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
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SUPREME COURT OF CANADA

CITATION: John Howard Society of Saskatchewan *v.* Saskatchewan (Attorney General), 2025 SCC 6

APPEAL HEARD: October 8 and 9, 2024
JUDGMENT RENDERED: March 14, 2025
DOCKET: 40608

BETWEEN:

John Howard Society of Saskatchewan
Appellant

and

Government of Saskatchewan (Attorney General for Saskatchewan)
Respondent

- and -

Attorney General of Canada,
Attorney General of Ontario,
Attorney General of Quebec,
Attorney General of British Columbia,
Attorney General of Alberta,
Alberta Prison Justice Society,
Federation of Sovereign Indigenous Nations,
Aboriginal Legal Services Inc.,
British Columbia Civil Liberties Association,
Criminal Lawyers' Association (Ontario),
Queen's Prison Law Clinic,
Association des avocats.es carcéralistes du Québec,
Canadian Civil Liberties Association,
Canadian Prison Law Association and
West Coast Prison Justice Society
Interveners

CORAM: Wagner C.J. and Karakatsanis, Côté, Rowe, Martin, Kasirer, Jamal, O'Bonsawin and Moreau JJ.

REASONS FOR JUDGMENT: (paras. 1 to 99)	Wagner C.J. (Karakatsanis, Martin, Kasirer, O'Bonsawin and Moreau JJ. concurring)
DISSENTING REASONS: (paras. 100 to 297)	Côté J. (Rowe and Jamal JJ. concurring)

NOTE: This document is subject to editorial revision before its reproduction in final form in the *Canada Supreme Court Reports*.

John Howard Society of Saskatchewan *Appellant*

v.

Government of Saskatchewan (Attorney General for Saskatchewan) *Respondent*

and

Attorney General of Canada,
Attorney General of Ontario,
Attorney General of Quebec,
Attorney General of British Columbia,
Attorney General of Alberta,
Alberta Prison Justice Society,
Federation of Sovereign Indigenous Nations,
Aboriginal Legal Services Inc.,
British Columbia Civil Liberties Association,
Criminal Lawyers' Association (Ontario),
Queen's Prison Law Clinic,
Association des avocats.es carcéralistes du Québec,
Canadian Civil Liberties Association,
Canadian Prison Law Association and
West Coast Prison Justice Society *Interveners*

Indexed as: John Howard Society of Saskatchewan *v.* Saskatchewan (Attorney General)

2025 SCC 6

File No.: 40608.

2024: October 8, 9; 2025: March 14.

Present: Wagner C.J. and Karakatsanis, Côté, Rowe, Martin, Kasirer, Jamal, O'Bonsawin and Moreau JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR SASKATCHEWAN

Constitutional law — Charter of Rights — Fundamental justice — Presumption of innocence — Inmate disciplinary proceedings — Standard of proof — Provincial legislation setting applicable standard of proof in inmate disciplinary proceedings at balance of probabilities — Whether inmate disciplinary proceedings where possible sanctions are disciplinary segregation and loss of earned remission are criminal in nature or lead to imposition of true penal consequences — Whether standard of proof on balance of probabilities in inmate disciplinary proceedings infringes right to be presumed innocent until proven guilty — Whether standard of proof on balance of probabilities in inmate disciplinary proceedings infringes principles of fundamental justice — If so, whether infringement justifiable — Canadian Charter of Rights and Freedoms, ss. 1, 7, 11(d) — The Correctional Services Regulations, 2013, R.R.S., c. C-39.2, Reg. 1, s. 68.

Section 68 of Saskatchewan's *Correctional Services Regulations, 2013* ("*Regulations*") sets at a balance of probabilities the applicable standard of proof in disciplinary proceedings involving inmates in Saskatchewan's provincial correctional institutions who are charged with disciplinary offences. This standard of proof is used in all disciplinary proceedings, including where an inmate is charged with a major

disciplinary offence for which sanctions can include disciplinary segregation for up to 10 days or loss of up to 15 days of earned remission.

Section 68 of the *Regulations* was challenged by the John Howard Society of Saskatchewan. The challenge was initially brought exclusively under s. 7 of the *Charter* on the basis that the residual protection for the presumption of innocence requires proof of guilt beyond a reasonable doubt, as reliance on s. 11(d) of the *Charter* was constrained by the Court's decision in *R. v. Shubley*, [1990] 1 S.C.R. 3, which held that inmate disciplinary proceedings in which disciplinary segregation and loss of earned remission are possible sanctions do not engage s. 11. The application judge held that s. 68 of the *Regulations* does not violate s. 7 of the *Charter* and the Court of Appeal agreed. They concluded that neither the nature of inmate disciplinary proceedings nor the severity of disciplinary segregation and loss of earned remission necessitated the heightened standard of proof. The John Howard Society appeals the s. 7 issue to the Court, and also raises, as a new constitutional issue, the question of whether s. 68 of the *Regulations* infringes s. 11(d) of the *Charter*.

Held (Côté, Rowe and Jamal JJ. dissenting): The appeal should be allowed, the judgments below set aside and s. 68 of the *Regulations* declared to be of no force or effect.

Per **Wagner** C.J. and Karakatsanis, Martin, Kasirer, O'Bonsawin and Moreau JJ.: Section 68 of the *Regulations* infringes ss. 7 and 11(d) of the *Charter* because it permits the imposition of imprisonment when a reasonable doubt as to the

accused's guilt may exist. Such an infringement cannot be saved by s. 1 of the *Charter*. To the extent that s. 68 of the *Regulations* permits the imposition of disciplinary segregation and loss of earned remission for an inmate disciplinary offence on a lower standard of proof, it is inconsistent with the Constitution and must therefore be declared to be of no force or effect.

The Court can exercise its discretion to consider a new issue of law on appeal where it is able to do so without procedural prejudice to the opposing party and where the refusal to do so would risk an injustice. The instant case is one of the exceptional cases where it is appropriate for the Court to exercise its discretion to consider the new constitutional issue raised on appeal, which questions whether s. 68 of the *Regulations* infringes s. 11(d) of the *Charter*. There is no indication that the Attorney General of Saskatchewan or any other attorney general would be disadvantaged if the Court were to consider the new issue; rather, failing to consider the new issue would create a potential injustice, as there is a risk that unnecessary expenses and delay would result from not considering the issue and the related question of whether *Shubley* remains good law.

Section 11(d) of the *Charter* guarantees all persons charged with an offence the right to be presumed innocent until proven guilty. This presumption requires guilt to be proven beyond a reasonable doubt. Under the tests articulated in *R. v. Wigglesworth*, [1987] 2 S.C.R. 541, s. 11 applies to a person charged with an offence when proceedings are criminal in nature or may lead to the imposition of true penal

consequences. The criminal in nature test focuses on the purpose and features of the proceedings themselves and not on the underlying acts that gave rise to the proceedings. The true penal consequence test focuses on the potential impact on the person subject to the proceeding and is always satisfied when there is the possibility of imprisonment.

The Court's decision in *Shubley* held that inmate disciplinary proceedings were not criminal in nature because they lacked the essential characteristics and public accountability purpose of criminal proceedings and did not lead to true penal consequences because disciplinary segregation and loss of earned remission do not constitute a sentence of imprisonment. At the core of *Shubley*'s interpretation of imprisonment is a formalistic adherence to the criminal law's distinction between the sentence of imprisonment imposed on a person and the conditions of imprisonment, a distinction that has been attenuated by subsequent *Charter* jurisprudence. Where an inmate's conditions of imprisonment affect the underlying interests that certain *Charter* rights seek to protect, courts may depart from the formalistic distinction between the sentence and conditions of imprisonment and intervene to give effect to the *Charter*'s purpose. *Shubley*'s application of the true penal consequence test set out in *Wigglesworth* rests on eroded legal foundations. When an inmate faces the risk of disciplinary segregation or loss of earned remission, they face the possibility of additional imprisonment — a true penal consequence. While the decision to depart from a precedent of the Court should not be taken lightly because adherence to precedent furthers values such as the certainty and predictability of the law, *Shubley*'s holding on the true penal consequence test should no longer be considered binding.

Adopting a functional definition of imprisonment gives effect to the liberty-protecting purpose of s. 11. The concept of imprisonment must be defined by reference to its substantive attributes, rather than unduly fixating on the form in which such a consequence is often imposed. Imprisonment under the true penal consequence test must therefore include state-imposed sanctions that, in light of their attributes, represent a deprivation of liberty at least as severe as that resulting from an initial sentence of imprisonment. In assessing whether a sentence of imprisonment and the sanctions in question are equivalent in severity, a court must consider the fact that sentences of imprisonment can include non-carceral punishments that share the fundamental features of significantly curtailing an individual's freedom of movement and segregating them from others.

Both disciplinary segregation and loss of earned remission significantly curtail an inmate's freedom of movement while exacerbating or continuing the inmate's segregation from society and therefore fall within a functional definition of imprisonment. Disciplinary segregation has always been understood as a uniquely severe form of punishment for inmates. While the conditions of disciplinary segregation have evolved over time, this form of punishment by its very nature has the effect of significantly curtailing an inmate's freedom of movement while severely limiting access to human interaction. As for remission, it acts as a *de facto* reduction in an inmate's sentence of imprisonment. The loss of remission as a punishment is therefore functionally equivalent to extending an inmate's sentence of incarceration. Accordingly, both disciplinary segregation and loss of earned remission pass the true

penal consequence test. Because they are available forms of punishment for the commission of a major disciplinary offence, s. 11 of the *Charter* is engaged by those offences. Since s. 68 of the *Regulations* permits findings of guilt for a major disciplinary offence to be made where the offences have not been proven beyond a reasonable doubt, it infringes s. 11(d) of the *Charter*.

