. Counsel submits that the Attorney General's submissions fail to distinguish between the commission of a continuing offence and the completion or termination of that offence. Counsel argues that on a plain reading, s. 11(i) of the *Charter* is concerned with the commission and not the termination or completion of an offence. Counsel argues that on the facts of this case, Mr. Lalonde entered into conspiracies to traffic in cocaine and marihuana before March 28, 2011. He had therefore committed his crimes before that date even though he and his co-conspirators carried on efforts to achieve the objects of the conspiracies after March 28, 2011.

[15] The distinction drawn by counsel for Mr. Lalonde between the point in time at which a crime is committed and the point at which that crime is completed or terminated is a valid one when the offence is a continuing offence. The commission of a crime connotes culpability for that crime. An offender is culpable in the sense that he or she is liable to be convicted for the offence when he or she has performed the required *actus reus* with the required *mens rea*. Criminal culpability exists from that point forward whether the offence is a

continuing one or not: see *Bell*, at p. 488; and *Brodie v. The King*, [1936] S.C.R. 188, at p. 198. Events subsequent to the point in time at which the *actus reus* and *mens rea* coexist cannot remove or negative culpability, although they may mitigate or aggravate punishment: see *R. v. Kosh*, [1965] 1 C.C.C. 230, 44 C.R. 185, at p. 235 (Sask. C.A.); and *R. v. Roberts*, [1981] B.C.J. No. 1185, at para. 7 (C.A.). For example, a person who enters into a criminal conspiracy, intending to carry it out, but abandons the conspiracy before the object is achieved or the agreement is terminated, remains criminally liable for the crime of conspiracy. As explained by Taschereau J., in *R. v. O'Brien*, [1954] S.C.R. 666, at p. 669:

> If a person, with one or several others, agrees to commit an unlawful act, and later, after having had the intention to carry it through, refuses to put the plan into effect, that person is nevertheless guilty, because all the ingredients of conspiracy can be found in the accused's conduct. …

[16] If, as is clear on the authorities, culpability for criminal conspiracy attaches when a person enters into an agreement with one or more other persons to commit a criminal offence, intending to achieve that criminal object, it is illogical to say that the conspiracy is not committed until the unlawful object is achieved or the conspiracy terminated. The continuing nature of the offence of conspiracy has significance for various issues. However, the continuing nature of the crime has no impact on the determination of the point in time at which liability for the commission of the offence attaches. If a person engages in the required *actus*

reus with the specified *mens rea*, that person commits the offence whether or not the offence is a continuing one.

[17] Section 11(i) fixes "the time of commission" of the offence as one of the two relevant points in time to be considered when applying the section. I see nothing in the language of s. 11(i), or the purpose underlying the section, justifying a departure from the plain meaning of the phrase, "the time of commission" of the crime. A crime is committed when culpability attaches.

[18] Counsel's research produced several decisions, most of them trial decisions, in which an indictment alleged an offence that straddled the date on which legislation came into force increasing or decreasing the relevant penalties. None of the cases involved the *AEPA* or the crime of conspiracy. In each case, the offender argued that s. 11(i) of the Charter entitled him or her to the lesser penalty.

[19] Most of the trial decisions referred to by counsel support Mr. Lalonde's position, although none contain any analysis of s. 11(i): see *R. v. A.B.*, 2008 QCCQ 3538, at para. 56 (Crim. & Pen. Div.); *R. v. Handy*, 2012 CarswellOnt 13427, at paras. 224-29 (Sup. Ct.); *R. v. Lewis*, 2014 ONSC 4188, at para. 14; and *R. v. Morier*, 2014 QCCQ 1959, at paras. 15-17 (Crim. & Pen. Div.).

[20] Counsel referred to two appellate decisions. Both support the Attorney General's position: *R. v. Pouliot*, 2006 QCCA 643, at para. 4; and *R. v. V.I.C.*, 2005 SKCA 95, 269 Sask. R. 131, at para. 11.

[21] In *Pouliot*, the accused was charged with keeping a common bawdy house over a lengthy period of time. During that timeframe, the penalty for the offence was amended to increase the offender's exposure to forfeiture of property used in the offence. The accused argued that he should be sentenced under the regime that existed at the commencement of the timeframe alleged in the indictment. The Quebec Court of Appeal rejected that argument. The court reasoned, at para. 4, that keeping a common bawdy house is a continuing offence, and that the accused continued to commit the offence well after the penalty increased. The accused was thus not entitled to the benefit of the old property forfeiture regime.

[22] In *V.I.C.*, the accused was charged with a single count of sexual assault covering a 14-month timeframe. The Crown alleged that he had assaulted his young cousin repeatedly during that timeframe. During the timeframe covered by the indictment, the statutory scheme was changed to make the accused liable for a more serious penalty. The accused argued that he should be sentenced under the law as it existed at the start of the timeframe set out in the indictment. The Saskatchewan Court of Appeal disagreed, pointing out that acts that amounted to

sexual assaults occurred before and after the enactment of the provision increasing the potential penalty. The court held, at para. 11:

> This was not a case of application of the law to an offence which occurred before the legislation came into effect, but of application of the law to an offence which was not complete, and therefore did not occur, until a date on which the legislation was in effect.

[23] With respect, I cannot agree with *Pouliot* and *V.I.C.* While I accept that the offences in both cases continued beyond the enactment of the relevant legislation, I do not agree that the continuation of the offences meant that they were not committed before the enactment of the relevant legislation. The accused in *Pouliot* was liable for the offence of keeping a common bawdy house as of the date on which the increased exposure to forfeiture came into effect. Had he been charged on that date, he would have been convicted.

[24] Similarly, the accused in *V.I.C.* committed acts of sexual assault before the enactment of the increased penalty. He was culpable on the single count indictment preferred by the Crown from the moment he committed the earliest of the sexual assaults capable of supporting the charge as framed in the indictment. Had the Crown proved only that one assault, the accused would have been convicted on the indictment as charged. I do not agree that because the Crown chose to lay a single charge encompassing several discrete acts of sexual assault that occurred over several months, the offence for which the accused was convicted should be viewed as “not complete”, or as if it “did not occur” until

the last of the sexual acts occurred. The number of discrete acts capable of supporting liability for the offence as charged does not alter the fact that the *actus reus* and *mens rea* required to support a conviction coexisted as of the first act of sexual assault.

[25] Having reviewed the cases, I remain satisfied that the words of s. 11(i) should be given their plain meaning. Mr. Lalonde committed his crimes at the point in time when he agreed with one or more persons to traffic in cocaine or marihuana, intending to do so.

III

WHEN DID MR. LALONDE COMMIT HIS CRIMES?

[26] As indicated above, the language in the indictment brought against Mr. Lalonde alleges dates that straddle March 28, 2011. To determine whether Mr. Lalonde was eligible for early parole, the Correctional authorities had to determine whether he committed the conspiracies before that date. The language of the indictment, standing alone, does not answer that question.

[27] Whether Mr. Lalonde entered into the alleged conspiracies before March 28, 2011 was not in issue at the trial proceedings and, not surprisingly, was not addressed by trial counsel or the trial judge. The facts relied on by the Crown to support Mr. Lalonde's guilty pleas were offered to establish his guilt and not to establish the point in time at which he became culpable for the conspiracies.

Those facts do, however, assist in determining whether Mr. Lalonde entered into the conspiracies before March 28, 2011.

[28] The facts relied on by the Crown to support the charge of conspiracy to traffic in cocaine included references to many acts allegedly done in furtherance of the conspiracy by Mr. Lalonde and others before March 28, 2011. An act can only be done in furtherance of a conspiracy if the conspiracy exists when the act is performed. On the facts put forward by the Crown, Mr. Lalonde had entered into a conspiracy to traffic in cocaine, intending to traffic in cocaine, well before March 28, 2011. On those facts, Mr. Lalonde committed the offence of conspiracy to traffic in cocaine before the *AEPA* repealed eligibility for early parole. He was entitled to be considered for early parole.

[29] The facts the Crown relied on in support of the plea on the charge of conspiracy to traffic in marihuana are less detailed than the facts relating to the cocaine conspiracy. None of the acts said to be in furtherance of the conspiracy to traffic in marihuana occurred before March 28, 2011. Nothing said by the Crown, however, suggests that the agreement to traffic in marihuana only came into existence after that date. Having regard to the terms of the indictment, and the entirety of the facts relied on by the Crown as they relate to both conspiracies, it is a fair inference that Mr. Lalonde was a member of both conspiracies as of March 28, 2011 and was therefore entitled to be considered for early parole in respect of both offences.

[30] In any event, it does not ultimately matter, for the purposes of determining Mr. Lalonde's eligibility to be considered for early parole, whether the offence of conspiracy to traffic in marihuana was committed before or after March 28, 2011. Mr. Lalonde received two concurrent five-year sentences. Pursuant to s. 139(1) and s. 120.1(1)(b) of the *CCRA*, Mr. Lalonde was deemed to be serving a single five-year sentence with a single parole eligibility date. If, as I would hold, Mr. Lalonde was eligible to be considered for early parole in relation to the conspiracy to traffic in cocaine conviction because the crime was committed before the repeal of the early parole provisions, his conviction at the same time for an offence committed after that date cannot, in my view, take away his constitutional right to be considered for early parole in respect of conspiracy to traffic in cocaine conviction. A change in the rules governing Mr. Lalonde's parole status as those rules relate to the conviction for conspiracy to traffic in cocaine after the date on which he committed that offence remains a violation of s. 11(i), even if a concurrent sentence imposed for an offence committed after the repeal of the early parole provisions would not attract the protection of s. 11(i).

IV

TWO ADDITIONAL COMMENTS

[31] The reasons set out above are enough to dispose of the appeal in favour of Mr. Lalonde. I will, however, in the hope of providing the Correctional authorities with some additional guidance, address two matters referred to in the affidavit of the senior Correctional Services manager filed on the application by the Attorney General of Canada.

[32] In the affidavit, the affiant states:

> [W]here offenders who receive one sentence for numerous offences which were committed both before and after the repeal of [accelerated parole], [those offenders] were not considered to be entitled to [accelerated parole].

[33] The position taken by the Correctional authorities is premised on the provisions of the *CCRA* which treat prisoners as serving a single sentence with a single parole eligibility date even though the prisoners were convicted of various offences at different times and received discrete sentences for each of those offences. The sentences are effectively amalgamated into a single sentence with a single parole eligibility date: see *CCRA* s. 120.1(2)(3), s. 120.2, s. 139(1). For example, if an offender is convicted and sentenced to a two-year sentence in the penitentiary and six months later receives an additional two years consecutive for a different offence, the Correctional authorities treat the person as serving a single four-year sentence, running from the date of the first sentence. They also

fix a single parole eligibility date using the somewhat complicated provisions in s. 120.1 of the *CCRA*.

[34] Essentially, for the reasons set out above in para. 30, I do not think that the Correctional authorities can ignore the date on which the offences occurred in determining eligibility for early parole. If the offender was entitled to apply for early parole as of the date of the offence, s. 11(i) constitutionally guarantees that eligibility, regardless of whether the offender is subsequently convicted of other offences which post-date the repeal of the early parole provisions. If, in the example set out above, the first offence for which the offender received a two-year sentence was committed before March 28, 2011, the offender was eligible to be considered for early parole. His subsequent conviction and two-year sentence for an offence committed after March 28, 2011 would not eliminate his eligibility for early parole on the first conviction, even though the Correctional authorities treat the sentences as one for the purposes of calculating the total sentence being served and the parole eligibility date.

[35] In holding that the offender would be entitled to the benefit of the early parole provisions despite the commission of offences after the repeal of those provisions, I do not mean to suggest that the commission of subsequent offences would not have relevance to the application of the early parole provisions. In fact, depending on the nature and timing of the subsequent offences, the offender may no longer meet the criteria in the early parole provisions to even be

considered for early parole.[1] The offender nonetheless would remain eligible for early parole in the sense that those provisions would apply to the offender because he was serving a sentence imposed, at least in part, in respect of an offence committed before the repeal of the early parole provisions.

[36] My second observation arises from the same affidavit. The affiant indicates that sentence managers are instructed that all offenders whose offence dates straddle March 28, 2011 are not considered eligible for accelerated parole. While I can appreciate the value of a bright-line rule for administrative purposes, the offender's constitutional rights under s. 11(i) cannot be negated by a default rule that has no connection to the facts of the individual case.

[37] The Correctional authorities charged with determining eligibility for early parole must do their best on the materials available to them to determine if an offence was committed before March 28, 2011. As I understand it, sentence managers usually have the indictment, reasons for conviction (assuming it was not a jury trial), reasons for sentence, and the warrant of committal. If a sentence manager is satisfied, based on that material, that the offence was committed, as defined in these reasons, before March 28, 2011, the sentence manager will treat the offender as eligible to be considered for accelerated parole, even if the offence continued after that date.

---

[1] For example, under the early parole provisions, an offender who is serving an offence for which he was eligible for early parole and who while serving that sentence committed a further offence ceases to be eligible for early parole: *CCRA* s. 125(1.1).

[38] If a sentence manager is unable, on the material available to him or her, to decide whether the offence was committed before March 28, 2011, it is incumbent on the Correctional authorities to put the offender on notice that he or she may be eligible to be considered for early parole, depending on when the offence was committed, and that the Correctional authorities are unable to make that determination on the material available to them. The offender should be given an opportunity, if he or she wishes to do so, to provide further information that may assist in determining the date of the offence.

V

CONCLUSION

[39] I would dismiss the appeal.

Released: “DD” “DEC 08 2016”

“Doherty J.A.”
“I sgree R.A. Blair J.A.”
“I agree Gloria Epstein J.A.”

1992 CarswellNS 15
Supreme Court of Canada

Please see in particular para. 8

Canada v. Pharmaceutical Society (Nova Scotia)

1992 CarswellNS 15, 1992 CarswellNS 353, [1992] 2 S.C.R. 606, [1992] S.C.J. No. 67, 10 C.R.R. (2d) 34, 114 N.S.R. (2d) 91, 139 N.R. 241, 15 C.R. (4th) 1, 16 W.C.B. (2d) 460, 313 A.P.R. 91, 34 A.C.W.S. (3d) 1092, 43 C.P.R. (3d) 1, 74 C.C.C. (3d) 289, 93 D.L.R. (4th) 36, J.E. 92-1019, EYB 1992-67391

NOVA SCOTIA PHARMACEUTICAL SOCIETY, PHARMACY ASSOCIATION OF NOVA SCOTIA, LAWTONS DRUG STORES LIMITED, WILLIAM H. RICHARDSON, EMPIRE DRUGSTORES LIMITED, WOODLAWN PHARMACY LIMITED, NOLAN PHARMACY LIMITED, CHRISTOPHER D.A. NOLAN, BLACKBURN HOLDINGS LIMITED, WILLIAM G. WILSON, WOODSIDE PHARMACY LIMITED and FRANK FORBES v. R.

ATTORNEY GENERAL FOR ONTARIO and ATTORNEY GENERAL FOR ALBERTA (Intervenors)

ASSOCIATION QUÉBÉCOISE DES PHARMACIENS PROPRIÉTAIRES, CUMBERLAND DRUGS (MERIVALE) LTD., KANE'S SUPER DRUGMART CORP. LTD., LES ENTREPRISES NORPHARM INC., ESCOMPTE CHEZ LAFORTUNE INC., FAMILI-PRIX INC., LE GROUPE JEAN COUTU (P.J.C.) INC., GROUPE PHARMACEUTIQUE FOCUS INC., LES MAGASINS KOFFLER DE L'EST INC., McMAHON ESSAIM INC., SUPER ESCOMPTE BROUILLET INC., B. MAYRAND INC., SUPERPHARM (MONTRÉAL) LTÉE, UNIPRIX INC., PIERRE BOSSÉ, FRANÇOIS-JEAN COUTU, CLAUDE GAGNON, GUY LANOUE, MICHEL LESIEUR, GUY-MARIE PAPILLON and JEAN-GUY PRUD'HOMME (Intervenors)

Lamer C.J.C., La Forest, L'Heureux-Dubé, Sopinka, Gonthier, Cory and Iacobucci JJ.

Heard: December 4, 1991
Judgment: July 9, 1992
Docket: Doc. 22473

Counsel: *Joel Fichaud*, *Harry Wrathall, Q.C.* and *Catherine Walker*, for appellants.
Michael R. Dambrot, Q.C., *Calvin S. Goldman, Q.C.* and *John S. Tyhurst*, for the Crown.
M. Philip Tunley and *David B. Butt*, for intervenor Attorney General for Ontario.
Bart Rosborough, for intervenor Attorney General for Alberta.
Yves Bériault and *Madeleine Renaud*, for intervenor Association québécoise des pharmaciens et al.