Section 7 of the *Charter* provides residual protection for the presumption of innocence. In proceedings where a moral judgment is made and severe liberty-depriving consequences are imposed as punishment, s. 7's residual protection operates to require proof beyond a reasonable doubt. In the instant case, even if s. 11 did not apply, s. 7 would require Saskatchewan's proceedings for major disciplinary offences to use a criminal standard of proof. Accordingly, s. 68 of the *Regulations* also infringes the presumption of innocence protected by s. 7 of the *Charter*. Major disciplinary offence proceedings involve an accusation of moral wrongdoing and the potential imposition of severe liberty-depriving consequences. Because s. 68 of the *Regulations* permits findings of guilt on a lesser standard, s. 7 of the *Charter* is infringed.

In the instant case, while promoting the expeditious resolution of inmate disciplinary proceedings constitutes a pressing and substantial objective, there is an obvious *Charter*-compliant alternative, which is to use the standard of proof beyond a reasonable doubt. As a result, s. 68 of the *Regulations* fails the minimal impairment test and is not saved by s. 1 of the *Charter*.

Per **Côté**, Rowe and Jamal JJ. (dissenting): The appeal should be dismissed. *Shubley* remains good law and a binding precedent and must be applied in the present case. As in *Shubley*, Saskatchewan's inmate disciplinary proceedings are not criminal in nature but are administrative and designed to regulate and maintain prison order, and the sanctions stemming from the disciplinary proceedings are not true penal consequences within the meaning of s. 11 of the *Charter*. Because the *Wigglesworth* test is not met, s. 11 has no application to Saskatchewan's inmate discipline regime and it is therefore unnecessary to decide whether s. 11(d) is infringed. While s. 7 of the *Charter* is implicated because of the evident engagement of an inmate's liberty interests, there is no infringement because the presumption of innocence as a principle of fundamental justice under s. 7 does not require a standard of proof beyond a reasonable doubt in the context of Saskatchewan's inmate disciplinary process.

There is agreement with the majority that the Court should hear the new constitutional issue of whether s. 68 of the *Regulations* infringes s. 11(d) of the *Charter*, as the instant case meets the stringent test for hearing a new issue on appeal. There is no concern with procedural prejudice, and the s. 7 *Charter* analysis of the courts below is intrinsically linked to considerations under s. 11(d). To refuse to hear the issue would be counter to the broader interests of the administration of justice.

Shubley considered the *Wigglesworth* test in the inmate disciplinary context. It remains good law and is a precedent that binds the Court to find that neither

loss of earned remission nor disciplinary segregation in the inmate disciplinary context satisfies the *Wigglesworth* test. The principle of *stare decisis* is a foundational doctrine that calls on courts to stand by previous decisions and not disturb settled matters. This doctrine promotes legal certainty and stability, and the legitimate and efficient exercise of judicial authority. It requires judges to give effect to legal principles that are well settled and depart from them only when there is a proper basis for doing so. *Shubley* should not be overturned on the basis of unworkability or on the basis that its holding has been subject to foundational erosion. First, the fact that provinces may impose different inmate disciplinary mechanisms does not give rise to unworkability: differing levels of protection for inmates in different provinces are to be expected in a federation where the division of powers allows for the creation of different rules concerning the management of correctional facilities in each province alongside of the interpretation of laws by the courts in each province.

Second, *Shubley* has not been subject to foundational erosion. With respect to the criminal in nature prong of the *Wigglesworth* test, recent case law has not changed its focus; the proceeding still remains paramount to the analysis, as it was in *Shubley*. As for the true penal consequence prong of the *Wigglesworth* test, the jurisprudence since *Shubley* has not disturbed its rationale. There has been no major shift in the foundation of *Shubley*'s holding on the loss of earned remission or on segregation. Furthermore, the majority's reliance on s. 10(c) and s. 7 *Charter* jurisprudence to make the point that in other *Charter* contexts the Court has not used a formalistic method of interpretation in maintaining a distinction between a sentence of

imprisonment and conditions of imprisonment is problematic, factually and legally. Factually, each of the cited cases involved severe segregation in separate wings and institutions and a lack of procedural fairness, unlike in the instant case, where inmates subject to segregation are generally confined to their own cells and, for the most part, still have access to cellmates, natural light, and television, and where all inmates facing disciplinary sanctions have access to procedural rights. From a legal standpoint, the s. 10(c) and s. 7 cases predate *Shubley* and therefore cannot be used to overturn a precedent on the basis of foundational erosion, since proper methodology requires that foundational erosion must have occurred after the precedent was decided. As well, the interpretative approaches to s. 10(c) and s. 11 are markedly different, as s. 11 has been given a narrower interpretation.

Section 11 does not apply to Saskatchewan's inmate disciplinary proceedings because it does not satisfy the test set out in *Wigglesworth*. The test is twofold. First, it asks whether the proceedings themselves are criminal in nature. Second, it asks whether a sanction arising from the proceedings can amount to a true penal consequence. Both prongs need not be satisfied to trigger the application of s. 11; one is sufficient. The criminal in nature prong involves an examination of the nature of the proceeding. The underlying act which gave rise to the proceeding is not relevant. The true penal consequences prong involves an examination of the purpose of the sanction in connection with its magnitude, although the magnitude is not determinative. The purpose of the sanction remains the focus of the inquiry to preserve the dichotomy between a sanction within the criminal realm intended to serve the purposes of

denunciation, punishment, and stigma for a wrong done to society at large and a sanction designed to maintain compliance. Regard must be had to whether the magnitude of the sanction is determined by regulatory considerations rather than principles of criminal sentencing.

Saskatchewan's inmate disciplinary proceedings do not meet the two-step test in *Wigglesworth* and therefore do not engage s. 11. They are administrative, not criminal, in nature. They are designed to maintain prison order and provide efficient, yet fair, resolution of misconduct allegations. They are not designed to redress wrongs to society as criminal proceedings are apt to do. This makes the standard of proof set out in s. 68 of the *Regulations* constitutionally compliant, as held in *Shubley*.

Under the criminal in nature prong of the test, the objective of the legislation is to maintain order and discipline in correctional facilities in Saskatchewan. This is in accordance with *Shubley*, where the inmate disciplinary proceedings under review in that case were implicitly aimed at promoting the orderly regulation and overall good government of correctional institutions. The objective of maintaining order is advanced by the standard of proof that was chosen for the purpose of providing both adequate procedural protection to inmates and administrative agility to administrators of institutions. The process leading to the sanction in *Shubley* was conducted informally, swiftly, in private, and with no court involvement. By contrast, the Saskatchewan inmate discipline regime has more formality in its proceedings: the *Regulations* set out a list of offences, classify them as minor or major and assign

severity of sanction on that basis, and require the prison administration to issue a notice of charge, provide for a full and fair hearing, and prescribe the rights of the inmate in this process. While these factors militate towards a finding of criminal in nature, they alone are insufficient to satisfy the criminal in nature prong. In the present case, there was no arrest or appearance before a court of criminal jurisdiction, no criminal record has resulted from it, and no use of words traditionally associated with the criminal process, such as guilt, acquittal, indictment, summary conviction, prosecution, and accused. There is no basis on which to suggest that these hearings are anything but administrative and regulatory in nature, intended to further the purpose of maintaining internal prison discipline. To hold that these proceedings are criminal in nature would fly in the face of both *Shubley* and *Wigglesworth*.

Under the true penal consequence prong of the test, segregation and loss of remission as possible consequences are at issue. *Shubley* ruled that both sanctions concerned the manner in which the inmate serves their time rather than the imposition of a new sentence and found their purpose to be entirely commensurate with the goal of fostering internal prison discipline. *Shubley* found those sanctions to be not of a magnitude or consequence that would be expected for redressing wrongs done to society at large. Applied to the instant case, the outcome is the same. In *Shubley*, close confinement for five days with a special diet that fulfilled basic nutritional requirements was declared constitutionally compliant; the maximum for that type of close confinement under the Ontario inmate disciplinary scheme was 10 days. In the instant case, the legislation provides for segregation to a cell, unit, or security area for a period

not exceeding 10 days. There is no basis on which to depart from the conclusions reached in *Shubley*. Those conclusions, in conjunction with the purpose of the sanction being clearly of an administrative and regulatory nature, militate against a finding of segregation being a true penal consequence. The purpose of imposing a loss of remission is not to add to an inmate's sentence, but to maintain order within a correctional institution. The application judge rightly referred to the cancellation of earned remission as a tool for prison administration to ensure the orderly running of a prison. The sanction is imposed not to punish or denounce, but to encourage compliance and deter breaches of the facility rules, which makes the consequence non-penal.

Section 7 is engaged but is not infringed by Saskatchewan's inmate disciplinary proceedings because the presumption of innocence, as a principle of fundamental justice guaranteed by s. 7, is applied in conjunction with the requirements of procedural fairness that serve as residual protection under s. 7. The test to determine whether there has been a violation of s. 7 of the *Charter* unfolds in three steps: (1) whether there was a real or imminent deprivation of life, liberty, security of the person, or a combination of these interests; (2) the identification and definition of the relevant principle of fundamental justice; and, (3) whether the deprivation was in accordance with the principle of fundamental justice. The first step of the analysis is not under debate in the instant case; when an inmate is faced with a sanction that includes the loss of earned remission and/or disciplinary segregation, there is a direct deprivation of liberty. With respect to the second step, the question is simply whether the presumption

of innocence as a principle of fundamental justice requires application of the criminal standard of proof beyond a reasonable doubt in inmate disciplinary proceedings.