Subject: Intellectual Property; Criminal; Property; Civil Practice and Procedure; Corporate and Commercial

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Competition law --- Conspiracy to lessen competition unduly — Constitutional validity of s. 32(1)(c) and (1.1) of Combines Investigation Act, R.S.C. 1970, c. C-23

Constitutional validity of s. 32(1)(c) and (1.1) of Combines Investigation Act, R.S.C. 1970, c. C-23 — Whether provision offends s. 7 of Canadian Charter of Rights and Freedoms — Whether "unduly" impermissibly vague — Fair notice to accused — Limitation of enforcement discretion — Concept of overbreadth — Minimal fault requirement — Market power — Structure of market — Behaviour of parties to agreement — Market share — Likely effect of agreement — Right of public to competition — Mental element of s. 32(1)(c) of Act and s. 7 of Charter — Intent of accused to enter into agreement as subjective element — Intent to lessen competition unduly as objective element — Provision as part of public policy in economic field.

Constitutional law --- Charter of Rights — Fundamental justice

Constitutional validity of s. 32(1)(c) and (1.1) of Combines Investigation Act, R.S.C. 1970, c. C-23 — Whether "unduly" impermissibly vague — Whether provision sufficiently precise to permit sufficient guidance for legal debate — Criterion of fair notice — Criterion of limitation on enforcement discretion — Overbreadth — Minimum fault requirement — Mens rea as element — Intent to enter agreement as subjective element — Intent to lessen competition unduly as objective element — Impairment — "Undue" having connotation of seriousness — Something affected unduly being of significant degree and not of minimal degree — Partial rule of reason — Provision of Act sufficiently precise to meet constitutional standard.

The accused were charged with two counts of having unlawfully conspired, combined, agreed or arranged together to prevent or lessen competition unduly in the production, manufacture, purchase, barter, sale, storage, rental, transportation, or supply of prescription drugs and pharmacists' dispensing services contrary to the provisions of s. 32(1)(c) and (1.1) of the Combines Investigation Act, R.S.C. 1970, c. C-23 (renamed the Competition Act, 1986, c. 26, s. 19 -now R.S.C. 1985, c. C-34, s. 45(1)(c) and (2)). The offence is indictable and subjects the accused to possible imprisonment.

The accused prior to trial launched a motion to the Trial Division for an order to quash the indictment on the basis that the applicable provisions of the Act violated ss. 7, 11(a) and (d) of the Canadian Charter of Rights and Freedoms and were therefore invalid and of no effect. The accused contended that the word "unduly" is impermissibly vague and that the element of mens rea was not contemplated by the impugned provisions.

The motions judge held that pursuant to s. 52 of the Constitution Act, 1982, that s. 32(1)(c) and (1.1) of the Combines Investigation Act is invalid and of no force and effect as it violates ss. 7, 11(a) and 11(d) of the Charter.

The Nova Scotia Supreme Court, Appeal Division allowed an appeal.

Held, per Gonthier J.:

1. Result

The appeal is dismissed. Section 32(1)(c) and (1.1) does not offend ss. 7 or 11 of the Canadian Charter of Rights and Freedoms.

2. Material elements of offence under s. 32(1)(c) of Act

The offence created by s. 32(1)(c) of the Act comprises the material elements: (a) an agreement entered into by the accused; (b) an undue prevention or lessening of competition flowing from the agreement; (c) a mental element.

3. Overbreadth

The submission of overbreadth of s. 32(1)(c) should not be used to masquerade an absence of constitutional foundation. Any excess in the scope of s. 32(1)(c) of the Act would only be the result of the allegation of vagueness of the word "unduly" Claims of overbreadth will succeed or fail depending on the success of the allegation of vagueness.

4. Doctrine of vagueness

A law will be found unconstitutionally vague if it so lacks in precision as not to give sufficient guidance for legal debate.

5. The expression "unduly"

The word "unduly" does not have a precise technical meaning but it does have a common meaning. It expresses a notion of seriousness or significance. Since "unduly" in s. 32(1)(c) of the Act leads to a discussion of the seriousness of the competitive effects, but not of all relevant economic matters, the section may be said to create a partial rule of reason.

Section 32(1)(c) of the Act is sufficiently precise to meet the constitutional standard, even when considered without the rest of the Act and case law. It outlines an area of risk, agreements that lessen or prevent competition, and imposes some boundaries on enforcement discretion, inasmuch as courts will scrutinize the impact of the agreement on competition to see if it runs against Canadian public policy of free competition.

In addition, s. 32(1)(c) is made even more precise when one considers the content of the inquiry it mandates, namely, the structure of the market and the behaviour of the parties to the agreement. The relevant market comprises both geographic and product aspects in the ascertainment of market power of the parties to the agreement.

The object of the agreement is the most important behaviour element in the inquiry under the section to determine the likely effect of the agreement.

Section 32(1)(c) requires, in addition to some market power, some behaviour likely to injure competition.

6. Mental element of s. 32(1)(c) of Act and s. 7 of Charter

The Crown must establish the subjective fault elements that the accused had the intention to enter into the agreement and was aware of its terms. As well, the Crown must demonstrate that the proof viewed objectively (i.e., by a reasonable business person) establishes that the accused was aware or ought to have been aware that the effect of the agreement entered into by the accused would be to prevent or lessen competition unduly.

Cases referred to:

R. v. Vaillancourt (1987), 47 D.L.R. (4th) 399, 39 C.C.C. (3d) 118, [1987] 2 S.C.R. 636, 60 C.R. (3d) 289, 32 C.R.R. 18, 68 Nfld. & P.E.I.R. 281, 81 N.R. 115;

Howard Smith Paper Mills Ltd. v. The Queen (1957), 29 C.P.R. 6, 8 D.L.R. (2d) 449, 118 C.C.C. 321, [1957] S.C.R. 403, 26 C.R. 1;

Reference re Section 94(2) of the Motor Vehicle Act (1985), 24 D.L.R. (4th) 536, 23 C.C.C. (3d) 289, [1985] 2 S.C.R. 486, 48 C.R. (3d) 289, 18 C.R.R. 30, 36 M.V.R. 240, [1986] 1 W.W.R. 481, 69 B.C.L.R. 145, 63 N.R. 266, 15 W.C.B. (2d) 343;

Reference re ss. 193 and 195.1(1)(c) of the Criminal Code (Man.) (1990), 56 C.C.C. (3d) 65, [1990] 1 S.C.R. 1123, 77 C.R. (3d) 1, 48 C.R.R. 1, [1990] 4 W.W.R. 481, 68 Man. R. (2d) 1, 109 N.R. 81, 10 W.C.B. (2d) 191;

Atlantic Sugar Refineries Co. v. A.-G. Can. (1980), 53 C.P.R. (2d) 1, 115 D.L.R. (3d) 21, 54 C.C.C. (2d) 373, [1980] 2 S.C.R. 644, 12 B.L.R. 171, 16 C.R. (3d) 128, (sub nom. *R. v. Atlantic Sugar Refineries Co)* 32 N.R. 562;

Knox Contracting Ltd. v. Canada (1990), 73 D.L.R. (4th) 110, 58 C.C.C. (3d) 65, [1990] 2 S.C.R. 338, [1990] 2 C.T.C. 262, 90 D.T.C. 6447, 106 N.B.R. (2d) 408, 110 N.R. 171, 10 W.C.B. (2d) 572;

R. v. Nguyen (1990), 59 C.C.C. (3d) 161, [1990] 2 S.C.R. 906, 79 C.R. (3d) 332, 50 C.R.R. 71, [1990] 6 W.W.R. 289, 3 W.A.C. 1, 73 Man. R. (2d) 1, 46 O.A.C. 13, 119 N.R. 353, 11 W.C.B. (2d) 199;

R. v. Perka (1984), 13 D.L.R. (4th) 1, 14 C.C.C. (3d) 385, [1984] 2 S.C.R. 232, 42 C.R. (3d) 113, [1984] 6 W.W.R. 289, 28 B.C.L.R. (2d) 205, 55 N.R. 1;

R. v. Morgentaler (1988), 44 D.L.R. (4th) 385, 37 C.C.C. (3d) 449, [1988] 1 S.C.R. 30, 62 C.R. (3d) 1, 31 C.R.R. 1, 82 N.R. 1, 63 O.R. (2d) 281n, 3 W.C.B. (2d) 332;

Irwin Toy Ltd. v. Quebec (Attorney-General) (1989), 25 C.P.R. (3d) 417, 58 D.L.R. (4th) 577, [1989] 1 S.C.R. 927, 39 C.R.R. 193, 24 Q.A.C. 2, 94 N.R. 167, 15 A.C.W.S. (3d) 121;

R. v. Keegstra (1990), 61 C.C.C. (3d) 1, [1990] 3 S.C.R. 697, 1 C.R. (4th) 129, 3 C.R.R. (2d) 193, [1991] 2 W.W.R. 1, 114 A.R. 81, 77 Alta. L.R. (2d) 193, 117 N.R. 1, 11 W.C.B. (2d) 352;

R. v. Oakes (1986), 26 D.L.R. (4th) 200, 24 C.C.C. (3d) 321, [1986] 1 S.C.R. 103, 50 C.R. (3d) 1, 19 C.R.R. 308, 65 N.R. 87, 53 O.R. (2d) 719n, 16 W.C.B. 73;

Canada (Canadian Human Rights Commission) v. Taylor (1990), 75 D.L.R. (4th) 577, [1990] 3 S.C.R. 892, 13 C.H.R.R. D/435, 3 C.R.R. (2d) 116, 117 N.R. 191, 24 A.C.W.S. (3d) 311;

Committee for the Commonwealth of Canada v. Canada (1991), 77 D.L.R. (4th) 385, [1991] 1 S.C.R. 139, 4 C.R.R. (2d) 60, 120 N.R. 241, 40 F.T.R. 240n, 25 A.C.W.S. (3d) 40;

Osborne v. Canada (Treasury Board) (1991), 82 D.L.R. (4th) 321, [1991] 2 S.C.R. 69, [1991] 3 F.C. 69, 37 C.C.E.L. 135, 91 C.L.L.C. 14,026, 4 C.R.R. (2d) 30, 125 N.R. 241, 41 F.T.R. 239n, 27 A.C.W.S. (3d) 601;

R. v. Butler (1992), 89 D.L.R. (4th) 449, 70 C.C.C. (3d) 129, [1992] 1 S.C.R. 452, 11 C.R. (4th) 137, 8 C.R.R. (2d) 1, [1992] 2 W.W.R. 577, 78 Man. R. (2d) 1, 134 N.R. 81, 15 W.C.B. (2d) 159;

Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc., 455 U.S. 489(1982);

Broadrick v. Oklahoma, 413 U.S. 601(1973);

R. v. Smith (1987), 40 D.L.R. (4th) 435, 34 C.C.C. (3d) 97, [1987] 1 S.C.R. 1045, 58 C.R. (3d) 193, 31 C.R.R. 193, [1987] 5 W.W.R. 1, 15 B.C.L.R. (2d) 273, 75 N.R. 321;

R. v. Goltz (1991), 67 C.C.C. (3d) 481, [1991] 3 S.C.R. 485, 8 C.R. (4th) 82, 7 C.R.R. (2d) 1, 31 M.V.R. (2d) 137, 11 W.A.C. 161, 61 B.C.L.R. (2d) 145, 131 N.R. 1, 14 W.C.B. (2d) 206;

R. v. Zundel (1987), 35 D.L.R. (4th) 338, 31 C.C.C. (3d) 97, 29 C.R.R. 349, 58 O.R. (2d) 129 [leave to appeal to S.C.C. refused 61 O.R. (2d) 588n, 80 N.R. 317n];

Maynard v. Cartwright, 486 U.S. 356(1988);

Grayned v. City of Rockford, 408 U.S. 104(1972);

R. v. MacDougall (1982), 142 D.L.R. (3d) 216, 1 C.C.C. (3d) 65, [1982] 2 S.C.R. 605, 31 C.R. (3d) 1, 18 M.V.R. 180, 54 N.S.R. (2d) 562, 44 N.R. 560, 8 W.C.B. 456;

Papachristou v. City of Jacksonville, 405 U.S. 156(1972);

Kolender v. Lawson, 461 U.S. 352(1983);

Smith v. Goguen, 415 U.S. 566(1974);

Sunday Times, Eur. Court H.R., Series A, No. 30, April 26, 1979;

Malone, Eur. Court H.R., Series A, No. 82, August 2, 1984;

Kruslin, Eur. Court H.R., Series A, No. 176-A, April 24, 1990;

Huvig, Eur. Court H.R., Series A, No. 176-B, April 24, 1990;

Silver and others, Eur. Court H.R., Series A, No. 61, March 25, 1983;

R. v. Wigglesworth (1987), 45 D.L.R. (4th) 235, 37 C.C.C. (3d) 385, [1987] 2 S.C.R. 541, 60 C.R. (3d) 193, 32 C.R.R. 219, [1988] 1 W.W.R. 193, 61 Sask. R. 105, 81 N.R. 161;

R. v. Shubley (1990), 65 D.L.R. (4th) 193, 52 C.C.C. (3d) 481, [1990] 1 S.C.R. 3, 42 Admin. L.R. 118, 74 C.R. (3d) 1, 46 C.R.R. 104, 37 O.A.C. 63, 104 N.R. 81, 71 O.R. (2d) 63n, 9 W.C.B. (2d) 229;

Weidman v. Shragge (1912), 20 C.C.C. 117, 46 S.C.R. 1, 2 W.W.R. 330;

Stinson-Reeb Builders Supply Co. v. The King, [1929] 3 D.L.R. 331, 52 C.C.C. 66, [1929] S.C.R. 276;

Container Materials Ltd. v. The King, [1942] 1 D.L.R. 529, 77 C.C.C. 129, [1942] S.C.R. 147;

R. v. J.J. Beamish Construction Co. (1967), 53 C.P.R. 43, 65 D.L.R. (2d) 260, [1968] 2 C.C.C. 5, [1968] 1 O.R. 5 [appeal to S.C.C. quashed 65 D.L.R. (2d) 286n];

R. v. Elliott (1905), 9 C.C.C. 505, 9 O.L.R. 648;

General Motors of Canada Ltd. v. City National Leasing (1989), 24 C.P.R. (3d) 417, 58 D.L.R. (4th) 255, [1989] 1 S.C.R. 641, 43 B.L.R. 225, 32 O.A.C. 332, 93 N.R. 326, 68 O.R. (2d) 512n, 7 W.C.B. (2d) 100;

R. v. J.W. Mills & Son Ltd., [1968] 2 Ex. C.R. 275 [affd 64 C.P.R. 7, 14 D.L.R. (3d) 464, 1 C.C.C. (2d) 240, [1971] S.C.R. 63];

R. v. Anthes Business Forms Ltd. (1975), 20 C.P.R. (2d) 1, 26 C.C.C. (2d) 349, 10 O.R. (2d) 153 [affd 28 C.P.R. (2d) 33n, 32 C.C.C. (2d) 207n, [1978] 1 S.C.R. 970, 22 N.R. 541];

R. v. Canadian Coat & Apron Supply Ltd. (1967), 52 C.P.R. 189, [1967] 2 Ex. C.R. 53, 2 C.R.N.S. 62;

R. v. Canadian General Electric Co. (1976), 29 C.P.R. (2d) 1, 75 D.L.R. (3d) 664, 34 C.C.C. (2d) 489, 15 O.R. (2d) 360;

Association Quebecoise des Pharmaciens Proprietaires v. Canada (Procurer-General), [1991] R.J.Q. 205;

R. v. Abitibi Power & Paper Co. (1960), 36 C.P.R. 188, 131 C.C.C. 201, 36 C.R. 96;

N.C.A.A. v. Board of Regents of University of Oklahoma, 468 U.S. 85(1984);

Federal Trade Commission v. Indiana Federation of Dentists, 476 U.S. 447(1986);

Volk v. Etablissements J. Vervaecke S.p.r.l., Case 5/69, [1969] E.C.R. 295;

S.A. Cadillon v. Firma Hoss Machinebau K.G., Case 1/71, [1971] E.C.R. 351;

R. v. McGavin Bakeries Ltd. (No. 6) (1951), 18 C.P.R. 26, [1952] 1 D.L.R. 201, 101 C.C.C. 22, 13 C.R. 63, 3 W.W.R. (N.S.) 289;

R. v. Northern Electric Co., [1955] 3 D.L.R. 449, 111 C.C.C. 241, 21 C.R. 45;

R. v. Wholesale Travel Group Inc. (1991), 38 C.P.R. (3d) 451, 84 D.L.R. (4th) 161, 67 C.C.C. (3d) 193, [1991] 3 S.C.R. 154, 8 C.R. (4th) 145, 7 C.R.R. (2d) 36, 49 O.A.C. 161, 130 N.R. 1, 4 O.R. (3d) 799n, 30 A.C.W.S. (3d) 660, 14 W.C.B. (2d) 208;

Hills v. Canada (Attorney-General) (1988), 48 D.L.R. (4th) 193, [1988] 1 S.C.R. 513, 88 C.L.L.C. 14,011, 84 N.R. 86, 9 A.C.W.S. (3d) 281;

Barthold, Eur. Court H.R., Series A, No. 90, March 25, 1985;

Muller and others, Eur. Court H.R., Series A, No. 133, May 24, 1988;

Leander, Eur. Court H.R., Series A, No. 116, March 26, 1987;

Aetna Insurance Co. v. The Queen (1977), 30 C.P.R. (2d) 193, 75 D.L.R. (3d) 332, 34 C.C.C. (2d) 157, [1978] 1 S.C.R. 731, 20 N.S.R. (2d) 565, 15 N.R. 117;

R. v. Metropolitan Toronto Pharmacists' Ass'n (1984), 3 C.P.R. (3d) 233

Statutes referred to:

"Act for the Prevention and Suppression of Combinations formed in restraint of Trade", S.C. 1889, c. 41,

s. 1

Canadian Charter of Rights and Freedoms,

ss. 1, 2, 7, 8, 11(a), (d), (h), 12

Civil Code of Lower Canada, art. 1053 Combines Investigation Act, R.S.C. 1970, c. C-23 (renamed Competition Act by 1986, c. 26, s. 19), ss. 30(2) [rep. & sub. 1986, c. 26, s. 28(2)], 32 [am. 1974-75-76, c. 76, s. 14; 1986, c. 26, s. 30], 32.01 [enacted idem, s. 31], 51, 70 [both rep. & sub. idem, s. 47] —

now R.S.C. 1985, c. C-34, ss. 34(2) [am. R.S.C. 1985, c. 19 (2nd Supp.), s. 28], 45 [idem, s. 30], 45.1 [enacted idem, s. 31], 79, 98 [both rep. & sub. idem, s. 45]

Criminal Code, ss. 19, 219, 222 to 240

Sherman Act, 1890, c. 647, 26 Stat 209 [am. 15 U.S.C. 1-7], 1 United States Constitution, amend. I, V, VIII, XIV European Convention for the Protection of Human Rights and Fundamental Freedoms 1950, 213 U.N.T.S. 222, arts. 8(2), 9(2), 10(2), 11(2), Protocol 4, art. 2(3) Europ. T.S. No. 46 Treaty of Rome, 1957, 298 U.N.T.S. 11, art. 85

Rules and regulations referred to:

Merger Guidelines, 49 Fed.

Reg. 26,823 (1984) Rules of the Supreme Court of Canada, SOR/83-74,

Rule 29(1) [rep. & sub. SOR/88-247, s. 10], (2)

Appeal from a judgment of the Nova Scotia Supreme Court, Appeal Division, 36 C.P.R. (3d) 173, 80 D.L.R. (4th) 206, 64 C.C.C. (3d) 129, 7 C.R.R. (2d) 352, 102 N.S.R. (2d) 222, 26 A.C.W.S. (3d) 663, setting aside a judgment of Roscoe J., 32 C.P.R. (3d) 259, 73 D.L.R. (4th) 500, 59 C.C.C. (3d) 30, 98 N.S.R. (2d) 296, 22 A.C.W.S. (3d) 779, 10 W.C.B. (2d) 578, declaring the provision of s. 32(1)(c) of the Competition Act (Can.) invalid, dismissed (Court File No. 22473).

Appeal from judgment reported at (1991), 64 C.C.C. (3d) 129, 102 N.S.R. (2d) 222, 279 A.P.R. 222, 80 D.L.R. (4th) 206, 36 C.P.R. (3d) 173, 7 C.R.R. (2d) 352 (C.A.), allowing Crown appeal of judgment quashing indictment under *Combines Investigation Act*, reported at (1990), 59 C.C.C. (3d) 30, 73 D.L.R. (4th) 500, 32 C.P.R. (3d) 259, 98 N.S.R. (2d) 296, 263 A.P.R. 296 (T.D.).

The judgment of the court was delivered by *Gonthier J.*:

I. Facts And Proceedings

1 The 12 appellants were indicted on May 31, 1990, with two counts of conspiracy to prevent or lessen competition unduly, contrary to s. 32(1)(*c*) of the *Combines Investigation Act*, R.S.C. 1970, c. C-23. Both counts related to the sale and offering for sale of prescription drugs and pharmacists' dispensing services between January 1, 1974 and June 16, 1986, for the first, and between July 1, 1976 and June 16, 1986, for the second. The trial was set to begin in October 1990.

2 On August 21, 1990, the appellants made a motion for an order to quash the indictment, on the basis that ss. 32(1)(*c*), 32(1.1) and 32(1.3) of the Act violated ss. 7, 11(*a*) and 11(*d*) of the *Canadian Charter of Rights and Freedoms* and were therefore invalid. The arguments raised revolved essentially on the issues of vagueness and mens rea. On September 5, 1990, Roscoe J. of the Nova Scotia Supreme Court, Trial Division, allowed the motion and quashed the indictment: (sub nom. *R. v. Nova Scotia Pharmaceutical Society*) (1990), 59 C.C.C. (3d) 30, 73 D.L.R. (4th) 500, 32 C.P.R. (3d) 259, *(*sub nom. *R. v. Nova Scotia Pharmaceutical Society (No. 2)))* 98 N.S.R. (2d) 296, 263 A.P.R. 296. The respondent appealed to the Nova Scotia Supreme Court, Appeal Division. On April 24, 1991, a unanimous bench (Clarke C.J.N.S., Jones and Hallett JJ.A.) allowed the appeal: (sub nom. *R. v. Pharmaceutical Society (Nova Scotia))* (1991), 64 C.C.C. (3d) 129, 102 N.S.R. (2d) 222, 279 A.P.R. 222, 80 D.L.R. (4th) 206, 36 C.P.R. (3d) 173, 7 C.R.R. (2d) 352. A notice of appeal was filed in this court on May 22, 1991.

II. Relevant Statutory Provisions

Combines Investigation Act

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> 32.(1) Every one who conspires, combines, agrees or arranges with another person
>
> . . . . .
>
> (*c*) to prevent, or lessen, unduly, competition in the production, manufacture, purchase, barter, sale, storage, rental, transportation or supply of a product, or in the price of insurance upon persons or property,
>
> . . . . .
>
> is guilty of an indictable offence and is likely to imprisonment for five years or a fine of one million dollars or to both.

The Act was amended in 1976 by S.C. 1974-75-76, c.76, also known as "Stage I" of competition law reform. Section 32(1.1) was then added:

> (1.1) For greater certainty, in establishing that a conspiracy, combination, agreement or arrangement is in violation of subsection (1), it shall not be necessary to prove that the conspiracy, combination, agreement or arrangement, if carried into effect, would or would be likely to eliminate, completely or virtually, competition in the market to which it relates or that it was the object of any or all of the parties thereto to eliminate, completely or virtually, competition in that market.

In 1986, in the course of "Stage II" of the reform, S.C. 1986, c.26, further added s. 32(1.3) to the Act (renamed the *Competition Act*):

> (1.3) For greater certainty, in establishing that a conspiracy, combination, agreement or arrangement is in contravention of subsection (1), it is necessary to prove that the parties thereto intended to and did enter into the conspiracy, combination, agreement or arrangement, but it is not necessary to prove that the parties intended that the conspiracy, combination, agreement or arrangement have an effect set out in subsection (1).

These sections are now respectively known as ss. 45(1)(*c*), 45(2) and 45(2.2) of the *Competition Act*, R.S.C. 1985, c. C-34.

III. Judgments Below

Nova Scotia Supreme Court, Trial Division (1990), 59 C.C.C. (3d) 30

4 On the mens rea issue, Roscoe J. reviewed the case law and concluded that s. 32(1)(*c*) of the Act requires the Crown to prove only that the accused intended to enter into an agreement, the effect of which, if carried out, would be to lessen competition, but not that it also intended to prevent or lessen competition unduly. Relying on *R. v. Vaillancourt*, [1987] 2 S.C.R. 636, 60 C.R. (3d) 289, 81 N.R. 115, 68 Nfld. & P.E.I.R. 281, 209 A.P.R. 281, 10 Q.A.C. 161, 39 C.C.C. (3d) 118, 47 D.L.R. (4th) 399, 32 C.R.R. 18, she found that s. 32(1)(*c*) creates a truly criminal offence, and that the absence of a subjective mens rea requirement with respect to the lessening of competition leaves the possibility that the "morally innocent" be convicted. She therefore concluded that s. 32(1)(*c*) violates s. 7 of the *Charter*.

5 On the vagueness issue, Roscoe J., after having considered the *Reference re ss. 193 & 195.1(1)(c) of the Criminal Code (Canada)*, [1990] 1 S.C.R. 1123, 77 C.R. (3d) 1, 56 C.C.C. (3d) 65, [1990] 4 W.W.R. 481, 109 N.R. 81, 68 Man. R. (2d) 1, 48 C.R.R. 1 (hereinafter the *Prostitution Reference*), examined the case law interpreting the word "unduly" in s. 32(1)(*c*) of the Act. She was of the opinion that the only test that provided a sufficient degree of certainty to meet the standards of s. 7 was the "virtual elimination of competition" test enunciated by Cartwright J. in *R. v. Howard Smith Paper Mills Ltd.*, [1957] S.C.R. 403, 26 C.R. 1, 118 C.C.C. 321, 8 D.L.R. (2d) 449. Since that test had been repealed by the enactment in 1976 of s. 32(1.1), Roscoe J. held that s. 32(1)(*c*) was too vague and violated s. 7 of the *Charter*. She also held the indictment too vague, on the basis that the mere repetition of the words of s. 32(1)(*c*) in the indictment could not give sufficient notice and information to the accused, and deprived them of their right to a full answer and defence under ss. 7, 11(*a*) and 11(*d*) of the *Charter*.

6 Roscoe J. considered that s. 1 of the *Charter* could not be applied to cure the violations of s. 7 flowing from the mens rea requirement, following the dictum of Lamer J. (as he then was) in *Reference re s. 94(2) of the Motor Vehicle Act (British Columbia)*, [1985] 2 S.C.R. 486, 48 C.R. (3d) 289, 36 M.V.R. 240, [1986] 1 W.W.R. 481, 69 B.C.L.R. 145, 63 N.R. 266, 23 C.C.C. (3d) 289, 24 D.L.R. (4th) 536, 18 C.R.R. 30, (sub nom. *Constitutional Question Act, R.S.B.C. 1979, Chap. 63))* [1986] D.L.Q. 90 (headnote), as well as appellate pronouncements on the issue. She also considered that the vagueness of s. 32(1)(*c*) could not make it a limit "prescribed by law" within the meaning of s. 1 of the *Charter*, and thus that this violation of s. 7 could not be saved either. She declared ss. 32(1)(*c*) and 32(1.1) of the Act invalid and of no force and effect, and quashed the indictment.

Supreme Court of Nova Scotia, Appeal Division (1991), 64 C.C.C. (3d) 129

7 For the court, on the mens rea issue, Clarke C.J.N.S. viewed *Atlantic Sugar Refineries Co. v. Canada (Attorney General)*, [1980] 2 S.C.R. 644, 16 C.R. (3d) 128, 12 B.L.R. 171, 54 C.C.C. (2d) 373, 115 D.L.R. (3d) 21, 53 C.P.R. (2d) 1, 32 N.R. 562, as having effected a change in law. Following the decision of this court, he held that s. 32(1)(*c*) requires the Crown to prove that the accused intended unduly to lessen competition. Furthermore, Clarke C.J.N.S. characterized s. 32(1)(*c*) as a criminal offence, even though it is found in a regulatory statute, citing *Knox Contracting Ltd. v. R.*, [1990] 2 S.C.R. 338, 90 D.T.C. 6447, (sub nom. *Knox Contracting Ltd. v. Canada)* 110 N.R. 171, 58 C.C.C. (3d) 65, [1990] 2 C.T.C. 262, 73 D.L.R. (4th) 110, 106 N.B.R. (2d) 408, 265 A.P.R. 408, in support. In the light of *Vaillancourt* and *R. v. Nguyen*, [1990] 2 S.C.R. 906, 79 C.R. (3d) 332, (sub nom. *R. v. Hess; R. v. Nguyen)* [1990] 6 W.W.R. 289, 50 C.R.R. 71, 119 N.R. 353, 46 O.A.C. 13, 73 Man. R. (2d) 1, 3 W.A.C. 1, 59 C.C.C. (3d) 161 , he held that "where a statutory provision creates an offence and imposes the possibility of imprisonment as a penalty upon conviction, some degree of mens rea must attach to each essential element of the offence if the provision is to comply with s. 7 of the Charter." (p. 146 [C.C.C.]). Given his conclusion on the substance of the section, there was no infringement of s. 7.

8 Clarke C.J.N.S. did not rule on the validity of s. 32(1.3) of the Act. Since it effected a substantive change in the law by removing the subjective mens rea requirement with respect to the lessening of competition, this section could not have a retroactive effect, and therefore it did not apply to the charges against the accused.

9 With respect to the vagueness argument, Clarke C.J.N.S. considered that the impugned provision must be assessed in light of the Act as a whole and of the relevant case law. First of all, in ss. 32(2) and 32(3), the Act enumerates subject-matters that will or will not attract the application of s. 32(1). Section 32(1.1) indicates that a virtual elimination of competition is not necessary to constitute the offence.

10 Secondly, case law has established that the inquiry must focus on the effect of the agreement on competition in the related market. A host of considerations then come into play, constituting a framework for decision. Clarke C.J.N.S. could not find s. 32(1)(*c*) vague, as it has been given meaning by the courts for a long period of time, leading to convictions and acquittals. The word "unduly" actually benefits the accused; even though it defies precise measurement, it is of common usage, and denotes a sense of seriousness. Parties to an impugned agreement were in the best position to assess the likely effect on competition.

11 Section 32(1)(*c*) was held by Clarke C.J.N.S. not to be unconstitutionally vague, and consequently the indictment was held not to violate ss. 7, 11(*a*) or 11(*d*) of the *Charter*. The appeal was allowed.

IV. Issues

12 The following constitutional questions were stated by the Chief Justice on July 11, 1991:

1. Is s. 32(1)(*c*) of the *Combines Investigation Act*, R.S.C. 1970, c. C-23 (now s. 45(1)(*c*) of the *Competition Act*, R.S.C. 1985, c. C-34) in whole or in part inconsistent with s. 7 of the *Canadian Charter of Rights and Freedoms*?

2. Is s. 32(1.1) of the *Combines Investigation Act*, R.S.C. 1970, c. C-23 (now s. 45(2) of the *Competition Act*, R.S.C. 1985, c. C-34) inconsistent with s. 7 of the *Canadian Charter of Rights and Freedoms*?

3. If the answer to questions 1 or 2 is yes, is the infringement nevertheless justified under s. 1 of the *Canadian Charter of Rights and Freedoms*?

13 Given the structure of the arguments presented by the parties, I propose to deal with the various issues as follows:

I. The alleged unconstitutional vagueness of ss. 32(1)(*c*) and 32(1.1) of the Act and of the indictment;

II. A. The mens rea required by s. 32(1)(*c*) of the Act; and

B. The constitutionality of the means rea requirement of s. 32(1)(*c*) of the Act.

14 In their notice of appeal, the appellants raised only the vagueness issue as a ground of appeal. By a notice of intention of June 20, 1991, the respondent indicated that it would seek a variation of the appeal judgment on the mens rea issue. The respondent asks this court to hold that s. 32(1)(*c*) does not require the Crown to prove intent to lessen competition, and that s. 32(1)(*c*) nevertheless does not violate the *Charter*. The appellants contend that the respondent was forbidden to raise the mens rea issue without having obtained prior leave from the court under R.29(2) of the *Rules of the Supreme Court of Canada*, SOR/83-74, since the respondent is indeed cross-appealing from the appeal judgment.

15 The respondent, through its notice of intention, is not in fact launching a cross-appeal from the decision of the Supreme Court of Nova Scotia, Appeal Division. It does not seek to modify the disposition of the case. It only aims at varying the reasons given for that disposition. This case falls plainly within R.29(1) of the *Rules of the Supreme Court*. R.29(2), dealing with cross-appeals, has no application here. Upon filing a notice of intention, the respondent could request a variation of the Court of Appeal judgment on the mens rea issue, as long as it ultimately upholds its disposition of the case. Even if the respondent had not filed a notice of intention, the court would have retained under R.29(1) complete discretion to treat the whole case as open, as was done in *Perka v. R.*, [1984] 2 S.C.R. 232, 42 C.R. (3d) 113, [1984] 6 W.W.R. 289, 55 N.R. 1, 14 C.C.C. (3d) 385, 13

D.L.R. (4th) 1, 28 B.C.L.R. (2d) 205. As Dickson J. (as he then was) wrote at p. 240 [S.C.R.], "it is open to a respondent to advance any argument to sustain the judgment below, and he is not limited to ap pellants' points of law."

16 The mens rea issue is therefore properly before this court.

V. Sections 32(1)(c) And 32(1.1) Of The Act And Vagueness Under S. 7 Of The Charter

17 Since vagueness is a central issue in this case, it is useful to review the relevant principles and their application before dealing with the merits of the case.

A. Vagueness under the Canadian Charter of Rights and Freedoms

18

1. The Case Law of this Court

19 So far eight cases have given rise to discussions of vagueness issues under the *Charter*. A review of them will show that, while the theme of vagueness and the related notion of overbreadth have appeared in many decisions of this court, giving rise to some questions as to the proper place of these concepts within *Charter* analysis, few statements have been made to substantiate the notion of vagueness, and its relationship with overbreadth.