As for the third step, the deprivation of liberty stemming from s. 68 of the *Regulations* is in accordance with the principles of fundamental justice at issue. The concern is to ensure that the presumption of innocence within s. 11(d), which firmly operates during a criminal trial, applies at other stages of the criminal law process. Section 7 acts as residual protection of the liberty interests of the accused persons during the criminal process and may, depending on the context, require proof beyond a reasonable doubt outside the trial stage of the criminal process. Two possible requirements that can be of assistance to determine which standard of proof applies under s. 7 are (1) whether the proceeding involves a determination of guilt or (2) whether the proceeding entails serious consequences analogous to a criminal sentence. These two requirements are not met in the instant case. The conclusion reached through the inmate disciplinary process does not amount to a determination of guilt. An inmate disciplinary proceeding cannot be analogized to a criminal trial, where it is incumbent on the prosecution to establish guilt beyond a reasonable doubt. Inmate disciplinary proceedings are administrative in nature, which means that they do not automatically attract the criminal standard of proof nor involve a determination of guilt in the criminal, penal sense. Nor does the language contained in the legislation support the conclusion that an inmate disciplinary proceeding leads to a determination of guilt; the discipline panel will either find that the inmate committed the disciplinary offence or dismiss the charge. The inmate disciplinary proceedings are performing an assessment

of the inmate's conduct to impose the least onerous condition on their residual liberty depending on the seriousness of the offence; the scheme is structured to make severe forms of punishment available only as a consequence of a major disciplinary offence. The inmate discipline regime permits the imposition of a sanction, not a sentence in a criminal context. The sanction, in contrast to a sentence, is not for the purpose of redressing a moral wrong to society, nor does it carry social stigma or profound effects.

In the present case, the procedural guarantees provided to inmates in the legislation are sufficient to ensure a fair process. The Court's jurisprudence clearly indicates that the question of standard of proof under s. 7 can be folded into discussions of procedural fairness and where the standard required by s. 7 is unclear, the presence of strong procedural guarantees may be decisive in determining whether s. 7 is infringed. The procedural guarantees that an inmate faced with disciplinary sanctions may claim include the right to be informed of the facts alleged against them, to a hearing that they can attend, to make arguments, to be represented by counsel, to consult the record, to call witnesses, to cross-examine, to certain rules of evidence, to an adjournment, and to a reasoned decision. Most of these protections are included in the current regime and therefore procedural guarantees offered to the inmates under that regime are sufficient to ensure a fair process as required by s. 7.

Having found no infringement of s. 7 or s. 11(d), there is no need to proceed to an analysis under s. 1 of the *Charter*. However, if s. 68 had not been constitutionally compliant, the s. 1 determination should have been remitted to the

application judge. There is disagreement with the majority's conclusion that s. 68 fails the proportionality test having regard to the standard of proof beyond a reasonable doubt codified for inmate disciplinary proceedings in the federal regime. Such a conclusion fails to account for the province's ability and resources to administer its own prison system. It is not the Court's role to question a province's ability to efficiently administer its correctional institutions on the basis of the legislative choices of the federal government.

Cases Cited

By Wagner C.J.

Overruled: *R. v. Shubley*, [1990] 1 S.C.R. 3; **applied:** *R. v. Oakes*, [1986] 1 S.C.R. 103; *R. v. Wigglesworth*, [1987] 2 S.C.R. 541; *Guindon v. Canada*, 2015 SCC 41, [2015] 3 S.C.R. 3; **considered:** *R. v. Pearson*, [1992] 3 S.C.R. 665; *R. v. Demers*, 2004 SCC 46, [2004] 2 S.C.R. 489; **referred to:** *R. v. D.B.*, 2008 SCC 25, [2008] 2 S.C.R. 3; *R. v. Malmo-Levine*, 2003 SCC 74, [2003] 3 S.C.R. 571; *Performance Industries Ltd. v. Sylvan Lake Golf & Tennis Club Ltd.*, 2002 SCC 19, [2002] 1 S.C.R. 678; *R. v. J.J.*, 2022 SCC 28; *R. v. Mentuck*, 2001 SCC 76, [2001] 3 S.C.R. 442; *R. v. Seaboyer*, [1991] 2 S.C.R. 577; *Martineau v. M.N.R.*, 2004 SCC 81, [2004] 3 S.C.R. 737; *Goodwin v. British Columbia (Superintendent of Motor Vehicles)*, 2015 SCC 46, [2015] 3 S.C.R. 250; *R. v. Généreux*, [1992] 1 S.C.R. 259; *R. v. Sullivan*, 2022 SCC 19, [2022] 1 S.C.R. 460; *R. v. Chaulk*, [1990] 3 S.C.R. 1303; *R. v. Bernard*, [1988] 2 S.C.R. 833; *R. v. Edwards*, 2024 SCC 15; *Canada (Attorney General) v. Power*, 2024

SCC 26; *Clark v. Canadian National Railway Co.*, [1988] 2 S.C.R. 680; *R. v. Beaulac*, [1999] 1 S.C.R. 768; *Health Services and Support — Facilities Subsector Bargaining Assn. v. British Columbia*, 2007 SCC 27, [2007] 2 S.C.R. 391; *Quebec (Attorney General) v. A*, 2013 SCC 5, [2013] 1 S.C.R. 61; *R. v. Turpin*, [1989] 1 S.C.R. 1296; *Hunter v. Southam Inc.*, [1984] 2 S.C.R. 145; *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295; *R. v. Zinck*, 2003 SCC 6, [2003] 1 S.C.R. 41; *May v. Ferndale Institution*, 2005 SCC 82, [2005] 3 S.C.R. 809; *Solosky v. The Queen*, [1980] 1 S.C.R. 821; *R. v. Miller*, [1985] 2 S.C.R. 613; *Morin v. National Special Handling Unit Review Committee*, [1985] 2 S.C.R. 662; *Cardinal v. Director of Kent Institution*, [1985] 2 S.C.R. 643; *Dumas v. Leclerc Institute*, [1986] 2 S.C.R. 459; *Jones v. Cunningham*, 371 U.S. 236 (1962); *Canada (Public Safety and Emergency Preparedness) v. Chhina*, 2019 SCC 29, [2019] 2 S.C.R. 467; *Cunningham v. Canada*, [1993] 2 S.C.R. 143; *Canada (Attorney General) v. Whaling*, 2014 SCC 20, [2014] 1 S.C.R. 392; *R. v. Rodgers*, 2006 SCC 15, [2006] 1 S.C.R. 554; *R. v. K.R.J.*, 2016 SCC 31, [2016] 1 S.C.R. 906; *R. v. Proulx*, 2000 SCC 5, [2000] 1 S.C.R. 61; *R. v. Wu*, 2003 SCC 73, [2003] 3 S.C.R. 530; *R. v. Wholesale Travel Group Inc.*, [1991] 3 S.C.R. 154; *R. v. Brown*, 2022 SCC 18, [2022] 1 S.C.R. 374; *R. v. Gardiner*, [1982] 2 S.C.R. 368; *Carey v. Laiken*, 2015 SCC 17, [2015] 2 S.C.R. 79; *Vidéotron Ltée v. Industries Microlec Produits Électroniques Inc.*, [1992] 2 S.C.R. 1065; *Frank v. Canada (Attorney General)*, 2019 SCC 1, [2019] 1 S.C.R. 3; *Alberta v. Hutterian Brethren of Wilson Colony*, 2009 SCC 37, [2009] 2 S.C.R. 567; *R. v. C.P.*, 2021 SCC 19, [2021] 1 S.C.R. 679; *Martineau v. Matsqui Institution Inmate Disciplinary Board*, [1978] 1 S.C.R. 118; *Ontario (Attorney General) v. G*, 2020 SCC 38, [2020] 3 S.C.R. 629.

By Côté J. (dissenting)

R. v. Wigglesworth, [1987] 2 S.C.R. 541; *R. v. Shubley*, [1990] 1 S.C.R. 3; *Carter v. Canada (Attorney General)*, 2015 SCC 5, [2015] 1 S.C.R. 331; *R. v. Pearson*, [1992] 3 S.C.R. 665; *R. v. Demers*, 2004 SCC 46, [2004] 2 S.C.R. 489; *R. v. J.J.*, 2022 SCC 28; *Guindon v. Canada*, 2015 SCC 41, [2015] 3 S.C.R. 3; *R. v. Bird*, 2019 SCC 7, [2019] 1 S.C.R. 409; *Re B.C. Motor Vehicle Act*, [1985] 2 S.C.R. 486; *R. v. Brunelle*, 2024 SCC 3; *Thomson Newspapers Ltd. v. Canada (Director of Investigation and Research, Restrictive Trade Practices Commission)*, [1990] 1 S.C.R. 425; *R. v. L. (D.O.)*, [1993] 4 S.C.R. 419; *R. v. Levogiannis*, [1993] 4 S.C.R. 475; *R. v. Fitzpatrick*, [1995] 4 S.C.R. 154; *R. v. Darrach*, 2000 SCC 46, [2000] 2 S.C.R. 443; *R. v. Mills*, [1999] 3 S.C.R. 668; *Martineau v. M.N.R.*, 2004 SCC 81, [2004] 3 S.C.R. 737; *Blencoe v. British Columbia (Human Rights Commission)*, 2000 SCC 44, [2000] 2 S.C.R. 307; *Canada (Attorney General) v. Whaling*, 2014 SCC 20, [2014] 1 S.C.R. 392; *R. v. Cross*, 2006 NSCA 30, 241 N.S.R. (2d) 349; *R. v. Samji*, 2017 BCCA 415, 357 C.C.C. (3d) 436; *Sivia v. British Columbia (Superintendent of Motor Vehicles)*, 2014 BCCA 79, 55 B.C.L.R. (5th) 1; *R. v. K.R.J.*, 2016 SCC 31, [2016] 1 S.C.R. 906; *Canada (Attorney General) v. United States Steel Corp.*, 2011 FCA 176, 333 D.L.R. (4th) 1; *Canada (Attorney General) v. Power*, 2024 SCC 26; *Auer v. Auer*, 2024 SCC 36; *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65, [2019] 4 S.C.R. 653; *Watkins v. Olafson*, [1989] 2 S.C.R. 750; *Goodwin v. British Columbia (Superintendent of Motor Vehicles)*, 2015 SCC 46, [2015] 3 S.C.R. 250; *Cunningham v. Canada*, [1993] 2 S.C.R. 143; *British Columbia Civil Liberties Association v.*