20 Beetz J., in his opinion in *R. v. Morgentaler*, [1988] 1 S.C.R. 30, 62 C.R. (3d) 1, 82 N.R. 1, 26 O.A.C. 1, 44 D.L.R. (4th) 385, 31 C.R.R. 1, 37 C.C.C. (3d) 449, responded to the argument that s. 251(4)(*c*) of the *Criminal Code*, R.S.C. 1970, c. C-34, was vague and offended s. 7 of the *Charter*. This section made abortions conditional upon the obtention of a doctor's certificate to the effect that the life or health of the woman was in danger. Beetz J. held that the standard of "likely danger to health" was not unduly vague. Since the law contemplated that the danger to health would be assessed by a medical practitioner exercising a medical judgment, some measure of flexibility was acceptable. "Flexibility and vagueness are not synonymous.", wrote Beetz J. at p. 107 [S.C.R.].

21 In *Irwin Toy Ltd. c. Québec (Procureur général)*, [1989] 1 S.C.R. 927, 94 N.R. 167, 58 D.L.R. (4th) 577, 24 Q.A.C. 2, 25 C.P.R. (3d) 417, 39 C.R.R. 193, it was submitted that ss. 248 and 249 of the Quebec *Consumer Protection Act*, R.S.Q. c. P-40.1, were too vague to constitute a limit prescribed by law. Sections 248 and 249 forbid commercial advertising directed at persons under 13 years of age. Section 249 lists three factors to be taken into account when determining whether an advertisement was so directed, the last of which is the time and place of the advertisement. Then s. 249 enunciates that the mere fact that the advertisement was printed or broadcast in circumstances where it was intended for persons 13 and over or for all persons does not create a presumption that the advertisement is not directed at persons under 13. It was argued that s. 249 was confusing and left too much scope for discretion. The majority of the court disagreed. It

found that the text of the section could be given a sensible construction. On the issue of discretion, Dickson C.J.C., Lamer J. (as he then was) and Wilson J. wrote at p. 983 [S.C.R.]:

> Absolute precision in the law exists rarely, if at all. The question is whether the legislature has provided an intelligible standard according to which the judiciary must do its work. The task of interpreting how that standard applies in particular instances might always be characterized as having a discretionary element, because the standard can never specify all the instances in which it applies. On the other hand, where there is no intelligible standard and where the legislature has given a plenary discretion to do whatever seems best in a wide set of circumstances, there is no 'limit prescribed by law'.

22 Then came the *Prostitution Reference*, supra, where it was alleged that ss. 193 and 195.1(1)(*c*) of the *Criminal Code*, R.S.C. 1970, c. C-34, were impermissibly vague under s. 7 of the *Charter*. Lamer J. (as he then was) devoted a long passage in his reasons to the "void for vagueness" doctrine. Lamer J. ascribed two rationales for the invalidation of vague laws under s. 7 of the *Charter* at p. 1152 [S.C.R.], that is the need (1) to give citizens fair notice of the consequences of their conduct, so that they may avoid liability and benefit from a full answer and defence should they be tried and (2) to limit law enforcement discretion. He then reviewed the distinction between vagueness and overbreadth. At p. 1155 [S.C.R.], Lamer J. pointed out that vagueness has been argued both under s. 7 and s. 1 of the *Charter*. He made some remarks on the issue: the vagueness doctrine does not require absolute certainty of laws, the interpretative role of the courts must not be overlooked and the possibility of varying interpretations is not fatal (at pp. 1156-1157 [S.C.R.]). He then proceeded to consider the impugned sections of the Code and found them not in violation of s. 7 of the *Charter* on account of vagueness. For the majority, Dickson C.J.C. endorsed Lamer J.'s analysis. While in dissent, Wilson J. agreed with the majority on this point.

23 Lamer J. also stated that even if the section was not unconstitutionally vague, it could nevertheless be found overly broad under s. 1 analysis. The majority did not consider this to be the case, but WilsonJ. found the provisions too broad to meet the "minimal impairment" test. The *Prostitution Reference* established the doctrine of vagueness as one of the fundamental principles of justice under s. 7 of the *Charter*, and also differentiated vagueness and overbreadth.

24 This distinction came to the fore in *R. v. Keegstra*, [1990] 3 S.C.R. 697, 1 C.R. (4th) 129, 77 Alta. L.R. (2d) 193, [1991] 2 W.W.R. 1, 61 C.C.C. (3d) 1, 117 N.R. 1, 114 A.R. 81, 3 C.R.R. (2d) 193. This time the question was considered under the "minimal impairment" branch of the *Oakes* test (developed in *R. v. Oakes*, [1986] 1 S.C.R. 103, 50 C.R. (3d) 1, 65 N.R. 87, 53 O.R. (2d) 719 (headnote only), 24 C.C.C. (3d) 321, 14 O.A.C. 335, 26 D.L.R. (4th) 200, 19 C.R.R. 308). It had been argued that s. 319(2) of the *Criminal Code*, R.S.C. 1985, c. C-46, was too broad in its ambit ("wilfully promot[ing] hatred against any identifiable group"), and could include expression that bears no relationship with Parliament's objective in enacting the statute. Furthermore, the vagueness of s. 319(2) was also raised. For the majority, Dickson C.J.C. blended

both concepts. After a careful analysis of the wording of s. 319(2) and of the defences open to the accused in s. 319(3), Dickson C.J.C. concluded that the subsection did pass the "minimal impairment" test. McLachlin J. in dissent focused more precisely on the overbreadth of the section in her reasons, even though she relied on the same elements as Dickson C.J.C. *Keegstra* does not bring anything new to the principles that had already been developed, and the majority opinion does not distinguish between vagueness and overbreadth quite as clearly as in the *Prostitution Reference*.

25 In *Canada (Canadian Human Rights Commission) v. Taylor*, [1990] 3 S.C.R. 892, 75 D.L.R. (4th) 577, 13 C.H.R.R. D/435, 3 C.R.R. (2d) 116, 117 N.R. 191, a companion case to *Keegstra*, McLachlin J. in dissent commented on the proper place of vagueness within *Charter* analysis. She wrote at p. 956 [S.C.R.]:

> [T]he difficulty in ascribing a constant and universal meaning to the terms used [in the impugned section] is a factor to be taken into account in assessing whether the law is 'demonstrably justified in a free and democratic society'. But I would be reluctant to circumvent the entire balancing analysis of the s. 1 test by finding that the words used were so vague as not to constitute a 'limit prescribed by law', unless the provision could truly be described as failing to offer an intelligible standard.

McLachlin J. seems to envision a relatively stringent standard for vagueness, if it is to cut short the s. 1 analysis through a finding that the disposition is not law within the meaning of "prescribed by law".

26 In *Comité pour la République du Canada - Committee for the Commonwealth of Canada v. Canada*, [1991] 1 S.C.R. 139, 120 N.R. 241, 77 D.L.R. (4th) 385, 4 C.R.R. (2d) 60, L'Heureux-Dubé J. discussed the vagueness and overbreadth of s. 7 of the *Government Airport Concession Operations Regulations*, SOR/79-373. She was of the opinion that a statutory disposition, if too vague, would not constitute a limit "prescribed by law", while if overbroad, may not pass the *Oakes* test (at p. 208 [S.C.R.]). In her discussion of vagueness, she linked this concept with the rule of law, and restated the dual concerns of fair notice and limitation of enforcement discretion that had been formulated by Lamer J. in the *Prostitution Reference*. As for overbreadth, L'Heureux-Dubé J. considered that this doctrine was more or less subsumed within the "minimal impairment" branch of the *Oakes* test.

27 Further in *Osborne v. Canada (Treasury Board)*, [1991] 2 S.C.R. 69, 37 C.C.E.L. 135, 91 C.L.L.C. 14,026, 125 N.R. 241, 82 D.L.R. (4th) 321, 4 C.R.R. (2d) 30, the vagueness and overbreadth of s. 33 of the *Public Service Employment Act*, R.S.C. 1985, c. P-33, were at issue under the s. 1 analysis. For the majority, SopinkaJ. adopted the statements made by McLachlin J. in *Taylor* and added at pp. 94-95 [S.C.R.]:

> Vagueness can have constitutional significance in at least two ways in a s. 1 analysis. A law may be so uncertain as to be incapable of being interpreted so as to constitute any restraint on governmental power. The uncertainty may arise either from the generality of the discretion conferred on the donee of the power or from the use of language that is so obscure as to be incapable of interpretation with any degree of precision using the ordinary tools. In these circumstances, there is no 'limit prescribed by law' and no s. 1 analysis is necessary as the threshold requirement for its application is not met. The second way in which vagueness can play a constitutional role is in the analysis of s. 1. A law which passes the threshold test may, nevertheless, by reason of its imprecision, not qualify as a reasonable limit. Generality and imprecision of language may fail to confine the invasion of a *Charter* right within reasonable limits. In this sense vagueness is an aspect of overbreadth.

28 In its recent decision in *R. v. Butler*, [1992] 1 S.C.R. 452, 11 C.R. (4th) 137, [1992] 2 W.W.R. 577, 70 C.C.C. (3d) 129, 134 N.R. 81, 8 C.R.R. (2d) 1, 89 D.L.R. (4th) 449, 78 Man. R. (2d) 1, 16 W.A.C. 1, this court followed its case law and found that the words "undue exploitation of sex" in s. 163(8) of the *Criminal Code*, R.S.C. 1985, c. C-46, constituted a limit prescribed by law within the meaning of s. 1 of the *Charter* and, as interpreted by the courts satisfied the minimum impairment branch of the s. 1 test.

29 The foregoing may be summarized by way of the following propositions:

> 1. Vagueness can be raised under s. 7 of the *Charter*, since it is a principle of fundamental justice that laws may not be too vague. It can also be raised under s. 1 of the *Charter* in limine, on the basis that an enactment is so vague as not to satisfy the requirement that a limitation on *Charter* rights be "prescribed by law". Furthermore, vagueness is also relevant to the "minimal impairment" stage of the *Oakes* test (*Morgentaler, Irwin Toy, Prostitution Reference*).
>
> 2. The "doctrine of vagueness" is founded on the rule of law, particularly on the principles of fair notice to citizens and limitation of enforcement discretion (*Prostitution Reference, Committee for the Commonwealth of Canada*).
>
> 3. Factors to be considered in determining whether a law is too vague include (a) the need for flexibility and the interpretative role of the courts, (b) the impossibility of achieving absolute certainty, a standard of intelligibility being more appropriate and (c) the possibility that many varying judicial interpretations of a given disposition may exist and perhaps coexist (*Morgentaler, Irwin Toy, Prostitution Reference, Taylor, Osborne*).
>
> 4. Vagueness, when raised under s. 7 or under s. 1 in limine, involves similar considerations (*Prostitution Reference, Committee for the Commonwealth of Canada*). On the other hand,

vagueness as it relates to the "minimal impairment" branch of s. 1 merges with the related concept of overbreadth (*Committee for the Commonwealth of Canada, Osborne*).

5. The court will be reluctant to find a disposition so vague as not to qualify as "law" under s. 1 in limine, and will rather consider the scope of the disposition under the "minimal impairment" test (*Taylor, Osborne*).

30 In order to give a more complete picture of issues of vagueness under the *Charter*, I will examine in turn the proper place of the doctrine of vagueness in *Charter* analysis and its content.

2. The Proper Place of the Doctrine of Vagueness in Charter Adjudication

31 Vagueness is often mingled and confused with overbreadth, possibly because of the influence of American authorities. From a review of American law, it will appear that overbreadth is not an autonomous notion in Canadian law, and that, contrary to the position of U.S. constitutional law, vagueness should have a constant meaning in Canadian law.

32 Overbreadth in American law is tied to the First Amendment. It is grounds to obtain what is termed "facial invalidation" of a statute, as opposed to a declaration that the statute is unconstitutional in the case of the particular plaintiff, which is the usual remedy. *Flipside v. Village of Hoffman Estates*, 455 U.S. 489 (1982), indicates how overbreadth interacts with vagueness in First Amendment cases. The court wrote at pp. 494-495:

> In a facial challenge to the overbreadth and vagueness of a law, a court's first task is to determine whether the enactment reaches a substantial amount of constitutionally protected conduct. If it does not, then the overbreadth challenge must fail. The court should then examine the facial vagueness challenge and, assuming the enactment implicates no constitutionally protected conduct, should uphold the challenge only if the enactment is impermissibly vague in all of its applications.

Overbreadth ties in to the taxonomy of protected and unprotected conduct and expression developed by American courts under the First Amendment. Some conduct or expression receives First Amendment protection and some does not, and to the extent that a statute substantially touches upon protected conduct and cannot be severed or read down, it will be declared void (see L.H. Tribe, *American Constitutional Law*, 2d ed. (Westbury, N.Y.: Foundation Pr. Inc., 1987), at p. 1022).

33 This distinction between protected and unprotected conduct or expression is typical of American law, since the American Constitution does not contain a general balancing clause similar to s. 1 of the *Charter*. Balancing must be done within the First Amendment itself. In this respect, it can be seen that the doctrine of overbreadth in American law involves an element of balancing, since the aims and scope of the statute must be compared with the range of protection of the First

Amendment. C. Rogerson, "The Judicial Search for Appropriate Remedies Under the Charter: The Examples of Overbreadth and Vagueness" in R. J. Sharpe, *Charter Litigation* (Toronto: Butterworths, 1987) at pp. 261-262, traces this element of balancing to *Broadrick v. Oklahoma*, 413 U.S. 601 (1973).

34 This court has repeatedly emphasized the numerous differences which exist between the *Charter* and the American Constitution. In particular, in the interpretation of s. 2 of the *Charter*, this court has taken a route completely different from that of U.S. courts. In cases starting with *Irwin Toy* up to *Butler*, including the *Prostitution Reference* and *Keegstra*, this court has given a wide ambit to the freedoms guaranteed by s. 2 of the *Charter*, on the basis that balancing between the objectives of the state and the violation of a right or freedom should occur at the s. 1 stage. Other sections of the *Charter*, such as ss. 7 and 8, do however incorporate some element of balancing, as a limitation within the definition of the protected right, with respect to other notions such as principles of fundamental justice or reasonableness.

35 A notion tied to balancing such as overbreadth finds its proper place in sections of the *Charter* which involve a balancing process. Consequently, I cannot but agree with the opinion expressed by L'Heureux-Dubé J. in *Committee for the Commonwealth of Canada* that overbreadth is subsumed under the "minimal impairment branch" of the *Oakes* test, under s. 1 of the *Charter*. This is also in accordance with the trend evidenced in *Osborne* and *Butler*. Furthermore, in determining whether s. 12 of the *Charter* has been infringed, for instance, a court, if it finds the punishment not grossly disproportionate for the accused, will typically examine reasonable hypotheses and assess whether the punishment is grossly disproportionate in these situations (*R. v. Smith*, [1987] 1 S.C.R. 1045, 58 C.R. (3d) 193, [1987] 5 W.W.R. 1, 75 N.R. 321, 15 B.C.L.R. (2d) 273, 34 C.C.C. (3d) 97, 40 D.L.R. (4th) 435, 31 C.R.R. 193, *R. v. Goltz*, [1991] 3 S.C.R. 485, 8 C.R. (4th) 82, 31 M.V.R. (2d) 137, 61 B.C.L.R. (2d) 145, 67 C.C.C. (3d) 481, 131 N.R. 1, 7 C.R.R. (2d) 1, 5 B.C.A.C. 161, 11 W.A.C. 161). This inquiry also resembles the sort of balancing process associated with the notion of overbreadth.

36 In all these cases, however, overbreadth remains no more than an analytical tool. The alleged overbreadth is always related to some limitation under the *Charter*. It is always established by comparing the ambit of the provision touching upon a protected right with such concepts as the objectives of the state, the principles of fundamental justice, the proportionality of punishment or the reasonableness of searches and seizures, to name a few. There is no such thing as overbreadth in the abstract. Overbreadth has no autonomous value under the *Charter*. As will be seen below, overbreadth is not at the heart of this case, although it has been invoked in argument.

37 The relationship between vagueness and "overbreadth" was well expounded by the Ontario Court of Appeal in this oft-quoted passage from *R. v. Zundel* (1987), 56 C.R. (3d) 1, 18 O.A.C. 161, 58 O.R. (2d) 129, 31 C.C.C. (3d) 97, 35 D.L.R. 338, 29 C.R.R. 349, at pp. 157-158 [O.R.]:

> Vagueness and overbreadth are two concepts. They can be applied separately, or they may be closely interrelated. The intended effect of a statute may be perfectly clear and thus not vague, and yet its application may be overly broad. Alternatively, as an example of the two concepts being closely interrelated, the wording of a statute may be so vague that its effect is considered to be overbroad.

I agree. A vague law may also constitute an excessive impairment of *Charter* rights under the *Oakes* test. This court recognized this, when it mentioned the two aspects of vagueness under s. 1 of the *Charter*, in *Osborne* and *Butler*.

38 For the sake of clarity, I would prefer to reserve the term "vagueness" for the most serious degree of vagueness, where a law is so vague as not to constitute a "limit prescribed by law" under s. 1 in limine. The other aspect of vagueness, being an instance of overbreadth, should be considered as such.