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APPEAL from a judgment of the Saskatchewan Court of Appeal (Schwann, Tholl and McCreary JJ.A.), 2022 SKCA 144, 476 D.L.R. (4th) 641, [2022] S.J. No. 449 (Lexis), 2022 CarswellSask 587 (WL), affirming a decision of Layh J., 2021 SKQB 287, [2021] S.J. No. 471 (Lexis), 2021 CarswellSask 651 (WL). Appeal allowed, Côté, Rowe and Jamal JJ. dissenting.

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Emily Hill and *Maxwell Hill*, for the intervener the Aboriginal Legal Services Inc.

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Eric S. Neubauer and *Paul Socka*, for the intervener the Criminal Lawyers' Association (Ontario).

Samara Secter and *Wesley Dutcher-Walls*, for the intervener the Queen's Prison Law Clinic.

Louis-Alexandre Hébert-Gosselin, for the intervener Association des avocats.es carcéralistes du Québec.

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Jessica Magonet and *Max McQuaig*, for the intervener the Canadian Prison Law Association.

David Honeyman, for the intervener the West Coast Prison Justice Society.

The judgment of Wagner C.J. and Karakatsanis, Martin, Kasirer, O'Bonsawin and Moreau JJ. was delivered by

THE CHIEF JUSTICE —

I. Introduction

[1] A fundamental principle of Canadian law is that the guilt of a person charged with an offence must be proven beyond a reasonable doubt before they are punished with imprisonment. This appeal invites this Court to confirm whether such a principle applies to persons behind the walls of correctional institutions who are charged with disciplinary offences. I conclude that it does.

[2] Section 11(d) of the *Canadian Charter of Rights and Freedoms* guarantees all persons "charged with an offence" the right to be presumed innocent until proven guilty. This Court has long held that this presumption requires guilt to be proven beyond a reasonable doubt (see *R. v. Oakes*, [1986] 1 S.C.R. 103, at p. 121). This Court has also recognized that s. 7 of the *Charter* provides residual protection for the presumption of innocence in circumstances where s. 11 does not apply (see *R. v. Pearson*, [1992] 3 S.C.R. 665, at p. 688). In proceedings where a moral judgment is made and severe liberty-depriving consequences are imposed as punishment, such as sentencing hearings with contested aggravating factors, s. 7's residual protection operates to require proof beyond a reasonable doubt (*ibid.*, at p. 686; *R. v. D.B.*, 2008 SCC 25, [2008] 2 S.C.R. 3, at paras. 78-80).

[3] The John Howard Society of Saskatchewan ("JHS") argues that s. 68 of Saskatchewan's *Correctional Services Regulations, 2013*, R.R.S., c. C-39.2, Reg. 1 ("*Regulations*"), infringes ss. 7 and 11(d) of the *Charter* because it sets the applicable standard of proof in inmate disciplinary proceedings at a balance of probabilities. This civil standard of proof is used even in circumstances where severe liberty-depriving consequences may be imposed. Under s. 77(1) of Saskatchewan's *Correctional Services Act, 2012*, S.S. 2012, c. C-39.2 ("*Act*"), inmates in provincial correctional institutions who have been found guilty of a "major disciplinary offence" face potential sanctions that include disciplinary segregation for up to 10 days and loss of up to 15 days of earned remission.

[4] JHS initially challenged s. 68 of the *Regulations* exclusively under s. 7 of the *Charter*, arguing that the residual protection for the presumption of innocence requires proof of guilt beyond a reasonable doubt. The courts below disagreed, concluding that neither the nature of inmate disciplinary proceedings nor the severity of disciplinary segregation and loss of earned remission necessitates the heightened standard of proof. Reliance on s. 11(d) of the *Charter* was constrained by this Court's decision in *R. v. Shubley*, [1990] 1 S.C.R. 3, which held that inmate disciplinary proceedings in which disciplinary segregation and loss of earned remission are possible sanctions do not engage s. 11.

[5] Under the tests articulated in *R. v. Wigglesworth*, [1987] 2 S.C.R. 541, s. 11 applies to a person "charged with an offence" when the proceedings (a) are criminal in nature or (b) may lead to the imposition of true penal consequences, such as "imprisonment" (pp. 559-61). In *Shubley*, the majority held that Ontario's inmate disciplinary proceedings were not "criminal in nature" because they lacked the essential characteristics and public accountability purpose of criminal proceedings (p. 20). Nor did they lead to "true penal consequences", because disciplinary segregation and loss of earned remission do not constitute a "sentence of imprisonment" (pp. 21-23).

[6] On appeal, JHS asks this Court to overturn *Shubley* and to hold that Saskatchewan's inmate disciplinary proceedings engage s. 11 of the *Charter*. In JHS's submission, the legal foundations of *Shubley* have been eroded by subsequent jurisprudence from this Court that has clarified the requirements of the *Wigglesworth*

tests and emphasized the importance of adopting a functional, rather than a formalistic, understanding of punishment. JHS argues that, if *Shubley* is overturned, s. 11 should apply to Saskatchewan's inmate disciplinary proceedings because they are criminal in nature and may lead to the imposition of true penal consequences.

[7] As I will explain, I agree that *Shubley*'s application of *Wigglesworth*'s true penal consequence test rests on eroded legal foundations. *Shubley*'s conclusion that disciplinary segregation and loss of earned remission do not engage s. 11 because they do not amount to imprisonment has been attenuated by this Court's consistent direction that judges must interpret the *Charter* in a generous, rather than a formalistic, manner that gives effect to the purpose of the right in question. When an inmate faces the risk of disciplinary segregation or loss of earned remission, they face the possibility of additional imprisonment — a true penal consequence.

[8] Section 11 therefore applies to Saskatchewan's inmate disciplinary proceedings involving the adjudication of a "major disciplinary offence". It follows that s. 68 of the *Regulations* infringes s. 11(d) of the *Charter* because it permits the imposition of imprisonment when a reasonable doubt as to the accused's guilt may exist. Moreover, even if I had concluded that s. 11 does not apply, I am satisfied that s. 68 of the *Regulations* also infringes s. 7 of the *Charter*. These infringements cannot be saved by s. 1 of the *Charter*.

[9] I would allow the appeal, set aside the judgments below, and declare s. 68 of the *Regulations* to be of no force or effect.

II. Background and Judicial History

A. *Background*

[10] Saskatchewan's inmate disciplinary process is codified by Part VIII of the *Act* and Part XIII of the *Regulations*. Disciplinary offences are enumerated in s. 54 of the *Regulations*. These offences include assault, gang activity, possession of contraband, and theft. Designated correctional staff are empowered to resolve disciplinary issues informally (s. 71 of the *Act*); if this does not occur, the designated staff member may issue a charge for either a "minor" or a "major" disciplinary offence (s. 72 of the *Act*). Section 55 of the *Regulations* specifies which offences are major. Discipline panels use an inquisitorial model of fact-finding and are required to ensure that inmates receive a "full and fair hearing" (s. 60 of the *Regulations*). Inmates are guaranteed a number of procedural protections, including the opportunity to call witnesses and the right to be informed of the charge and of the evidence to be used against them (ss. 56, 61 and 64 of the *Regulations*).

[11] Section 77(1) of the *Act* provides that, after finding that an inmate has committed a major disciplinary offence, the discipline panel may impose "segregation to a cell, unit or security area for a period not exceeding 10 days" (s. 77(1)(d)) or "forfeiture of a period, not exceeding 15 days, of remission earned" (s. 77(1)(h)). Under Saskatchewan's inmate discipline policy, if there are multiple sanctions arising from separate incidents, these sanctions may be imposed consecutively, which means that an inmate's time in disciplinary segregation may exceed 10 consecutive days (Ministry of

Corrections, Policing and Public Safety – Custody, Supervision and Rehabilitation Services, *Inmate Discipline*, last updated November 9, 2023 (online), s. 15.5). The uncontested evidence of the Attorney General of Saskatchewan ("AGS") is that, in 2019, disciplinary segregation and loss of earned remission accounted for 39 percent and 0.3 percent, respectively, of the punishments imposed on inmates (affidavit of Lindsay Tokarski, at para. 12, reproduced in A.R., at p. 79).

[12] Inmates subject to disciplinary segregation in Saskatchewan are only guaranteed one hour out of their cells each day to permit them to shower, exercise, and go outside (affidavit of Lindsay Tokarski, at para. 13). For the other 23 hours of the day, inmates remain in their cells. Inmates in segregation maintain access to health care as well as to elders, chaplains, and program staff. While in segregation, inmates *may* have a cellmate, television, and natural light. This description reflects administrative practice, but these conditions are not guaranteed by the *Act* or *Regulations*.