39 Moreover, in American constitutional law, "vagueness" has been given various contents, depending on whether it is considered under the First, Fifth (and Fourteenth) or even Eighth Amendment (for statutory conditions warranting the imposition of the death penalty). The scope of the inquiry and the reference group will change, as the United States Supreme Court stated in *Maynard v. Cartwright*, 486 U.S. 356 (1988), at p. 361.

40 Under the *Charter*, however, given the statements of Lamer J. in the *Prostitution Reference*, at p. 1155 [S.C.R.], I would consider that the "doctrine of vagueness" is a single concept, whether invoked as a principle of fundamental justice under s. 7 of the *Charter* or as part of s. 1 of the *Charter* in limine. Indeed from a practical point of view this makes little difference in the analysis, since a consideration of s. 1 in limine would follow immediately the determination of whether s. 7 has been violated. No intermediate step is lost. From a theoretical perspective, the justifications invoked for the doctrine of vagueness under both s. 7 and s. 1 are similar. A reading of the aforementioned cases shows that the rationales of fair notice to the citizen and limitation of enforcement discretion are put forward in every discussion of vagueness, irrespective of where it occurs in the *Charter* analysis. I see no ground for distinguishing them.

41 Vagueness may be raised under the substantive sections of the *Charter* whenever these sections comprise some internal limitation. For example, under s. 7, it may be that the limitation on life, liberty and security of the person would not otherwise be objectionable, but for the vagueness of the impugned law. The doctrine of vagueness would then rank among the principles of fundamental justice. Outside of these cases, the proper place of a vagueness argument is under s. 1 in limine.

42 I would therefore conclude that:

1. What is referred to as "overbreadth", whether it stems from the vagueness of a law or from another source, remains no more than an analytical tool to establish a violation of a *Charter* right. Overbreadth has no independent existence. References to a "doctrine of overbreadth" are superfluous.

2. The "doctrine of vagueness", the content of which will be developed shortly, is a principle of fundamental justice under s. 7 and it is also part of s. 1 in limine ("prescribed by law").

3. The Content of the "Doctrine of Vagueness"

43 As was said by this court in *Osborne* and *Butler*, the threshold for finding a law vague is relatively high. So far discussion of the content of the notion has evolved around intelligibility.

44 The two rationales of fair notice to the citizen and limitation of enforcement discretion have been adopted as the theoretical foundations of the doctrine of vagueness, here (*Prostitution Reference, Committee for the Commonwealth of Canada*) as well as in the United States (see *Grayned v. Rockford (City)*, 408 U.S. 104 (1972), at pp. 108-109) and in Europe, as will be seen later. These two rationales have been broadly linked with the corpus of principles of government known as the "rule of law", which lies at the core of our political and constitutional tradition.

Fair notice to the citizen

45 Fair notice to the citizen, as a guide to conduct and a contributing element to a full answer and defence, comprises two aspects.

46 First of all, there is the more formal aspect of notice, that is acquaintance with the actual text of a statute. In the criminal context, this concern has more or less been set aside by the common law maxim "Ignorance of the law is no excuse", embodied in s. 19 of the *Criminal Code* (see *R. v. MacDougall*, [1982] 2 S.C.R. 605, 31 C.R. (3d) 1, 18 M.V.R. 180, 1 C.C.C. (3d) 65, 54 N.S.R. (2d) 562, 112 A.P.R. 562, 142 D.L.R. (3d) 216, 44 N.R. 560). In the civil context, the maxim does not apply with equal force (see J.-L. Baudouin, *Les obligations*, 3d ed. (Cowansville, Que.: Yvon Blais, 1989) at p.122, and *Chitty on Contracts*, 25th ed. (London: Sweet & Maxwell, 1983), at paras. 314 and 353). Some authors have expressed the opinion that this maxim contradicts the rule of law, and should be revised in light of the growing quantity and complexity of penal legislation (see E. Colvin, "Criminal Law and The Rule of Law", in P. Fitzgerald, ed., *Crime, Justice & Codification* (Toronto: Carswell, 1986) 125 at p. 151, and J. C. Jeffries, Jr., "Legality, Vagueness, and the Construction of Penal Statutes" (1985) 71 Va. L. Rev. 189, at p. 209). Since this argument was not raised in this case, I will refrain from ruling on this issue. In any event, given that, as this court has already recognized, case law applying and interpreting a particular section is relevant in determining whether the section is vague, formal notice is not a central concern in a vagueness analysis.

47 As Lamer J. pointed out in *Reference re s. 94(2) of the Motor Vehicle Act (British Columbia)*, supra, principles of fundamental justice, such as the doctrine of vagueness, must have a substantive as well as procedural content. Indeed the idea of giving fair notice to citizens would be rather empty if the mere fact of bringing the text of the law to their attention was enough, especially when knowledge is presumed by law. There is also a substantive aspect to fair notice, which could be described as a notice, an understanding that some conduct comes under the law. Jeffries, supra, calls this the "core concept of notice" (at p. 211).

48 Let me take homicide as an example. The actual provisions of the *Criminal Code* dealing with homicide are numerous (comprising the core of ss. 222-240 and other related sections). When one completes the picture of the Code with case law, both substantive and constitutional, the result is a fairly intricate body of rules. Notwithstanding formal notice, it can hardly be expected of the average citizen that he know the law of homicide in detail. Yet no one would seriously argue that there is no substantive fair notice here, or that the law of homicide is vague. It can readily be seen why this is so. First of all, everyone (or sadly, should I say, almost everyone) has an inherent knowledge that taking the life of another human being is wrong. There is a deeply-rooted perception that homicide cannot be tolerated, whether one comes to this perception from a moral, religious or sociological stance. Therefore it is expected that homicide will be punished by the state. Secondly, homicide is indeed punished by the state, and homicide trials and sentences receive a great deal of publicity.

49 I used homicide as an example, because it lies so at the core of our criminal law and our shared values that substantive notice is easy to demonstrate. Similar demonstrations could be made, at greater length, for other legal provisions. The substantive aspect of fair notice is therefore a subjective understanding that the law touches upon some conduct, based on the substratum of values underlying the legal enactment and on the role that the legal enactment plays in the life of the society.

50 I do not wish to suggest that the state can only intervene through law when some non-legal basis for intervention exists. Many enactments are relatively narrow in scope and echo little of society at large; this is the case with many regulatory enactments. The weakness or the absence of substantive notice before the enactment can be compensated by bringing to the attention of the public the actual terms of the law, so that substantive notice will be achieved. Merit point and driving license revocation schemes are prime examples of this; through publicity and advertisement these schemes have been "digested" by society. A certain connection between the formal and substantive aspects of fair notice can be seen here.

51 Fair notice may not have been given when enactments are in somewhat general terms, in a way that does not readily permit citizens to be aware of their substance, when they do not relate to any element of the substratum of values held by society. It is no coincidence that these

enactments are often found vague. For instance, the vagrancy ordinance invalidated by the United States Supreme Court in *Papachristou v. Jacksonville*, 405 U.S. 156 (1972), or the compulsory identification statute struck down in *Kolender v. Lawson*, 461 U.S. 352 (1983), fall in this group.

52 Hence, aside from a formal aspect which is in our current system often presumed, fair notice to the citizen comprises a substantive aspect, that is an understanding that certain conduct is the subject of legal restrictions.

Limitation of law enforcement discretion

53 Lamer J. in the *Prostitution Reference* used the phrase "standardless sweep", first coined by the United States Supreme Court in *Smith v. Goguen*, 415 U.S. 566 (1974), at p. 575, to describe the limitation of enforcement discretion rationale for the doctrine of vagueness. It has become the prime concern in American constitutional law (*Kolender*, at pp. 357-358). Indeed today it has become paramount, given the considerable expansion in the discretionary powers of enforcement agencies that has followed the creation of the modern welfare state.

54 A law must not be so devoid of precision in its content that a conviction will automatically flow from the decision to prosecute. Such is the crux of the concern for limitation of enforcement discretion. When the power to decide whether a charge will lead to conviction or acquittal, normally the preserve of the judiciary, becomes fused with the power to prosecute because of the wording of the law, then a law will be unconstitutionally vague.

55 For instance, the wording of the vagrancy ordinance invalidated by the United States Supreme Court in *Papachristou* and quoted at length in the *Prostitution Reference* at pp. 1152-1153 [S.C.R.], was so general and so lacked precision in its content that a conviction would ensue every time the law enforcer decided to charge someone with the offence of vagrancy. The words of the ordinance had no substance to them, and they indicated no particular legislative purpose. They left the accused completely in the dark, with no possible way of defending himself before the court.

c. European Court of Human Rights case law

56 I would also note that the European Court of Human Rights (hereinafter "E.C.H.R.") has adopted the same approach to issues of vagueness, in the course of its treatment of words such as "prescribed by law", found in many limitation clauses of the *European Convention for the Protection of Human Rights and Fundamental Freedoms*, 213 U.N.T.S. 222 (hereinafter the "convention"), such as arts. 8(2), 9(2), 10(2), 11(2) or art. 2(3) of Protocol No. 4 to the Convention, Europ. T.S. No. 46. The E.C.H.R. gave this phrase a substantive content, which went beyond a mere inquiry as to whether a law existed or not.

57 The E.C.H.R. developed its conception of "prescribed by law" in the course of two famous cases, the *Sunday Times Case* (1979), Ser.A, No. 30, and the *Malone Case*, judgment of (August 2,

1984), Ser.A, No. 82. In the former, the E.C.H.R. drew attention to the two aspects of fair notice, namely formal notice ("accessibility") and substantive notice ("foreseeability"). It wrote at p. 31:

> In the Court's opinion, the following are two of the requirements that flow from the expression 'prescribed by law'. Firstly, the law must be adequately accessible: the citizen must be able to have an indication that is adequate in the circumstances of the legal rules applicable to a given case. Secondly, a norm cannot be regarded as a 'law' unless it is formulated with sufficient precision to enable the citizen to regulate his conduct: he must be able — if need be with appropriate advice — to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail. Those consequences need not be foreseeable with absolute certainty: experience shows this to be unattainable. Again, whilst certainty is highly desirable, it may bring in its train excessive rigidity and the law must be able to keep pace with changing circumstances. Accordingly, many laws are inevitably couched in terms which, to a greater or lesser extent, are vague and whose interpretation and application are questions of practice.

In the latter, the E.C.H.R. added the limitation of enforcement discretion to the range of interests underpinning its interpretation of "prescribed by law" at p. 32:

> The phrase thus implies ... that there must be a measure of legal protection in domestic law against arbitrary interferences by public authorities with the rights safeguarded by paragraph 1 [of article 8 of the Convention].

(See also the *Kruslin Case*, judgment of (April 24, 1990), Ser. A, No. 176-A, at pp. 24-25, and the *Huvig Case*, judgment of (April 24, 1990), Ser. A, No. 176-B, at p. 56.)

58 In my opinion, the case law of the E.C.H.R. is a very valuable guide on this issue, and it will be relied on further below.

d. The scope of precision

59 This leads me to synthetize these remarks about vagueness. The substantive notice and limitation of enforcement discretion rationales point in the same direction: an unintelligible provision gives insufficient guidance for legal debate and is therefore unconstitutionally vague.

60 Legal provisions by stating certain propositions outline certain permissible and impermissible areas, and they also provide some guidance to ascertain the boundaries of these areas. In his survey article "La teneur indécise du droit" (1991) 107 Rev. dr. publ. 1199, P. Amselek rightly underlines the etymological and metaphorical relationship between law and geometry and writes at pp. 1200-1201:

> [TRANSLATION]

> Legal rules are mental tools ... authoritatively introduced, given effect, by public authorities placed at the head of human communities to govern them: such rules are thought content with a specific purpose, to be used as a tool to guide conduct, thought content which determines the boundaries of possible action depending on the circumstances — for the Romans, these boundaries were the meaning of the very concept of *jus* in its earliest sense and are also reflected in our concept of 'law', implying the very idea of possibility, of latitude. These boundaries impose limits on the will of those to whom they apply, serving as a support, a yardstick enabling them to remain within the area of right conduct, of rectitude, within the parameters of conduct which the concept lays down and which it then gives effect to, setting the process in motion.

These rules, as Amselek later points out, are characterized by their unresolved nature, inasmuch as they are neither objective nor complete.

61 Legal rules only provide a framework, a guide as to how one may behave, but certainty is only reached in instant cases, where law is actualized by a competent authority. In the meanwhile, conduct is guided by approximation. The process of approximation sometimes results in quite a narrow set of options, sometimes in a broader one. Legal dispositions therefore delineate a risk zone, and cannot hope to do more, unless they are directed at individual instances.

62 By setting out the boundaries of permissible and non-permissible conduct, these norms give rise to legal debate. They bear substance, and they allow for a discussion as to their actualization. They therefore limit enforcement discretion by introducing boundaries, and they also sufficiently delineate an area of risk to allow for substantive notice to citizens.

63 Indeed no higher requirement as to certainty can be imposed on law in our modern state. Semantic arguments, based on a perception of language as an unequivocal medium, are unrealistic. Language is not the exact tool some may think it is. It cannot be argued that an enactment can and must provide enough guidance to predict the legal consequences of any given course of conduct in advance. All it can do is enunciate some boundaries, which create an area of risk. But it is inherent to our legal system that some conduct will fall along the boundaries of the area of risk; no definite prediction can then be made. Guidance, not direction, of conduct is a more realistic objective. The E.C.H.R. has repeatedly warned against a quest for certainty and adopted this "area of risk" approach in *Sunday Times*, supra, and especially the case of *Silver Case*, judgment of (March 25, 1983), Ser. A, No. 61, (sub nom. *Silver v. United Kingdom*) 3 E.H.R.R. 475, at pp. 33-34 [Ser. A, No. 61], and *Malone*, supra, at pp. 32-33.

64 A vague provision does not provide an adequate basis for legal debate, that is, for reaching a conclusion as to its meaning by reasoned analysis applying legal criteria. It does not sufficiently delineate any area of risk, and thus can provide neither fair notice to the citizen nor a limitation of enforcement discretion. Such a provision is not intelligible, to use the terminology of previous

decisions of this court, and therefore it fails to give sufficient indications that could fuel a legal debate. It offers no grasp to the judiciary. This is an exacting standard, going beyond semantics. The term "legal debate" is used here not to express a new standard or one departing from that previously outlined by this court. It is rather intended to reflect and encompass the same standard and criteria of fair notice and limitation of enforcement discretion viewed in the fuller context of an analysis of the quality and limits of human knowledge and understanding in the operation of the law.

e. Vagueness and the rule of law

65 The criterion of absence of legal debate relates well to the rule of law principles that form the backbone of our polity. Here one must see the rule of law in the contemporary context. Continental European studies on the "État de droit" or "Rechtsstaat" are relevant (see L. C. Blaau, "The Rechtsstaat Idea Compared with the Rule of Law as a Paradigm for Protecting Rights" (1990) 107 S. Afr. L.J. 76, at pp. 88-92, for an exposition of the historical differences between these concepts).

66 J. P. Henry, "Vers la fin de l'État de droit?" (1977) 93 Rev. dr. publ. 1207, gives the following definition of the "État de droit" at p. 1208:

> [TRANSLATION]
>
> In theoretical terms, the *état de droit* is a system of organization in which all social and political relations are subject to the law. This means that relations between individuals and authority, as well as relations between individuals themselves, are part of a legal interchange involving rights and obligations.

See also J. Chevallier, "L'État de droit" (1988) 104 Rev. dr. publ. 313, at pp. 330-331, and R. Carré de Malberg, *Contribution à la théorie générale de l'État* (Paris: Sirey, 1920), vol. 1, at pp. 488-490. At the core of the "État de droit", as under the rule of law, lies the proposition that the relationship of the state to the individuals is regulated by law.

67 One must move away from the non-interventionist attitude that surrounded the development of the doctrine of the rule of law to a more global conception of the state as an entity bound by and acting through law. The modern state intervenes in almost every field of human endeavour, and it plays a role that goes far beyond collecting taxes and policing. The state has entered fields where the positions are not so clear-cut; in the realm of social or economic policy, interests diverge, and the state does not seek to enforce a definite and limited social interest in public order, for instance, against an individual. Often the state attempts to realize a series of social objectives, some of which must be balanced against one another, and which sometimes conflict with the interests of individuals. The modern state, while still acting as an enforcer, assumes more and more of an arbitration role.

68 This arbitration must be done according to law, but often it reaches such a level of complexity that the corresponding enactment will be framed in relatively general terms. In my opinion the generality of these terms may entail a greater role for the judiciary, but unlike some authors (see F. Neumann, *The Rule of Law* (New York: St. Martin, 1987), at pp. 238-239), I fail to see a difference in kind between general provisions where the judiciary would assume part of the legislative role and "mechanical" provisions where the judiciary would simply apply the law. The judiciary always has a mediating role in the actualization of law, although the extent of this role may vary.

69 Indeed, as the E.C.H.R. has recognized in *Sunday Times*, supra, and particularly in the *Barthold Case*, judgment of (March 25, 1985), Ser. A, No. 90, at p. 22, and in the case of *Müller Case*, judgment of (May 24, 1988), Ser. A, No. 133, at p. 20, laws that are framed in general terms may be better suited to the achievement of their objectives, inasmuch as in fields governed by public policy circumstances may vary widely in time and from one case to the other. A very detailed enactment would not provide the required flexibility, and it might furthermore obscure its purposes behind a veil of detailed provisions. The modern state intervenes today in fields where some generality in the enactments is inevitable. The substance of these enactments remains nonetheless intelligible. One must be wary of using the doctrine of vagueness to prevent or impede state action in furtherance of valid social objectives, by requiring the law to achieve a degree of precision to which the subject-matter does not lend itself. A delicate balance must be maintained between societal interests and individual rights. A measure of generality also sometimes allows for greater respect for fundamental rights, since circumstances that would not justify the invalidation of a more precise enactment may be accommodated through the application of a more general one.

70 What becomes more problematic is not so much general terms conferring broad discretion, but terms failing to give direction as to how to exercise this discretion, so that this exercise may be controlled. Once more, an unpermissibly vague law will not provide a sufficient basis for legal debate; it will not give a sufficient indication as to how decisions must be reached, such as factors to be considered or determinative elements. In giving unfettered discretion, it will deprive the judiciary of means of controlling the exercise of this discretion. The need to provide guidelines for the exercise of discretion was at the centre of the E.C.H.R. reasons in *Malone*, supra, at pp. 32-33, and the *Leander Case*, judgment of (March 26, 1987), Ser. A, No. 116, at p. 23.

71 Finally, I also wish to point out that the standard I have outlined applies to all enactments, irrespective of whether they are civil, criminal, administrative or other. The citizen is entitled to have the state abide by constitutional standards of precision whenever it enacts legal dispositions. In the criminal field, it may be thought that the terms of the legal debate should be outlined with special care by the state. In our opinion, however, once the minimal general standard has been met, any further arguments as to the precision of the enactments should be considered at the "minimal impairment" stage of s. 1 analysis.

72 The doctrine of vagueness can therefore be summed up in this proposition: a law will be found unconstitutionally vague if it so lacks in precision as not to give sufficient guidance for legal debate. This statement of the doctrine best conforms to the dictates of the rule of law in the modern state, and it reflects the prevailing argumentative, adversarial framework for the administration of justice.

B. The Validity of s. 32(1)(c) of the Act

73 The offence created by s. 32(1)(*c*) comprises two material elements:

1. An agreement entered into by the accused ("Every one who conspires, combines, agrees or arranges with another person"); and

2. An undue prevention or lessening of competition flowing from this agreement ("to prevent, or lessen, unduly, competition in the production, manufacture, purchase, barter, sale, storage, rental, transportation or supply of a product, or in the price of insurance upon persons or property ...").

There is furthermore a mental element to this offence, which I will discuss in Part VI of these reasons.

74 The first element has given rise to some debate throughout the history of competition legislation in Canada, but it is not the prime concern of this appeal. The bulk of the argument before us has been on the second element of s. 32(1)(*c*), more precisely on the word "unduly". Only the intervenors Association québécoise des pharmaciens propriétaires et al. (hereinafter "A.Q.P.P.") presented submissions on other points, and I will deal with them briefly before concentrating on the word "unduly", that is to say, on the test for differentiating between agreements which fall under s. 32(1)(*c*) of the Act and others which do not.

75 First of all, the A.Q.P.P. has argued that the range of agreements covered by s. 32(1)(*c*) is too wide. This submission bears more on "overbreadth" than vagueness, and it shows the dangers of too great a reliance on this concept. In order to claim that s. 32(1)(*c*) covers too many types of agreements, some idea as to its proper scope must be explicitly or implicitly advanced. Section 32(1)(*c*) must be too broad in the light of some *Charter* right, if one is to find a *Charter* violation. Setting aside the vagueness issue, the A.Q.P.P. does not argue that s. 32(1)(*c*) imposes a grossly disproportionate punishment, jeopardizes the impartiality of the tribunal, or interferes with some other *Charter* right. The A.Q.P.P. might find that the scope of the section is too broad with respect to the objectives of the state in fostering free competition. Absent a violation of the *Charter*, though the mere fact that the state may have reached for more than its objectives might have warranted is no ground for constitutional redress. In effect, the A.Q.P.P. argument rests on an implicit assumption that some agreements or some persons are entitled to escape the application of

competition law, presumably because of their smallness or their innocuity. Our constitution knows of no right to be shielded from economic regulation on such grounds. Claims of overbreadth should not be used to masquerade an absence of constitutional foundation. In the instant case any excess in the scope of s. 32(1)(*c*) would only be the result of the alleged vagueness of the word "unduly", and claims of overbreadth will succeed or fail accordingly.

76 Furthermore, the A.Q.P.P. has claimed that the Act, in giving enforcement authorities, under certain circumstances, a discretion between penal and civil recourses, leaves them with too much discretion. The source of this allegedly excessive discretion lies in the structure of the Act and not in s. 32(1)(*c*) of the Act itself. This claim lies beyond the lis of this case, but I will nevertheless address it. The A.Q.P.P. argues that the Act, because of the extent of overlap between its central provisions dealing with conspiracies, abuses of dominant position and mergers, confers on the Director of Investigation and Research an excessive discretion to choose between so-called "civil" recourses before the Competition Tribunal and criminal recourses. The A.Q.P.P. further adds that s. 30(2) of the Act (now s. 34(2)) gives the Director a choice between a criminal prosecution and a prohibition order, when seeking relief before the criminal courts.

77 In the first place, what the A.Q.P.P. brands as an arbitrary power given to the Director does not correspond to the kind of excessive enforcement discretion leading to concerns about the vagueness of the law. It is not submitted that the law, because of its imprecision, essentially gives the Director a power to convict from the moment a prosecution is brought against a person under the Act. The choice between criminal and civil/administrative remedies is and remains the sole concern of the A.Q.P.P., and this concern does not relate to the doctrine of vagueness. The thrust of the A.Q.P.P. is more akin to double jeopardy. In this respect, it must be said that, except for s. 32(1)(*c*), the options open to the Director do not qualify for the application of s. 11(*h*), following *R. v. Wigglesworth*, [1987] 2 S.C.R. 541, 60 C.R. (3d) 193, [1988] 1 W.W.R. 193, 61 Sask. R. 105, 81 N.R. 161, 28 Admin. L.R. 294, 24 O.A.C. 321, 45 D.L.R. (4th) 235, 32 C.R.R. 219, 37 C.C.C. (3d) 385 , and *R. v. Shubley*, [1990] 1 S.C.R. 3, 74 C.R. (3d) 1, 104 N.R. 81, 52 C.C.C. (3d) 481, 42 Admin. L.R. 118, 65 D.L.R. (4th) 193, 37 O.A.C. 63, 46 C.R.R. 104. Moreover, the *Charter* does not prevent Parliament from creating offences that may overlap. The guarantees against double jeopardy found in s. 11(*h*) and perhaps also s. 7 of the *Charter* apply only to proceedings, not to legal enactments. Even then, it is apparent that Parliament has added ss. 32.01, 51(7) and 70 to the Act (now ss. 45.1, 79(7) and 98) precisely in order to prevent multiple proceedings against a person on the same or a similar factual basis.

78 The additional arguments of the A.Q.P.P. therefore fail, and I will now consider the alleged vagueness of s. 32(1)(*c*) of the Act.

1. "Unduly" in the Decisions of this Court

79 This court has already interpreted the word "unduly" on a number of occasions, namely in *Weidman v. Shragge* (1912), 46 S.C.R. 1, 2 W.W.R. 330, 20 C.C.C. 117, 2 D.L.R. 734; *Stinson-Reeb Builders Supply Co. v. R.*, [1929] S.C.R. 276, 52 C.C.C. 66, [1929] 3 D.L.R. 331; *R. v. Container Materials Ltd.*, [1942] S.C.R. 147, 77 C.C.C. 129, [1942] 1 D.L.R. 529; *R. v. Howard Smith Paper Mills Ltd.*, supra; *R. v. Aetna Insurance Co.*, [1978] 1 S.C.R. 731, 20 N.S.R. (2d) 565, 15 N.R. 117, 34 C.C.C. (2d) 157, 75 D.L.R. (3d) 332, 30 C.P.R. (2d) 193; and *Atlantic Sugar Refineries Co. v. Canada (Attorney General)*, supra. I will not proceed to a lengthy survey of these decisions (this has been done in *Aetna Insurance*).

80 The meaning of "unduly" has usually been described by reference to various synonyms. In *Weidman*, Anglin J. adopted the string of synonyms given in *R. v. Elliott* (1905), 9 O.L.R. 648, 9 C.C.C. 505 (Ont. C.A.), at p. 520 [C.C.C.] ("improper, inordinate, excessive or oppressive"). This string has been mentioned in all subsequent judgments of this court on the issue. In *Howard Smith*, Cartwright J. sought to restate the law and introduced what was branded as the "virtual elimination of competition" criterion. Cartwright J. was in minority in that case, and furthermore a close reading of his reasons reveals that he might not have intended to depart from the existing law (see the dissenting reasons of Laskin J.A. (as he then was) in *R. v. J.J. Beamish Construction Co.* (1967), [1968] 1 O.R. 5, [1968] 2 C.C.C. 5, 65 D.L.R. (2d) 260, 53 C.P.R. 43 (C.A.), at p. 285 [D.L.R.]). Nevertheless, given that a controversy had arisen, Parliament saw fit to add s. 32(1.1) to the Act, thus dispelling any doubt as to the state of the law. Anglin J.'s reasons in *Weidman* remain authoritative. Instead of adding to this string of synonyms, I will adopt the reasons of Clarke C.J.N.S. in the instant case at p. 157 [C.C.C.]:

> While the word unduly is not defined by statute and defies precise measurement, it is a word of common usage which denotes to all of us in one way or another a sense of seriousness. Something affected unduly is not affected to a minimal degree but to a significant degree.

Clarke C.J.N.S. has touched upon the very nature of "unduly": while this word does not have a precise technical meaning, it does have a common meaning, and it expresses a notion of seriousness or significance.

81 Nothing more will be gained by a semantic inquiry into the meaning of "unduly". Such an inquiry is a beginning, however, not an end. The appellants and the A.Q.P.P. were content with pointing out the generality of "unduly" and arguing that any other consideration pertaining to s. 32(1)(*c*) is a question of fact, following *Container Materials*. According to the appellants, since the determination of whether the restriction on competition was undue is a question of fact, not subject to appellate review, no conclusion can be drawn from the case law. This argument rests on a mistaken perception of the distinction between questions of fact and questions of law.

82 In the context of s. 32(1)(*c*), the process followed and the criteria used to arrive at a determination of "undueness" are questions of law and as such are reviewable by an appellate court. The application of this process and these criteria, that is the full inquiry, often involving complicated economic issues, into whether the impugned agreement was an undue restriction on competition, remains a question of fact. The general rule that appellate courts should be reluctant to venture into a re-examination of the factual conclusions of the trial judge applies with special force in a complex matter such as here.

83 The legal content of s. 32(1)(*c*), however, is not exhausted by a search for the meaning of unduly. Section 32(1)(*c*) must not be taken in a vacuum. Its interpretation is conditioned, first of all, by the purposes of the Act. Furthermore, its content is enriched by the rest of the section in which it is found and by the mode of inquiry adopted by courts as they have ruled under it. These are matters of law, pertaining to the determination of undueness under s. 32(1)(*c*), and as such most relevant. I will look at each in turn.

2. The Act, s. 32(1)(c) and Canadian Public Policy

84 At the outset, it must be noted that the Act is central to Canadian public policy in the economic sector, and that s. 32 is itself one of the pillars of the Act.

85 The history of competition legislation in Canada dates back to 1889, with the *Act for the Prevention and Suppression of Combinations formed in restraint of Trade*, S.C. 1889, c. 41 (hereinafter the *1889 Act*). In fact, the *1889 Act* came into force before the American *Sherman Act*, c. 647, 26 Stat. 209 (1890), codified as amended at 15 U.S.C. §§ 1-7, generally seen as the primogenitor of competition law. The *1889 Act* created in s. 1 the offence of "combining for the purpose of unlawfully hindering competition", in substance the direct ancestor to s. 32(1) of the Act.

86 The *1889 Act* was perhaps the first major foray by Parliament in the realm of economic policy. As B. Dunlop, D. McQueen and M. Trebilcock, *Canadian Competition Policy: A Legal and Economic Analysis* (Toronto: Canada Law Book, 1987), point out at p. 42, the common law of restraint of trade was very much anchored within a private law framework, and was not concerned with broader interests in the proper functioning of the economy. The *1889 Act* introduced these interests in Canadian law (see *Container Materials*, supra, at p. 152, *per* Duff C.J.C.).

87 The content of the *1889 Act* was progressively enlarged, until it grew into the current Act. In *City National Leasing Ltd. v. General Motors of Canada Ltd.*, [1989] 1 S.C.R. 641, 43 B.L.R. 225, 24 C.P.R. (3d) 417, 58 D.L.R. (4th) 255, 93 N.R. 326, 32 O.A.C. 332, Dickson C.J.C. wrote for the court at p. 676 [S.C.R.]:

> From this overview of the *Combines Investigation Act* I have no difficulty in concluding that the Act as a whole embodies a complex scheme of economic regulation. The purpose of the Act is to eliminate activities that reduce competition in the market-place. The entire Act is geared to achieving this objective. The Act identifies and defines anti-competitive conduct. It establishes an investigatory mechanism for revealing prohibited activities and provides an extensive range of criminal and administrative redress against companies engaging in behaviour that tends to reduce competition.

The Act can thus be seen as a central and established feature of Canadian economic policy.

88 Section 32(1)(*c*) of the Act moreover is its oldest provision. Even today, it remains at the core of the criminal part of the Act. The prohibition of conspiracies in restraint of trade is the epitome of competition law, finding its place in every competition law, from §1 of the *Sherman Act* to art. 85 of the *Treaty establishing the European Economic Community*, [1957, 298 U.N.T.S. 11] (hereinafter *Treaty of Rome*). Section 32(1)(*c*) of the Act is not just another regulatory provision. It definitely rests on a substratum of values, a finding which must be kept in mind in the course of the vagueness analysis.

89 This court has made numerous remarks on the public policy interests underlying s. 32(1)(*c*) of the Act. These remarks, found in *Weidman, Stinson-Reeb, Container Materials*, and *Aetna Insurance*, supra, are perhaps best summarized in this passage from the majority judgment in *Howard Smith*, supra, at p. 411 [S.C.R.]:

> The statute proceeds upon the footing that the preventing or lessening of competition is in itself an injury to the public. It is not concerned with public injury or public benefit from any other standpoint.

Considerations such as private gains by the parties to the agreement or counterbalancing efficiency gains by the public lie therefore outside of the inquiry under s. 32(1)(*c*). Competition is presumed by the Act to be in the public benefit. The only issue is whether the agreement impairs competition to the extent that it will attract liability.

90 The peculiar nature of the inquiry under s. 32(1)(*c*) of the Act becomes apparent when it is compared with § 1 of the *Sherman Act*. Since the inception of the *Sherman Act*, American antitrust law has developed the two paradigms of adjudication known as the "per se rule" and the "rule of reason". The former attaches consequences to precisely-defined acts, irrespective of surrounding circumstances, whereas the latter is more general and invites in-depth inquiry into the details of the operation. The distinction between the two is not airtight, as leading authors have shown (see P.E. Areeda, *Antitrust Law: An Analysis of Antitrust Principles and Their Application*, vol. 7 (Boston: Little, Brown & Co., 1987), at ¶ 1511, and P.E. Areeda and H. Hovenkamp, *Antitrust Law: An*

Analysis of Antitrust Principles and Their Application (1990 Supplement) (Boston: Little, Brown & Co., 1990).

91 Section 32(1)(*c*) of the Act lies somewhere on the continuum between a per se rule and a rule of reason. It does allow for discussion of the anti-competitive effects of the agreement, unlike a per se rule, which might dictate that all agreements that lessen competition attract liability. On the other hand, it does not permit a full-blown discussion of the economic advantages and disadvantages of the agreement, like a rule of reason would. Since "unduly" in s. 32(1)(*c*) leads to a discussion of the seriousness of the competitive effects, but not of all relevant economic matters, one may say that this section creates a partial rule of reason.

92 The public policy objectives of s. 32(1)(*c*) of the Act already offer a clear idea of what is meant by "unduly" lessening competition, and what kind of inquiry is mandated. In fact, s. 32(1)(*c*) embodies a general standard, much like art. 1053 of the *Civil Code of Lower Canada* or s. 219 of the *Criminal Code*, for that matter. It represents an intelligible principle, one that carries meaning and that has conceptual force. In all its generality, however, it cannot readily be applied to a factual situation to yield an answer. Few legal norms are so.

93 The accused may actually be favoured by having a clear statement of principle, inasmuch as it contains the "spirit" as well as the letter of the law. Even when considered without the rest of the Act and case law, I would be inclined to say that s. 32(1)(*c*) of the Act is sufficiently precise to meet the constitutional standard. It outlines an area of risk, agreements that lessen or prevent competition, and imposes some boundaries on enforcement discretion, inasmuch as courts will scrutinize the impact of the agreement on competition to see if it runs against our public policy of free competition.