[13] Earned remission refers to reductions in an inmate's sentence for good behaviour in a correctional institution. Pursuant to s. 99 of the *Act*, an inmate may obtain remission as provided for in Canada's *Prisons and Reformatories Act*, R.S.C. 1985, c. P-20. Under s. 6(1) of the *Prisons and Reformatories Act*, every prisoner serving a sentence will generally "be credited with 15 days of remission of the sentence in respect of each month and with a number of days calculated on a *pro rata* basis in respect of each incomplete month during which the prisoner has earned that remission by obeying prison rules and conditions governing temporary absence and by actively

participating in programs, other than full parole, designed to promote prisoners' rehabilitation and reintegration".

B. *Court of Queen's Bench for Saskatchewan, 2021 SKQB 287 (Layh J.)*

[14] The application judge held that s. 68 of the *Regulations* does not violate s. 7 of the *Charter*. He began his analysis by noting that the AGS had conceded that s. 7 was engaged because s. 77 of the *Act* enumerates consequences, including loss of earned remission and disciplinary segregation, that may deprive inmates of their residual liberties. The central question to be determined was whether a principle of fundamental justice necessitates that disciplinary offences be proven beyond a reasonable doubt before such consequences are imposed. In the application judge's view, JHS sought the recognition of a new principle of fundamental justice. As a result, he examined whether proof beyond a reasonable doubt in inmate disciplinary proceedings meets the test for the recognition of a new principle as articulated in *R. v. Malmo-Levine*, 2003 SCC 74, [2003] 3 S.C.R. 571.

[15] The application judge began his analysis by considering the nature of the proceedings. He noted that it was held in *Shubley* that inmate disciplinary proceedings are "not by their nature criminal proceedings" and have a distinct purpose (para. 69; see also para. 70). He believed that *Shubley*'s characterization of such proceedings needed to animate and inform his s. 7 analysis. He went on to reject JHS's argument that *Pearson* and *R. v. Demers*, 2004 SCC 46, [2004] 2 S.C.R. 489, stand for the proposition that proof beyond a reasonable doubt is required under s. 7 anytime

proceedings involve a "determination of guilt" (application judge's decision, at para. 31 (emphasis deleted)). The application judge was of the view that this interpretation "stretches the meaning of guilt" and that those cases were simply referring to a guilty verdict in criminal proceedings (para. 75). He emphasized that many proceedings outside of a criminal trial in which serious consequences may be imposed, such as professional discipline and bail hearings, do not require a standard of proof beyond a reasonable doubt.

[16] The application judge further considered whether the severity of the consequences in question warrants a heightened standard of proof under s. 7. He deferred to this Court's conclusion in *Shubley* that loss of earned remission cannot be equated with imprisonment. He likewise found "nothing in the evidence" to suggest that disciplinary segregation in Saskatchewan is "as severe as one might associate with the term 'solitary confinement'" (para. 86). Finally, he highlighted how only federal legislation requires inmate disciplinary offences to be proven beyond a reasonable doubt. This further bolstered the idea that there is no "significant societal consensus" that a heightened standard of proof in inmate disciplinary proceedings is a principle of fundamental justice (para. 95). For these reasons, the application judge rejected the s. 7 claim.

C. *Court of Appeal for Saskatchewan, 2022 SKCA 144, 476 D.L.R. (4th) 641 (Schwann, Tholl and McCreary JJ.A.)*

[17] The Court of Appeal unanimously concluded that s. 68 of the *Regulations* does not infringe s. 7 of the *Charter*. Rather than framing JHS's claim as seeking the recognition of a new principle of fundamental justice, the Court of Appeal framed the issue as being whether the presumption of innocence applies in inmate disciplinary proceedings and, if so, whether it requires a standard of proof beyond a reasonable doubt.

[18] In rejecting JHS's claim, the Court of Appeal first considered the nature of the consequences that such proceedings may have for inmates, focusing on segregation and loss of earned remission. The Court of Appeal noted that the application judge had found that disciplinary segregation is not the "same thing" as solitary confinement and can only extend to 10 days (para. 32). It then held that loss of earned remission is "not the same" as the imposition of an additional period of incarceration and "is not more time in jail" (para. 37). For these reasons, the Court of Appeal concluded that these consequences are of a different nature than "true penal consequences", which lent support to the idea that inmate disciplinary offences do not require the same standard of proof as criminal offences (para. 40).

[19] The Court of Appeal then turned to the question of whether the nature of disciplinary proceedings suggests that the presumption of innocence applies. In making this determination, the Court of Appeal agreed with the application judge's decision to distinguish this case from *Pearson* and *Demers*. In the Court of Appeal's view, these two cases established that the presumption of innocence requires proof of guilt beyond

a reasonable doubt only for criminal offences that attract true penal consequences. The court further noted that *Pearson* held that the presumption of innocence does not require proof beyond a reasonable doubt every time a deprivation of liberty may occur. The Court of Appeal also considered *Shubley*'s conclusion that inmate disciplinary proceedings are administrative, rather than criminal, in nature. In light of these considerations, the court held that the presumption of innocence does not require a standard of proof beyond a reasonable doubt in inmate disciplinary proceedings.

III. Issues

[20] This appeal raises the following issues:

1. Does s. 68 of the *Regulations* infringe s. 11(d) of the *Charter*?

2. Does s. 68 of the *Regulations* infringe s. 7 of the *Charter*?

3. If either s. 7 or s. 11(d) is infringed, can s. 68 of the *Regulations* be saved under s. 1 of the *Charter*?

IV. Analysis

A. *Section 11(d) Should Be Considered*

[21] JHS acknowledges that the question of whether s. 68 of the *Regulations* infringes s. 11(d) is a new constitutional issue raised on appeal.

[22] In *Guindon v. Canada*, 2015 SCC 41, [2015] 3 S.C.R. 3, this Court reiterated that it can exercise its discretion "to consider a new issue of law on the appeal where it is able to do so without procedural prejudice to the opposing party and where the refusal to do so would risk an injustice" (para. 22, quoting *Performance Industries Ltd. v. Sylvan Lake Golf & Tennis Club Ltd.*, 2002 SCC 19, [2002] 1 S.C.R. 678, at para. 33). The burden is on JHS to persuade this Court to exercise its discretion to consider the new issue in light of all of the circumstances (*Guindon*, para. 23). Because JHS raises a new constitutional question, "[t]he Court must be sure that no attorney general has been denied the opportunity to address [it]" (*ibid.*). Consideration of a new issue on appeal is exceptional, and thus this Court's discretion to hear such an issue should not be exercised routinely or lightly.

[23] In my view, this is one of the exceptional cases where it is appropriate for this Court to exercise its discretion to consider the new issue.

[24] On the question of procedural prejudice, there is no indication that the AGS, or any other attorney general, would be disadvantaged if the Court were to consider the new issue. JHS filed a notice of constitutional question containing the new issue on February 9, 2024. The intervening attorneys general have raised no concerns about the consideration of the new issue and have largely focused their submissions on addressing this issue specifically. The AGS argues that it has not had an opportunity to

file evidence that is fully responsive to the arguments on s. 11(d) and s. 1 (R.F., at paras. 109 and 164). However, this argument is unpersuasive because the question of what s. 7 may require in the inmate disciplinary context engages considerations similar to those engaged by the question of whether s. 11 applies. Both inquiries concern the nature of the proceedings at issue and the degree to which an individual's liberty is in jeopardy. Moreover, the possibility of having to justify a s. 7 infringement under s. 1 was at issue in the courts below.

[25] Failing to consider the new issue would also create the potential for injustice. There is a risk that unnecessary expense and delay would result from not considering the question of whether s. 11(d) is infringed and the related question of whether *Shubley* remains good law. As discussed, *Shubley*'s analysis of whether s. 11 applies in the inmate disciplinary context is relevant to the question of whether s. 68 of the *Regulations* infringes s. 7 of the *Charter*. It would therefore be undesirable for this Court to consider s. 7 without first addressing the status of *Shubley*. This risk of unnecessary expense and delay means that there is a strong public interest in deciding the new issue on appeal. As a result, the question of whether s. 11(d) is infringed should be answered first.

[26] I note that, in coming to this conclusion, I am not establishing a principle of broader application for when accused persons raise claims under both ss. 7 and 11(d) (see *R. v. J.J.*, 2022 SCC 28, at para. 115). The methodology for assessing alleged *Charter* breaches is highly context- and fact-specific (*ibid.*; *R. v. Mentuck*, 2001 SCC

76, [2001] 3 S.C.R. 442, at para. 37). It remains true that ss. 7 and 11(d) are "inextricably intertwined" (*R. v. Seaboyer*, [1991] 2 S.C.R. 577, at p. 603).

B. *Section 11(d) of the Charter Is Infringed*

(1) Scope of Section 11

[27] Section 11 of the *Charter* enumerates a series of rights possessed by "[a]ny person charged with an offence". In *Wigglesworth*, this Court developed two tests for determining which "offences" will trigger the protections of s. 11. First, s. 11 can be invoked when the proceedings at issue are "criminal in nature" (p. 559). Proceedings of this kind are "intended to promote public order and welfare within a public sphere of activity" and stand in contrast to "private, domestic or disciplinary matters which are regulatory, protective or corrective" (p. 560). Second, s. 11 can be invoked when the proceedings may lead to the imposition of "true penal consequences" (p. 561). Such consequences include "imprisonment" or 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 for the maintenance of internal discipline" (*ibid.*).