3. The Content of the Inquiry under s. 32(1)("c") of the Act

94 In addition, s. 32(1)(*c*) is made even more precise when one considers the content of the inquiry it mandates.

95 Since the few cases that have been considered by this court always involved agreements where the effects on competition were easily ascertainable, this court has never had the opportunity to consider the process whereby the undueness of the restriction on competition is assessed. In the context of this *Charter* inquiry into the alleged vagueness of s. 32(1)(*c*) of the Act, a survey of the rest of the section, together with lower court decisions and doctrinal writings, will show that adjudication under s. 32(1)(*c*) follows a definite process that eliminates any vagueness that might remain.

96 First of all, there are two major elements to this inquiry, that is (1) the structure of the market, and (2) the behaviour of the parties to the agreement. As a preliminary step, definition of the relevant market is required. Many decisions have explicitly adopted this approach (*J.W. Mills*

& Son Ltd. v. R., [1968] 2 Ex. C.R. 275, 56 C.P.R. 1, at p. 303 [Ex. C.R.]; *J.J. Beamish*, supra, at pp. 271 and 273 [D.L.R.]; *R. v. Canadian Coat & Apron Supply Ltd.*, 2 C.R.N.S. 62, [1967] 2 Ex. C.R. 53, 52 C.P.R. 189, at p. 68 [Ex. C.R.]; *R. v. Anthes Business Forms Ltd.* (1975), 10 O.R. (2d) 153, 26 C.C.C. (2d) 349, 20 C.P.R. (2d) 1 (C.A.), at pp. 375-376 [C.C.C.]; *R. v. Canadian General Electric Co.* (1976), 15 O.R. (2d) 360, 29 C.P.R. (2d) 1, 34 C.C.C. (2d) 489, 75 D.L.R. (3d) 664 (H.C.), at p. 500 [C.C.C.]).

97 I will not venture into the intricacies of outlining the relevant market, other than to repeat that it comprises both geographical and produce or service aspects, as was stated in *J.W. Mills*, at p. 303 [Ex. C.R.]. Definition of the relevant market is a fairly circumscribed process, even though it may require considerable inquiry (see *R. v. Metropolitan Toronto Pharmacists' Assn.* (1984), 3 C.P.R. (3d) 233 (Ont. H.C.)).

98 The structure-behaviour framework of analysis remains merely a convenient way of approaching conspiracy problems, and it should not be seen as a rite of passage. Indeed, to a certain extent, the determination of whether an agreement unduly restricts competition involves an examination not only of market structure and firm behaviour separately, but also of the relationship between them, as Gibson J. remarked in *J.W. Mills*, at p. 309 [Ex. C.R.].

a. Market structure

99 The appellants and the A.Q.P.P. have devoted a substantial part of their argument to a demonstration that no clear market-share guideline can be found in the cases. They have brought to the attention of this court two works, W. T. Stanbury, *Legislation to Control Agreements in Restraint of Trade in Canada: Review of the Historical Record and Proposals for Reform* (National Conference on the Centenary of Competition Law and Policy in Canada, October 1989), cited with approval in *Assn québécoise des pharmaciens propriétaires c. Canada (Procureur général)* (1990), [1991] R.J.Q. 205 (C.S.), and W.T. Stanbury and G. B. Reschenthaler, "Reforming Canadian Competition Policy: Once More unto the Breach" (1981) 5 Can. Bus. L.J. 381, where the authors express doubts about the possibility of discerning a market-share threshold for liability in conspiracy cases. Indeed market share as such cannot suffice to conclude on the structure of the market, and s. 32(1)(*c*) would lose some of its effectiveness and would stray from its objectives if it incorporated a market-share threshold. Market share alone is not determinative, as was rightly pointed out in *Canadian General Electric*, at p. 501 [C.C.C.].

100 The aim of the market structure inquiry is to ascertain the degree of market power of the parties to the agreement, as was said in *Canadian Coat & Apron Supply Ltd.*, at p. 64 [Ex. C.R.]. In this respect, many factors other than market share are relevant. Some were listed in *J. W. Mills*, at pp. 307-308 [Ex. C.R.]: (1) the number of competitors and the concentration of competition, (2) barriers to entry, (3) geographical distribution of buyers and sellers, (4) differences in the degree of integration among competitors, (5) product differentiation, (6) countervailing power and (7)

cross-elasticity of demand (see also *Canadian General Electric*, supra). This list is not limitative: for instance, I note that in its Merger Guidelines, 49 Fed. Reg. 26823 (1984), the United States Department of Justice, Antitrust Division, proposed the ability to raise prices on a given product by five per cent over a year without losses as the yardstick for market power. This approach may or may not be appropriate in the context of s. 32(1)(*c*) of the Act.

101 Market power is the ability to behave relatively independently of the market. This is precisely what s. 32(1)(*c*) of the Act seeks to prevent. As this court has always held in its previous judgments, the aim of the Act is to secure for the Canadian public the benefit of free competition. Excessive market power runs against the objectives of the Act. When it occurs in the context of a conspiracy to restrict competition, s. 32(1)(*c*) will apply. It can be presumed that Parliament did not wish s. 32(1)(*c*) to apply in the absence of market power. Absent such power, agreements to restrict competition would either benefit the public by allowing small firms to consolidate their position and be more competitive, or dissolve under competitive pressures (see Dunlop, supra, at p. 114).

102 The level of market power necessary to trigger the application of s. 32(1)(*c*) is not necessarily the same as for other sections of the Act. For instance, s. 51 of the Act (now s. 79), prohibiting abuses of dominant position, contemplates at subs. (1)(*a*) that the holders of the dominant position "substantially or completely control, throughout Canada or any area thereof, a class or species of business". The required degree of market power under s. 51 of the Act comprises "control", and not simply the ability to behave independently of the market.

103 The application of s. 32(1)(*c*) of the Act does not presuppose such a degree of market power, as s. 32(1.1) clearly enunciates. Parties to the agreement need not have the capacity to influence the market. What is more relevant is the capacity to behave independently of the market, in a passive way. A moderate amount of market power is required to achieve this (see *R. v. Abitibi Power & Paper Co.* (1960), 36 C.R. 96, 36 C.P.R. 188, 131 C.C.C. 201 (Que.), at pp. 249-252 [C.C.C., pp. 146-149 C.R.]).

104 I note that the competition law of both the United States and the European Communities comprises an analogous requirement of minimal market power in cases of agreements to restrain competition.

105 In the United States, the nature of the impugned restraints will determine whether they are assessed according to a per se rule or a rule of reason. This operation has diverted much attention away from the substance of § 1 of the *Sherman Act* and, to correct this, the Supreme Court has to a certain extent blurred the distinction between the two approaches in *National Collegiate Athletic Assn. v. Board of Regents of the University of Oklahoma*, 468 U.S. 85 (1984). There the United States Supreme Court held that naked restrictions on price and output did not require a finding of market power, for their unreasonableness could be presumed (at pp. 100-101, 109-110). The possibility of per se rules allows for a presumption of unreasonableness (Canadian law does not

offer this possibility, since the word "undue" appears at s. 32(1)(*c*) of the Act), but otherwise some showing of market power is necessary to evidence a genuine adverse effect on competition (See *Federal Trade Commission v. Indiana Federation of Dentists*, 476 U.S. 447 (1986), at pp. 460-461, and Areeda, supra, at ¶1503, pp. 376-377).

106 In the European Communities, the commission has given the *Notice of 3 September 1986 on agreements of minor importance which do not fall under Article 85(1) of the Treaty establishing the European Economic Community*, O.J.E.C., 12 September 1986, No. C231/2, and in addition the Court of Justice of the European Communities has long recognized that agreements which do not significantly affect the common market fall outside of the scope of art. 85 of the Treaty of Rome (*Völk v. Établissements J. Vervaecke S.p.r.l.*, [1969] E.C.R. 295, [1969] C.M.L.R. 273, and *S.A. Cadillon v. Firma Höss Maschinebau K.B.*, Case 1/71, [1971] E.C.R. 351).

b. Behaviour

107 The second part of the framework found in case law involves an examination of the behaviour of firms. In both *R. v. McGavin Bakeries Ltd. (No. 6)* (1951), 13 C.R. 63, 3 W.W.R. (N.S.) 289, 101 C.C.C. 22 (Alta.), at p. 303 [W.W.R. (N.S.)], and *Canadian General Electric*, supra, at pp. 531-532 [C.C.C.], the court considered which facet of competition was affected by the agreement (price, quality, service or other) and whether it was the prime concern of the buying public. The object of the agreement is without doubt the most important behaviourial element in the inquiry, but others may be relevant, such as the manner in which the agreement has been or will be carried out and, in general, any behaviour that tends to reduce competition or limit entry (see *J. W. Mills*, supra, at p. 309 [Ex. C.R.]).

108 The aim of the inquiry is the likely effect of the agreement. I can only quote from *R. v. Northern Electric Co.*, 21 C.R. 45, [1955] O.R. 431, 111 C.C.C. 241, 24 C.P.R. 1, [1955] 3 D.L.R. 449 (H.C.), at p. 469 [D.L.R.]:

> In considering whether the agreement or conspiracy comes within the statute, one does not judge the unlawfulness by what was done pursuant to the agreement (although this may be evidence of the agreement) but ... one examines the nature and scope of the agreement as proved and decides whether that agreement, if carried into effect, would prejudice the public interest in free competition to a degree that in fact would be undue.

See also *Aetna Insurance*, supra, at p. 747 [S.C.R.]. The agreement must be or must have been likely to injure competition, irrespective of any actual effect it may have had (although evidence of the effects offers good guidance as to the likely effects of the agreement). Some agreements do not constitute behaviour likely to injure competition, while others are highly injurious.

109 The Act itself gives some guidance as to which behaviour may or may not be injurious to competition. Section 32(2) contains a list of permissible fields, lying outside the scope of s. 32(1)

(*c*). Section 32(3) lists impermissible fields, to which s. 32(1)(*c*) will apply even if the agreement relates to one of the fields enumerated in s. 32(2). These lists bear some conceptual resemblance to the elaborate system of "black", "white" and "grey" clauses found in the regulations of the E.C. Commission exempting broad categories of agreements from art. 85 of the *Treaty of Rome* (see for instance *Commission Regulation (EEC) No. 1983/83 of 22 June 1983 on the application of Article 85(3) of the Treaty to categories of exclusive distribution agreements*, O.J.E.C., 30 June 1983, No. L 173/1, at arts. 1, 2). Given the relative smallness of the Canadian market when compared with the European Community, though, one cannot expect Canadian legislation to provide as much detail as E.C. regulations. Section 32(6) adds an exception for agreements on standards of competence and integrity in the field of services.

110 Section 32(1)(*c*) therefore requires, in addition to some market power, some behaviour likely to injure competition. It is the combination of the two that makes a lessening of competition undue. Many combinations are possible. For one, market power may come from the agreement. The agreement could either have an "internal" effect, in consolidating the market power of the parties (as is the case with price-fixing) or have an "external" effect, in weakening competition and thus increasing the market power of the parties (as is the case with market-sharing). Market power may also exist independently of the agreement, in which case any anti-competitive effect of the agreement will be suspicious. A particularly injurious behaviour may also trigger liability even if market power is not so considerable. These are only examples of possible combinations of market power and behaviour likely to injure competition that will be "undue" under s. 32(1)(*c*) of the Act.

111 In summary, I find that s. 32(1)(*c*) of the Act and its companion interpretative provision s. 32(1.1) do not violate s. 7 of the *Charter* on grounds of vagueness. The word "unduly" as such carries a connotation of seriousness. Considering further that s. 32(1)(*c*) of the Act is one of the oldest and most important parts of Canadian public policy in the economic field, and that it mandates a partial rule of reason inquiry into the seriousness of the competitive effects of the agreement, Parliament has sufficiently delineated the area of risk and the terms of debate to meet the constitutional standard. Moreover, the rest of the Act and the case law have outlined a process of examination of market structure and behaviour under s. 32(1)(*c*) of the Act, thus making it even more precise. I note that the E.C.H.R. has also found a comparable competition statute to be "prescribed by law" in *Barthold*, supra.

112 This holding is also dispositive of the further argument of the appellants on the alleged unconstitutionality of the indictment with respect to s. 11(*a*) of the *Charter*.

VI. The Mental Element Of S. 32(1)(C) Of The Act And S. 7 Of The Charter

113 It may be helpful to set out once again the relevant provisions of the Act. Section 32(1) provides:

32.(1) Every one who conspires, combines, agrees or arranges with another person

. . . . .

> *c*) to prevent, or lessen, unduly, competition in the production, manufacture, purchase, barter, sale, storage, rental, transportation or supply of a product, or in the price of insurance upon persons or property,

. . . . .

is guilty of an indictable offence and is liable to imprisonment for five years or a fine of one million dollars or to both.

114 The Act was amended in 1976 by the addition of s. 32(1.1) which reads:

(1.1) For greater certainty, in establishing that a conspiracy, combination, agreement or arrangement is in violation of subsection (1), it shall not be necessary to prove that the con spiracy, combination, agreement or arrangement, if carried into effect, would or would be likely to eliminate, completely or virtually, competition in the market to which it relates or that it was the object of any or all of the parties thereto to eliminate, completely or virtually, competition in that market.

115 In 1986, further amendments to the Act (renamed the *Competition Act*) were adopted, including s. 32(1.3):

1.3) For greater certainty, in establishing that a conspiracy, combination, agreement or arrangement is in contravention of subsection (1), it is necessary to prove that the parties thereto intended to and did enter into the conspiracy, combination, agreement or arrangement, but it is not necessary to prove that the parties intended that the conspiracy, combination, agreement or arrangement have an effect set out in subsection (1).

116 How then should those sections be interpreted in light of s. 7 of the *Charter*? The reasons of this court in *R. v. Vaillancourt*, supra, at p. 652 [S.C.R.], make it clear that the requirement of a mental element, sometimes referred to as an element of fault, has now been raised from an interpretative presumption to a constitutional guarantee. This reasoning was based upon the principle that the morally innocent should not be punished. An element of fault must exist before punishment can be justified.

117 From the reasons of this court in *R. v. Wholesale Travel Group Inc.*, [1991] 3 S.C.R. 154, 8 C.R. (4th) 145, 67 C.C.C. (3d) 193, 84 D.L.R. (4th) 161, 130 N.R. 1, 38 C.P.R. (3d) 451, 49 O.A.C. 161, 7 C.R.R. (2d) 36, it can be seen that a minimum fault requirement with respect to every criminal or regulatory offence satisfies the requirements of s. 7. That same case indicates, at p. 238 [S.C.R.]:

That fault may be demonstrated by proof of intent, whether subjective or objective, or by proof of negligent conduct, depending on the nature of the offence. ...

> ... Mens rea focuses on the mental state of the accused and requires proof of a positive state of mind such as intent, recklessness or wilful blindness. Negligence, on the other hand, measures the conduct of the accused on the basis of an objective standard, irrespective of the accused's subjective mental state.

118 The sections of the Act set out above require the proof of two fault elements: one subjective, the other objective.

119 To satisfy the subjective element, the Crown must prove that the accused had the intention to enter into the agreement and had knowledge of the terms of that agreement. Once that is established, it would ordinarily be reasonable to draw the inference that the accused intended to carry out the terms in the agreement, unless there was evidence that the accused did not intend to carry out the terms of the agreement.

120 In order to satisfy the objective element of the offence, the Crown must establish that on an objective view of the evidence adduced the accused intended to lessen competition unduly. This surely does not impose too high a burden on the Crown. Section 32(1)(*c*) requires that the Crown demonstrate that the effect of the agreement will be to prevent competition or to lessen it unduly. Once again, it would be a logical inference to draw that a reasonable business person who can be presumed to be familiar with the business in which he or she engages would or should have known that the likely effect of such an agreement would be to unduly lessen competition. Thus in proving the actus reus that the agreement was likely to lessen competition unduly, the Crown could, in most cases, establish the objective fault element that the accused as a reasonable business person would or should have known that this was the likely effect of the agreement.

121 It must be remembered that if there are two possible interpretations of a statutory provision, one of which embodies the *Charter* values and the other does not, that which embodies the *Charter* values should be adopted. (See *Hills v. Canada (Attorney General)*, [1988] 1 S.C.R. 513, 88 C.L.L.C. 14,011, 30 Admin. L.R. 187, 84 N.R. 86, 48 D.L.R. (4th) 193.)

122 In summary then, the Crown must establish the subjective fault elements that the accused had the intention to enter into the agreement and was aware of its terms. As well, the Crown must demonstrate that the proof, viewed objectively (i.e., by a reasonable business person), establishes that the accused was aware or ought to have been aware that the effect of the agreement entered into by the accused would be to prevent or lessen competition unduly.

123 Section 32(1)(*c*) of the Act does not therefore violate s. 7 of the *Charter*.

VII. Answers

124 I would answer the constitutional questions as follows:

1. Is s. 32(1)(*c*) of the *Combines Investigation Act*, R.S.C. 1970, c. C-23 (now s. 45(1)(*c*) of the *Competition Act*, R.S.C. 1985, c. C-34) in whole or in part inconsistent with s. 7 of the *Canadian Charter of Rights and Freedoms*?

Answer: No.