[28] The key distinction between the two *Wigglesworth* tests was articulated in *Guindon*. In that case, this Court emphasized that "[t]he criminal in nature test focuses on the process while the [true] penal consequences test focuses on its potential impact on the person subject to the proceeding" (para. 50).

[29] Under the criminal in nature test, the focus of the inquiry is not on the underlying acts that gave rise to the proceedings, but is instead on the purpose and features of the proceedings themselves (*Martineau v. M.N.R.*, 2004 SCC 81, [2004] 3 S.C.R. 737, at paras. 24 and 28-32; *Guindon*, at para. 45). The presence of analogues to the following features of a criminal trial may suggest that the proceedings at issue are criminal in nature: a charge, an information, an arrest, a summons, and a subsequent criminal record (*Martineau*, at para. 45; *Goodwin v. British Columbia (Superintendent of Motor Vehicles)*, 2015 SCC 46, [2015] 3 S.C.R. 250, at para. 43). Proceedings may be criminal in nature even in circumstances where they have both a public accountability function and a private, disciplinary one (see *R. v. Généreux*, [1992] 1 S.C.R. 259, at p. 281). The purpose of the penalties may also inform the criminal in nature test, but its consideration is often reserved for the true penal consequence test to avoid "unnecessary repetition" (*Guindon*, at para. 52; see also para. 46).

[30] Importantly for our purposes, the true penal consequence test is "always" satisfied when there is the possibility of imprisonment (*Guindon*, at para. 76). Whether other sanctions, such as fines or monetary penalties, are true penal consequences depends on if they are punitive "in purpose or effect" (*ibid.*). A punitive purpose may be discerned if the sanction is determined by the principles of criminal sentencing rather than by regulatory considerations (*ibid.*; *Martineau*, at para. 62). A sanction's effects may be considered punitive once they are "assessed relative to the conduct in question and the regulatory objective" at issue (*Goodwin*, at para. 46). Where the effects of a

sanction are "out of proportion" to what is required to achieve the regulatory purpose, the sanction will likely constitute a true penal consequence (*Guindon*, at para. 77).

[31] As I discuss below, the key question in this case is whether disciplinary segregation and loss of earned remission constitute forms of "imprisonment" under the true penal consequence test. When imprisonment is understood in a functional rather than a formalistic manner, this question must be answered in the affirmative.

(2) Legal Status of *Shubley*

[32] If *Shubley* remains a binding precedent, it must be concluded that disciplinary segregation and loss of earned remission are not true penal consequences. JHS argues that *Shubley* should be overturned for two reasons: (a) reliance on s. 7 of the *Charter* to provide inmates with procedural protections during disciplinary proceedings has proven unworkable; and (b) the legal foundations of *Shubley* have been eroded. I agree with JHS that *Shubley*'s application of the true penal consequence test should be overturned because it rests on eroded legal foundations. It is unnecessary to address the assertion of unworkability and the legal foundations of *Shubley*'s application of the criminal in nature test.

[33] The decision to depart from a precedent of this Court should not be taken lightly. This is because adherence to precedent furthers values such as the certainty and predictability of the law (*R. v. Sullivan*, 2022 SCC 19, [2022] 1 S.C.R. 460, at para. 64). In some exceptional circumstances, however, a compelling reason will outweigh the

benefits of following precedent and justify a departure (see *R. v. Chaulk*, [1990] 3 S.C.R. 1303, at pp. 1352-53, per Lamer C.J., citing *R. v. Bernard*, [1988] 2 S.C.R. 833, at p. 849, per Dickson C.J., dissenting, but not on this point). It is uncontroversial that one such compelling reason is that the rationale for the precedent in question has been eroded due to significant legal change (see *R. v. Edwards*, 2024 SCC 15, at para. 66; *Canada (Attorney General) v. Power*, 2024 SCC 26, at para. 98; see also *Clark v. Canadian National Railway Co.*, [1988] 2 S.C.R. 680, at p. 704).

[34] *Shubley* is an example of this type of precedent. When *Shubley* is situated within the full constellation of this Court's subsequent case law on *Charter* interpretation, it is clear that its reasoning in applying the true penal consequence test rested on a formalistic method of interpretation that has since been consistently eschewed.

[35] This Court has overturned precedents that adopted an overly formalistic method of *Charter* interpretation before (see, e.g., *R. v. Beaulac*, [1999] 1 S.C.R. 768, at paras. 16-25; *Health Services and Support — Facilities Subsector Bargaining Assn. v. British Columbia*, 2007 SCC 27, [2007] 2 S.C.R. 391, at para. 30; *Quebec (Attorney General) v. A*, 2013 SCC 5, [2013] 1 S.C.R. 61, at paras. 338-47, per Abella J., dissenting, but not on this point).

[36] Legal interpretation becomes formalistic when there is excessive adherence to matters of form at the expense of substance. When formalism is adopted, legal interpretation becomes a "mechanical and sterile categorization process" that

undermines the law's capacity to achieve its underlying purpose and ignores how understandings of legal concepts must adapt in light of varying social contexts (see *R. v. Turpin*, [1989] 1 S.C.R. 1296, at p. 1332).

[37] Avoidance of formalism takes on heightened importance in constitutional interpretation because a constitution's "function is to provide a continuing framework for the legitimate exercise of governmental power and, when joined by a *Bill* or a *Charter of Rights*, for the unremitting protection of individual rights and liberties" (*Hunter v. Southam Inc.*, [1984] 2 S.C.R. 145, at p. 155). For this reason, this Court has insisted that the interpretation of a *Charter* right be "a generous rather than a legalistic one, aimed at fulfilling the purpose of the guarantee" (*R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295, at p. 344).

[38] *Shubley*'s application of the true penal consequence test was formalistic in a way that sits in tension with the contemporary legal landscape on *Charter* interpretation. In that case, an inmate argued that his punishment of disciplinary segregation, coupled with the potential loss of earned remission, constituted a form of imprisonment and was therefore a true penal consequence. On the question of disciplinary segregation, the majority simply stated that the inmate experienced "close confinement for five days on a special diet that fulfils basic nutritional requirements" and that this did not constitute imprisonment (p. 21). On the question of loss of earned remission, the majority rejected the argument that it constituted imprisonment by emphasizing that remission does not technically "shorten a sentence [of]

imprisonment" (p. 22). The majority emphasized that both disciplinary segregation and loss of earned remission are confined "to the manner in which the inmate serves his time" and involve "neither punitive fines nor a sentence of imprisonment" (p. 23 (emphasis added)). In saying so, the majority made it clear that it understood *Wigglesworth* as holding that only formal sentences of imprisonment, rather than any form of state-imposed imprisonment, will pass the true penal consequence test.

[39] By conflating the concept of imprisonment with a formal sentence of imprisonment, the majority in *Shubley* narrowed *Wigglesworth*'s holding that "imprisonment" is a true penal consequence that will always trigger s. 11 of the *Charter*. This narrow interpretation reflected a fixation on the *form* in which imprisonment is typically, but not always, imposed under the law. As discussed below, a functional understanding of imprisonment that defines the sanction in light of its substantive attributes is necessary to give effect to s. 11's liberty-protecting purpose.

[40] At the core of *Shubley*'s interpretation of "imprisonment" is a formalistic adherence to the criminal law's distinction between the sentence of imprisonment imposed on a person and the conditions of imprisonment, a distinction that has been attenuated by subsequent *Charter* jurisprudence (see L. Kerr, "Contesting Expertise in Prison Law" (2014), 60 *McGill L.J.* 43, at pp. 62-63). The conditions of imprisonment have traditionally been understood as falling within the purview of correctional institutions, not courts (see *R. v. Zinck*, 2003 SCC 6, [2003] 1 S.C.R. 41, at para. 18). This abstentionist approach to the conditions of imprisonment emerged in part from the

common law's historical view that a person who had been convicted of an offence and sentenced to prison was "devoid of rights" (*May v. Ferndale Institution*, 2005 SCC 82, [2005] 3 S.C.R. 809, at para. 23).

[41] However, over time, Canadian courts came to recognize that "a person confined to prison retains all of his civil rights, other than those expressly or impliedly taken from him by law" (*Solosky v. The Queen*, [1980] 1 S.C.R. 821, at p. 839). This evolution has gradually led to a recognition that, where an inmate's conditions of imprisonment affect the underlying interests that certain *Charter* rights seek to protect, courts may depart from the formalistic distinction between the sentence and conditions of imprisonment and intervene to give effect to the *Charter*'s purpose. While the importance of departing from this distinction was recognized in *Charter* jurisprudence prior to *Shubley*, this approach gained momentum in subsequent case law from this Court.

[42] For example, s. 10(c) of the *Charter* guarantees everyone who is detained the right "to have the validity of the detention determined by way of *habeas corpus* and to be released if the detention is not lawful". In the foundational case of *R. v. Miller*, [1985] 2 S.C.R. 613, this Court was asked to decide whether *habeas corpus* was available to challenge the validity of an inmate's placement in a special handling unit, described as a "particularly restrictive form of segregated detention" (p. 617). Given the traditional distinction between the sentence and conditions of imprisonment, there was uncertainty over whether a writ of *habeas corpus* was available to challenge an

individual's detention only if release from that detention would restore their "complete liberty" (p. 634). In rejecting this narrow approach, Le Dain J. recognized that the writ needed to be adapted to reflect the "modern realities of confinement in a prison setting" and the importance of "challenging deprivations of liberty" (p. 641). Accordingly, he held that *habeas corpus* should lie "to challenge the validity of a distinct form of confinement or detention in which the actual physical constraint or deprivation of liberty, as distinct from the mere loss of certain privileges, is more restrictive or severe than the normal one in an institution" (*ibid.*). This reasoning was applied in the companion case of *Morin v. National Special Handling Unit Review Committee*, [1985] 2 S.C.R. 662, and to other circumstances of administrative segregation in the companion case of *Cardinal v. Director of Kent Institution*, [1985] 2 S.C.R. 643.

[43] This trilogy of cases made it clear that *habeas corpus* can "free inmates from a 'prison within a prison'" (*May*, at para. 27). It also laid the groundwork for *Dumas v. Leclerc Institute*, [1986] 2 S.C.R. 459, which clarified that *habeas corpus* is available to challenge three different deprivations of liberty: ". . . the initial deprivation of liberty, a substantial change in conditions amounting to a further deprivation of liberty, and a continuation of the deprivation of liberty" (p. 464). Following *Shubley*, this Court continued to embrace *Dumas*'s expansive approach to *habeas corpus* with the understanding that it is not "a static, narrow, formalistic remedy" and that it must evolve to achieve its purpose of preventing wrongful restraints on liberty (*May*, at para. 21, quoting *Jones v. Cunningham*, 371 U.S. 236 (1962), at p. 243; see also

Canada (Public Safety and Emergency Preparedness) v. Chhina, 2019 SCC 29, [2019] 2 S.C.R. 467, at para. 19).

[44] This evolution in *habeas corpus* jurisprudence has, subsequent to *Shubley*, influenced the scope of the liberty interest protected by s. 7 of the *Charter*. For instance, in *Cunningham v. Canada*, [1993] 2 S.C.R. 143, this Court considered whether a retrospective change to the parole system violated s. 7. Relying on the reasoning in *Dumas*, this Court confirmed that an offender has an expectation of liberty based on the parole system at the time of sentencing and that a "substantial change" that thwarts this expectation can constitute a deprivation of liberty under s. 7 (p. 151; see also p. 150). In doing so, this Court explicitly rejected the formalistic argument that, once an inmate is incarcerated, there can be "no further impeachment of his liberty interest" (p. 148). This argument "oversimplifie[d] the concept of liberty" by seeking to preserve a rigid distinction between the sentence and conditions of imprisonment (*ibid.*).

[45] Changes to the conditions of imprisonment have also attracted constitutional scrutiny under s. 11(h) of the *Charter*. In *Canada (Attorney General) v. Whaling*, 2014 SCC 20, [2014] 1 S.C.R. 392, this Court held that some retrospective changes to the conditions of imprisonment can constitute a "punishment" in violation of s. 11(h)'s guarantee against double jeopardy, depending on the degree to which the changes thwart an inmate's "settled expectation of liberty" (para. 60). In making this holding, the Court expanded the test for "punishment", which had previously been limited to the "arsenal of sanctions" that may be imposed during the criminal

sentencing process (para. 50, quoting *R. v. Rodgers*, 2006 SCC 15, [2006] 1 S.C.R. 554, at paras. 62 and 65). It did so on the basis that, "from a functional rather than a formalistic perspective, the harshness of punishment has been increased" when there has been a substantial increase in the risk of additional incarceration as a result of retrospective changes to the conditions of imprisonment (para. 52; see also para. 63).

[46] *Whaling*'s embrace of a liberal and purposive interpretation of the *Charter* subsequently prompted this Court to reformulate the test for "punishment" under s. 11(h) and (i) "to carve out a clearer and more meaningful role for the consideration of the impact of a sanction" (*R. v. K.R.J.*, 2016 SCC 31, [2016] 1 S.C.R. 906, at para. 41; see also paras. 36-40).

[47] A common thread running through these cases is that, when interpreting the scope of different *Charter* rights, including s. 11 rights, this Court has rejected formalistic interpretations that seek to preserve an inflexible distinction between the sentence and conditions of imprisonment. Instead, this Court has adopted a purposive method of constitutional interpretation that gives effective protection to the underlying interests that the *Charter* right at issue is intended to secure.

[48] Since the release of *Shubley*, this Court has never reaffirmed the idea that "imprisonment" under the true penal consequence test is limited to a formal sentence of imprisonment (see, e.g., *Martineau*, at para. 57; *Guindon*, at para. 76). In my view, this is because *Shubley*'s application of the true penal consequence test no longer fits within the broader landscape of this Court's jurisprudence. It does not consider how

the concept of imprisonment, when understood functionally, is broad enough to encompass both substantial erosions to an inmate's residual liberties (i.e., disciplinary segregation) and extensions to an inmate's period of incarceration (i.e., loss of earned remission). It is now necessary to depart from the formalistic distinction between the sentence and conditions of imprisonment to ensure that s. 11's fundamental purpose of safeguarding liberty is robustly protected. For this reason, *Shubley*'s holding on the true penal consequence test should no longer be considered binding.

[49] In reaffirming this Court's commitment to purposive constitutional interpretation when interpreting the scope of s. 11, I emphasize that "it is important not to overshoot the actual purpose of the right or freedom in question" (*Big M Drug Mart Ltd.*, at p. 344). *Wigglesworth* exemplifies how a provision's purpose can perform this constraining function in constitutional interpretation, and it remains good law. In that case, the Court adopted a "somewhat narrow definition of the opening words of s. 11" to ensure that the substantive protections offered by s. 11 rights would not vary according to the type of proceeding at issue (p. 558). Such variation risked creating a lack of predictability and clarity in the development of s. 11 jurisprudence, which would undermine s. 11's objective of ensuring strong procedural protections for those who are charged with a criminal offence or who otherwise "may well suffer a deprivation of liberty" as a result of the prosecutorial power of the state (*ibid.*). For that reason, s. 11 was limited to the "most serious offences known to our law, i.e., criminal and penal matters" (*ibid.* (emphasis added)).

[50] As this Court recognized in *K.R.J.*, the true penal consequence test from *Wigglesworth* sets an "indisputably high bar" in order to give effect to s. 11's purpose by limiting the number of offences outside the criminal context that trigger the most robust procedural protections in our legal system (para. 38). However, in setting this high bar, *Wigglesworth* did not suggest that the sanctions recognized as true penal consequences, such as imprisonment, must be understood formalistically. A formalistic interpretation of these sanctions erodes the acknowledgment in *Wigglesworth* that, where non-criminal offences may lead to the imposition of truly punitive consequences, s. 11 should apply to fulfil its liberty-protecting purpose. Adopting a formalistic understanding of sanctions recognized as true penal consequences risks undermining this purpose by allowing the label placed on such sanctions, rather than their impact on individual liberty, to govern the determination of whether s. 11 applies.

[51] I will now explain why major disciplinary offences in Saskatchewan may lead to the imposition of punishments that constitute a form of imprisonment, and therefore pass *Wigglesworth*'s true penal consequence test.

(3) Section 11 Is Engaged by Offences Punishable by Disciplinary Segregation or Loss of Earned Remission

(a) *Meaning of "Imprisonment"*

[52] The key question in this appeal is whether the punishments of disciplinary segregation and loss of earned remission constitute forms of "imprisonment", thereby

satisfying the true penal consequence test and engaging the protections in s. 11 of the *Charter*. Answering this question requires a clarification of the meaning of "imprisonment" under *Wigglesworth*'s true penal consequence test.

[53] At the hearing, the AGS described imprisonment as a "binary" and suggested that an individual cannot be further imprisoned once incarcerated (transcript, day 2, at p. 36). For this reason, the AGS submits that disciplinary segregation and loss of earned remission cannot be understood as forms of imprisonment that trigger s. 11 of the *Charter*. However, this reasoning is rooted in the formalistic distinction between the sentence and conditions of imprisonment, a distinction that, as discussed above, this Court has departed from when interpreting the scope of other *Charter* protections.

[54] Instead, I would take up JHS's invitation and adopt Cory J.'s definition of imprisonment in his dissenting reasons in *Shubley*. Cory J. stated that imprisonment means "the denial of freedom of movement and the segregation or isolation of an inmate from society" (p. 11). He thus defined the concept of imprisonment by reference to its substantive attributes, rather than unduly fixating on the form in which such a consequence is often imposed.

[55] Adopting this functional definition of imprisonment gives effect to the liberty-protecting purpose of s. 11. Imprisonment always satisfies the true penal consequence test and thus triggers s. 11 protections because it is "the most severe deprivation of liberty known to our law" (*Wigglesworth*, at p. 562). Imprisonment under *Wigglesworth*'s true penal consequence test must therefore include state-

imposed sanctions that, in light of their attributes, represent a deprivation of liberty at least as severe as that resulting from an initial sentence of imprisonment. This approach is necessary to ensure that the state cannot simply label forms of imprisonment with euphemisms in order to circumvent the application of s. 11 of the *Charter*.

[56] In assessing whether a sentence of imprisonment and the sanction in question are equivalent in severity, a court must consider the fact that sentences of imprisonment can include non-carceral punishments that share the fundamental features of significantly curtailing an individual's freedom of movement and segregating them from others. For example, some sections of the *Criminal Code*, R.S.C. 1985, c. C-46, treat conditional sentences as sentences of imprisonment (see, e.g., *R. v. Proulx*, 2000 SCC 5, [2000] 1 S.C.R. 61, at para. 29). This Court has called such sentences "imprisonment without incarceration" (*R. v. Wu*, 2003 SCC 73, [2003] 3 S.C.R. 530, at para. 25).