2. Is s. 32(1.1) of the *Combines Investigation Act*, R.S.C. 1970, c. C-23 (now s. 45(2) of the *Competition Act*, R.S.C. 1985, c. C-34) inconsistent with s. 7 of the *Canadian Charter of Rights and Freedoms*?

Answer: No.

3. If the answer to questions 1 or 2 is yes, is the infringement nevertheless justified under s. 1 of the *Canadian Charter of Rights and Freedoms*?

Answer: It is not necessary to answer this question.

VIII. Conclusion

125 I would dismiss the appeal.

Appeal dismissed.

Headnote

Practice --- Practice on appeal — Appeal to Supreme Court of Canada — Powers and duties of Supreme Court of Canada on appeal — Quashing appeal

Trade and Commerce --- Combines and competition legislation — Constitutional issues — Charter of Rights and Freedoms

Charter of Rights and Freedoms — Life, liberty and security — Principles of fundamental justice — Under s. 7 law cannot be too vague — Law having to give sufficient guidance for legal debate — Combines Investigation Act offence of conspiracy to lessen competition unduly not violating s. 7 on grounds of vagueness — "Unduly" representing intelligible principle — Combines Investigation Act, R.S.C. 1970, c. C-23.

Charter of Rights and Freedoms — Demonstrably justified reasonable limit — Prescribed by law — Law having to be not too vague. .

Charter of Rights and Freedoms — Right to be informed of offence — Indictment for conspiracy to unduly lessen competition under Combines Investigation Act not violating s. 11(a) of Charter — Combines Investigation Act, R.S.C. 1970, c. C-23.

Charter of Rights and Freedoms — Life, liberty and security — Principles of fundamental justice — Fault — Objective requirement under Combines Investigation Act of reasonable knowledge that agreement likely to lessen competition not violating s. 7 — Combines Investigation Act, R.S.C. 1970, c. C-23.

The 12 accused were charged with two counts of conspiracy to prevent or lessen competition unduly, contrary to s. 32(1)(*c*) of the *Combines Investigation Act*, R.S.C. 1970, c. C-23. Both counts related to the sale and offering for sale of prescription drugs and pharmacists' dispensing services. A judge of the Trial Division of the Nova Scotia Supreme Court granted the motion of the accused persons to quash the indictment on the basis that ss. 32(1)(*c*), 32(1.1) and 32(1.3) of the Act (now ss. 45(1)(*c*), 45(2) and 45(2.2) of the *Competition Act*, R.S.C. 1985, c. C-34) violated ss. 7, 11(*a*) and 11(*d*) of the *Charter of Rights and Freedoms*. The Appeal Division of the Nova Scotia Supreme Court allowed the Crown's appeal. The main issues on the accused's further appeal were whether s. 32(1)(*c*) of the Act infringed s. 7 of the *Charter* because of the vagueness arising from the use of the word "unduly" and whether that section violated s. 7 by reason of the mens rea required by the offence.

Held:

The appeal was dismissed.

Vagueness

Vagueness can be raised under s. 7 of the *Charter* since it is a principle of fundamental justice that laws may not be too vague. It can also be raised under s. 1 of the *Charter* in limine, on the basis that an enactment is so vague as not to satisfy the requirement that a limitation on *Charter* rights be "prescribed by law". Vagueness is also relevant to the "minimal impairment" stage of the *Oakes* test for s. 1. Vagueness, when raised under s. 7 or under s. 1 in limine, involves similar considerations and is a single concept. Vagueness as it relates to the "minimal impairment" branch of s. 1 merges with the related concept of overbreadth.

What is referred to as "overbreadth", whether it stems from the vagueness of a law or from another source, remains no more than an analytical tool to establish a violation of a *Charter* right. It is always established by comparing the ambit of the provision touching upon a protected right with such concepts as the objectives of the state, the principles of fundamental justice, the proportionality of punishment or the reasonableness of searches and seizures. There is no such thing as overbreadth in the abstract. Overbreadth has no autonomous value under the *Charter*. References to a "doctrine of overbreadth" are superfluous.

The "doctrine of vagueness" is founded on the rule of law, particularly on the principles of fair notice to citizens and limitation of enforcement discretion. Aside from a formal aspect which is in our current system often presumed, fair notice to the citizen comprises a subjective aspect, that is, an understanding that certain conduct is the subject of legal restrictions. The crux of the concern for limitation of enforcement discretion is that a law must not be so devoid of precision in its content that a conviction will automatically flow from the decision to prosecute. A law will be found unconstitutionally vague if it so lacks in precision as not to give sufficient guidance for legal debate. This statement of the doctrine best conforms to the dictates of the rule of law in the modern state and reflects the prevailing argumentative, adversarial framework for the administration of justice. No higher requirement as to certainty can be imposed on law in our modern state. It cannot be argued that an enactment can and must provide enough guidance to predict the legal consequences of any given course of conduct in advance. All it can do is enunciate some boundaries, which create an area of risk. A vague provision does not provide an adequate basis for legal debate, that is, for reaching a conclusion as to its meaning by reasoned analysis applying legal criteria. The threshold for finding a law vague is relatively high. Factors to be considered include the need for flexibility and the interpretive role of the court, the impossibility of achieving absolute certainty, a standard of intelligibility being more appropriate and the possibility that many varying judicial interpretations of a given disposition may exist and perhaps co-exist.

Section 32(1)(*c*) of the Act and its companion interpretive provision s. 32(1.1) (now s. 45(2)) do not violate s. 7 of the *Charter* on grounds of vagueness. Section 32(1)(*c*) embodies a general standard which represents an intelligible principle, one that carries meaning and has conceptual force. The word "unduly" connotes seriousness. Considering further that s. 32(1)(*c*) of the Act is one of the oldest and most important parts of Canadian public policy in the economic field, and that it mandates a partial rule of reason inquiry into the seriousness of the competitive effects of the agreement, Parliament has sufficiently delineated the area of risk and the terms of debate to meet the constitutional standard. Moreover, the rest of the Act and the case law have outlined a process of examination of market structure and behaviour, thus making the section even more precise.

For these reasons, the indictment did not infringe s. 11(*a*) of the *Charter*.

Mens Rea

The mens rea issue was properly before the court even though the appellant had only raised the vagueness issue as a ground of appeal. The respondent Crown could properly file a notice of intention, as it had, to request a variation of the Court of Appeal judgment on this issue, as long as it ultimately sought to uphold the disposition of the case in the Court of Appeal. Even without such a notice, the court would have retained complete discretion under R. 29(1) of the *Rules of the Supreme Court of Canada* to treat the whole case as open. A respondent may advance any argument to sustain the judgment below, and is not limited to the appellant's points of law.

The mens rea required by s. 32(1)(*c*) is not inconsistent with s. 7 of the *Charter*. Under s. 7, an element of fault must exist before punishment can be justified. However, a minimum fault requirement with respect to every criminal or regulatory offence satisfies the requirements of s. 7. Fault may be demonstrated by proof of intent, whether subjective or objective, or by proof of negligent conduct, depending on the nature of the offence. Here, s. 32(1)(*c*) required proof of two fault elements: one subjective, the other objective. To satisfy the subjective element of the offence, the Crown had to prove that the accused had the intention to enter into the agreement and had knowledge of the terms of that agreement. Once that was established, it would ordinarily be reasonable to draw the inference that the accused intended to carry out the terms in the agreement, unless there was evidence to the contrary. In order to satisfy the objective element of the offence, the Crown had to establish that, on an objective view of the evidence, the accused intended to lessen competition unduly. This surely did not impose too high a burden on the Crown. In proving the actus reus that the agreement was likely to lessen competition unduly, the Crown could, in most cases, establish the objective fault element that the accused as a reasonable business person would or should have known that this was the likely effect of the agreement.

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s. 1

s. 2

s. 7

s. 8

s. 11(*a*)

s. 11(*d*)

s. 11(*h*)

s. 12

Combines Investigation Act, R.S.C. 1970, c. C-23 [R.S.C. 1985, c. C-34; retitled R.S.C. 1985, c. 19 (2nd Supp.), s. 19 (now the Competition Act)] —

s. 30(2) [R.S.C. 1985, c. C-34, s. 34(2)]

s. 32 [R.S.C. 1985, c. C-34, s. 45]

s. 32(1) [am. S.C. 1974-75-76, c. 76, s. 14(1)] [R.S.C. 1985, c. C-34, s. 45(1)]

s. 32(1)(*c*) [re-en. S.C. 1974-75-76, c. 76, s. 14(1)] [R.S.C. 1985, c. C-34, s. 45(1)(*c*)]

s. 32(1.1) [en. S.C. 1974-75-76, c. 76, s. 14(2)] [R.S.C. 1985, c. C-34, s. 45(2)]

s. 32(1.3) [en. S.C. 1986, c. 26, s. 30(3)] [R.S.C. 1985, c. C-34, s. 45(2.2); en. R.S.C. 1985, c. 19 (2nd Supp.), s. 30(3)]

s. 32(2) [R.S.C. 1985, c. C-34, s. 45(3)]

s. 32(3) [R.S.C. 1985, c. C-34, s. 45(4)]

s. 32(6) [en. S.C. 1974-75-76, c. 76, s. 14(7)] [R.S.C. 1985, c. C-34, s. 45(7)]

s. 32.01 [en. S.C. 1986, c. 26, s. 31] [R.S.C. 1985, c. C-34, s. 45.1; en. R.S.C. 1985, c. 19 (2nd Supp.), s. 31]

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s. 51(7) [en. S.C. 1986, c. 26, s. 47] [R.S.C. 1985, c. C-34, s. 79(7); en. R.S.C. 1985, c. 19 (2nd Supp.), s. 45]

s. 70 [en. S.C. 1986, c. 26, s. 47] [R.S.C. 1985, c. C-34, s. 98; en. R.S.C. 1985, c. 19 (2nd Supp.), s. 45]

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s. 19

s. 45(1)(*c*)

s. 45(2)

s. 45(2.2)

s. 79

s. 79(7)

s. 98

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s. 248

s. 249

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s. 193 [R.S.C. 1985, c. C-46, s. 210]

s. 195.1(1)(*c*) [en. S.C. 1985, c. 50, s. 1] [R.S.C. 1985, c. C-46, s. 213(1)(*c*); en. R.S.C. 1985, c. 51 (1st Supp.), s. 1]

s. 251(4)(*c*) [R.S.C. 1985, c. C-46, s. 287(4)(*c*)]

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s. 19

s. 163(8)

s. 219

s. 319(2)

s. 319(3)

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art. 9(2)

art. 10(2)

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R. 29(1) [re-en. SOR/88-247]

R. 29(2)

Regulations considered:

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s. 7

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Words and phrases considered:

DOCTRINE OF VAGUENESS

The "doctrine of vagueness" . . . is a principle of fundamental justice under s. 7 [of the *Charter*] and it is also a part of s. 1 in limine ("prescribed by law").

. . . . .

The doctrine of vagueness can . . . be summed up in this proposition: a law will be found unconstitutionally vague if it so lacks in precision as not to give sufficient guidance for legal debate. This statement of the law best conforms to the dictates of the rule of law in the modern state, and it reflects the prevailing argumentative, adversarial framework for the administration of justice.

LEGAL DEBATE

A vague provision does not provide an adequate basis for legal debate, that is, for reaching a conclusion as to its meaning by reasoned analysis applying legal criteria . . . The term "legal debate" is used here not to express a new standard or one departing from that previously outlined by this court. It is rather intended to reflect and encompass the same standard and criteria of fair notice and limitation of enforcement discretion viewed in the fuller context of an analysis of the quality and limits of human knowledge and understanding in the operation of the law.

OVERBREADTH

Overbreadth in American law is tied to the First Amendment. It is grounds to obtain what is termed "facial invalidation" of a statute, as opposed to a declaration that the statute is unconstitutional in the case of the particular plaintiff, which is the usual remedy. *Flipside v. Village of Hoffman Estates*, 455 U.S. 489(1982), indicates how overbreadth interacts with vagueness in First Amendment cases. The court wrote at pp. 494-495:

In a facial challenge to the overbreadth and vagueness of a law, a court's first task is to determine whether the enactment reaches a substantial amount of constitutionally protected conduct. If it does not, then the overbreadth challenge must fail. The court should then examine the facial vagueness challenge and, assuming the enactment implicates no constitutionally protected conduct, should uphold the challenge only if the enactment is impermissibly vague in all its applications.

Overbreadth ties in to the taxonomy of protected and unprotected conduct and expression developed by American courts under the First Amendment. Some conduct or expression received First Amendment protection and some does not, and to the extent that a statute substantially touches upon protected conduct and cannot be severed or read down, it will be declared void (see L.H. Tribe, American Constitutional Law, 2d ed. (Westbury, N.Y. . . . : Foundations Pr. Inc., 1987) at p. 1022).

. . . . .

The relationship between vagueness and "overbreadth" was well expounded by the Ontario Court of Appeal in . . . *R. v. Zundel* (1987), 29 C.R.R. 349 . . . at p. 372 . . .

Vagueness and overbreadth are two concepts. They can be applied separately, or they may be closely interrelated. The intended effect of a statute may be perfectly clear and thus not vague, and yet its application may be overly broad. Alternatively, as an example of the two concepts being so closely interrelated, the wording of a statute may be so vague that its effect is considered to be overbroad.

. . . . .

What is referred to as "overbreadth", whether it stems from the vagueness of a law or from another source, remains no more than an analytical tool to establish a violation of a *Charter* right. Overbreadth has no independent existence. References to a "doctrine of overbreadth" are superfluous.

PRESCRIBED BY LAW

I . . . note that the European Court of Human Rights (hereinafter "E.C.H.R.") has adopted the same approach to issues of vagueness [as that adopted in this case], in the course of treatment of words such as "prescribed by law", found in many limitation clauses of the *European Convention for the Protection of Human Rights and Fundamental Freedoms*, 213 U.N.T.S. 222 . . . such as arts. 8(2), 9(2), 10(2) [and] 11(2) . . . The E.C.H.R. gave this phrase a substantive content, which went beyond a mere inquiry as to whether a law existed or not.

The E.C.H.R. developed its conception of "prescribed by law" in the course of two famous cases, the *Sunday Times Case* (1979), Ser. A, No. 30, and the *Malone Case*, judgment of (August 2, 1984), Ser. A, No. 82. In the former, the E.C.H.R. drew attention to the two aspects of fair notice, namely formal notice ("accessibility") and substantive notice ("foreseeability"). It wrote at p. 31:

In the Court's opinion, the [above] are two of the requirements that flow from the expression "prescribed by law".

STANDARDLESS SWEEP

Lamer J. in the [*(Prostitution Reference, Committee for the Commonwealth of Canada)*] used the phrase "standardless sweep", first coined by the United States Supreme Court in *Smith v. Goguen*, 415 U.S. 566(1974), at p. 575, to describe the limitation of enforcement discretion rationale for the doctrine of vagueness. It has become the prime concern in American constitutional law (*Kolender v. Lawson*, 461 U.S. 352at pp. 357-358). Indeed today it has become paramount, given the considerable expansion in the discretionary powers of enforcement agencies that has followed the creation of the modern welfare state.

UNDULY

The meaning of "unduly" [in the *Combines Investigation Act*, [title changed to *Competition Act*, 1986, c. 26, s. 19], R.S.C. 1970, c. C-23, s. 32(1)] has usually been described by reference to various synonyms. In [*Weidman v. Shragge* (1912), 46 S.C.R. 1] Anglin J. adopted the string of synonyms given in *R. v. Elliot* (1905), 9 C.C.C. 505 (Ont. C.A.), at p. 520 (improper, inordinate, excessive or oppressive) . . . I will adopt the reasons of Clarke C.J.N.S. in the instant case at p. 380 C.R.R., p. 157 C.C.C.:

While the word "unduly" is not defined by statute and defies precise measurement, it is a word of common usage which denotes to all of us in one way or another a sense of seriousness. Something affected unduly is not affected to a minimal degree but to a significant degree.

Clarke C.J.N.S. has touched upon the very nature of "unduly": while this word does not have a precise technical meaning, it does have a common meaning, and it expresses a notion of seriousness or significance.

VAGUE

"Flexibility and vagueness are not synonymous", wrote Beetz J. . . . [in *R. v. Morgentaler* (1988), 31 C.R.R. 1 at 59 (S.C.C.)].

. . . . .

. . . Sopinka J. . . . [in *Osborne v. Canada (Treasury Board)* (1991), 4 C.R.R. (2d) 30 (S.C.C.), stated] at pp. 45-46 . . . :

Vagueness can have constitutional significance in at least two ways in a s. 1 analysis. A law may be so uncertain as to be incapable of being interpreted so as to constitute any restraint on governmental power. The uncertainty may arise either from the generality of the discretion conferred on the donee of the power or from the use of language that is so obscure as to be incapable of interpretation with any degree of precision using the ordinary tools.

VAGUENESS

The doctrine of vagueness can . . . be summed up in this proposition: a law will be found unconstitutionally vague if it so lacks in precision as not to give sufficient guidance for legal debate. This statement of the doctrine best conforms to the dictates of the rule of law in the modern state, and it reflects the prevailing argumentative, adversarial framework for the administration of justice.

Footnotes

Carswell View Carswell references