(b) *Disciplinary Segregation and Loss of Earned Remission Are Forms of Imprisonment*

[57] In this case, we are dealing with sanctions that impose a constraint on an individual's freedom of movement and segregate them from others to a degree at least equivalent to that of a sentence of incarceration.

[58] As Cory J. explained in *Shubley*, disciplinary segregation and loss of earned remission fall within a functional definition of imprisonment and therefore

constitute true penal consequences. Disciplinary segregation involves the use of "[p]risons within prisons" and, when imposed, effectively leads to "an additional violation of whatever residual liberties an inmate may retain" (p. 9). Likewise, loss of earned remission constitutes imprisonment because it has the effect of extending an inmate's period of incarceration and therefore extends the time during which "freedom of movement and the ability to interact with others" are curtailed (p. 11).

[59] A brief historical overview of the manner in which disciplinary segregation and loss of earned remission have been perceived in Canada supports Cory J.'s conclusion and elucidates how both of these punishments have frequently been understood as exceptionally severe deprivations of liberty for those already living within a prison. Unlike most other punishments imposed on inmates, both significantly curtail an inmate's freedom of movement while exacerbating or continuing the inmate's segregation from society. In narrowing the scope of "imprisonment" under *Wigglesworth*'s true penal consequence test to a formal sentence of imprisonment, the majority in *Shubley* failed to meaningfully consider this history.

(i) Disciplinary Segregation

[60] The use of segregation as a disciplinary measure against inmates has been a feature of Canadian correctional institutions since the first penitentiary opened in Kingston in 1835. The legislation applicable at the time referred to the possibility that individuals could be "confined in solitude for misconduct in the Penitentiary" (*An Act*

to provide for the Maintenance and Government of the Provincial Penitentiary, S.U.C. 1834, 4 Will. 4, c. 37, s. 27).

[61] Since that time, disciplinary segregation has been consistently understood as a distinctive form of imprisonment within correctional institutions. For example, after finding that the Kingston Penitentiary had instituted a cruel system of corporal punishment to manage inmate discipline, the Brown Commission recommended in 1849 that persistent rule infractions be punished by segregation instead (*Reports of the Commissioners Appointed to Inquire Into the Conduct, Discipline, & Management of the Provincial Penitentiary*, at p. 288). In discussing segregation, the Commission noted that "the human mind cannot endure protracted imprisonment under this system" (p. 286 (emphasis added)).

[62] Reliance on disciplinary segregation continued following Confederation. The first set of disciplinary regulations issued under *The Penitentiary Act of 1868*, S.C. 1868, c. 75, authorized "[c]onfinement in the penal or separate cells with such diet as the Surgeon shall pronounce sufficient, respect being had to the constitution of the convict, and the length of the period during which he is to be confined" (*Rules and Regulations for the Government of the Penitentiaries of the Dominion of Canada* (1870), s. 361, quoted in M. Jackson, *Prisoners of Isolation: Solitary Confinement in Canada* (1983), at p. 40). In his annual report for the 1891-92 year, the Inspector of Penitentiaries described segregation cells as "the dungeon" (*Report of the Minister of Justice as to Penitentiaries in Canada for the Year Ended 30th June 1892*, reproduced

in *Sessional Papers*, vol. XXVI, No. 10, 3rd Sess., 7th Parl., 1893, No. 18, at p. ix). And while he viewed this "punishment" as being, "as a rule, deserved", he believed that if a short time in the "dungeon do[es] not produce the desired effect, longer confinement there generally results in a greater degree of callousness, stubbornness and resistance to authority" and should therefore be avoided (*ibid.*).

[63] In 1894, the construction of a block of cells that would be used for segregation in the Kingston Penitentiary was completed. The formal name for these cells was the "Prison of Isolation" (Jackson, at pp. 36-37). Regulations promulgated in 1893 stated the criteria for admission:

> Any male convict whose conduct is found to be vicious, or who persists in disobedience to the Rules and Regulations of the Prison, or who is found to exercise a pernicious influence on his fellow convicts may be imprisoned in the Prison of Isolation for an indefinite period not to exceed the unexpired term of the convict's sentence. [Emphasis added.]
>
> (Jackson, at p. 37, quoting *Rules and Regulations Respecting Prisoners of Isolation and the Punishment and Government of Convicts*, s. 1.)

[64] Government reports throughout the 20th century likewise recognized the distinctive quality of disciplinary segregation. The Swackhamer Report of 1972 listed "punitive dissociation" as a punishment that, along with loss of remission and corporal punishment, justified a right of appeal if imposed (*Report of the Commission of Inquiry Into Certain Disturbances at Kingston Penitentiary During April, 1971*, at p. 55). The Vantour Report of 1975 recognized the distinctive function of disciplinary segregation, stating that it "serves to isolate the inmate for a short period and represents a

denunciation of his behaviour" (*Report of the Study Group on Dissociation*, at p. 74). The Vantour Report also highlighted that disciplinary segregation can impact the length of an inmate's period of incarceration because it is "presumed that he will not be granted his earned remission for the period during which he is dissociated" (p. 81).

[65] As well, the 1987 Working Paper No. 5 of the Correctional Law Review noted that "punitive dissociation is still regarded as the most severe disciplinary measure at the disposal of prison officials" ("Correctional Authority and Inmate Rights", in Solicitor General Canada, *Influences on Canadian Correctional Reform: Working Papers of the Correctional Law Review, 1986 to 1988* (2002), 165, at p. 209). It further observed that courts had increasingly intervened in inmate disciplinary matters because "punishments imposed as a result of disciplinary convictions . . . can significantly affect the conditions of confinement (through punitive dissociation)" (p. 197).

[66] This history reveals that disciplinary segregation has always been understood as a uniquely severe form of punishment for inmates. While the conditions of disciplinary segregation have evolved over time, this form of punishment by its very nature has the effect of significantly curtailing an inmate's freedom of movement while severely limiting access to human interaction. As this Court acknowledged in *Cardinal*, regardless of the label placed on inmate segregation, "its effect on the inmate . . . is the same" (p. 654).

[67] This effect is present in Saskatchewan's practice of disciplinary segregation. The AGS concedes that when inmates are subject to disciplinary segregation, they are only guaranteed one hour outside of their cells each day. For the other 23 hours of the day, inmates remain in their cells. While some inmates have a cellmate, television, and natural light, others do not. Where safety concerns exist, inmates can be segregated in more secure units. Accordingly, Saskatchewan's practice of disciplinary segregation shares the fundamental features of significantly curtailing an inmate's residual freedom of movement and exacerbating their segregation from society. It therefore constitutes a distinct form of imprisonment.

(ii) Loss of Earned Remission

[68] Remission has been used in Canadian correctional institutions since *The Penitentiary Act of 1868*, which introduced a scheme that reduced the length of an inmate's sentence as a reward for "good behaviour, diligence and industry" (s. 62; see also D. P. Cole and A. Manson, *Release From Imprisonment: The Law of Sentencing, Parole and Judicial Review* (1990), at p. 163). Since that enactment, government reports have consistently acknowledged that remission acts as a *de facto* reduction in an inmate's sentence of imprisonment and that, by extension, its loss constitutes a lengthening of the inmate's sentence.

[69] For example, the Archambault Commission described earned remission as a "reward of a shorter sentence" (*Report of the Royal Commission to Investigate the Penal System of Canada* (1938), at p. 107). The Commission further explained that

"[w]hen remission has been granted to a prisoner, his sentence has been executed and he is entitled to be discharged and set at liberty, subject, however, to the cancellation for misconduct" (p. 231). When discussing a regulation that denied the granting of remission to those unable to perform labour, the Commission described the effect as follows: ". . . a prisoner who is ill, although of exemplary conduct, serves a longer sentence than a prisoner in good health" (p. 233).

[70] Recognizing the significant liberty interests at stake with loss of remission, the Swackhamer Report recommended that it be one of the few punishments, along with disciplinary segregation, that would be subject to a right of appeal if imposed (p. 55). Moreover, in its 1977 *Report to Parliament*, the Sub-Committee on the Penitentiary System in Canada (part of the Standing Committee on Justice and Legal Affairs), when discussing the difficulties inmates faced when computing the length of their sentence, wrote that sentence length was "modified by the statutory formulas for computing statutory remission and earned remission, both of which affect the time spent in prison" (para. 462 (emphasis added)). In exploring other incentives for good behaviour, the Sub-Committee suggested that "[i]t should even be possible to grant extra 'good time', or earned remission, to such inmates, so that they could, quite literally, work their way out of prison" (para. 529 (emphasis added)).

[71] The 1987 Working Paper No. 5 of the Correctional Law Review described loss of remission as "clearly a very serious disciplinary measure, as it results in more time spent incarcerated" (p. 209). It also observed that court intervention in inmate

disciplinary measures was partially driven by the use of loss of earned remission as a disciplinary sanction, since it "can affect the amount of time an inmate will spend imprisoned" (p. 197).

[72] The effect of loss of earned remission was also recognized by the Honourable D. F. Huyghebaert, Minister of Corrections, Public Safety and Policing, at second reading of the bill he introduced that would ultimately become the *Act*: "Losing remission means the inmate will spend more time in prison, therefore it is particularly important that we provide an opportunity for independent review of those decisions" (Legislative Assembly of Saskatchewan, *Debates and Proceedings (Hansard)*, vol. 54, No. 6A, 1st Sess., 27th Leg., December 13, 2011, at p. 177).

[73] The current federal legislation governing earned remission is explicit about its effect. Section 6(5) of the *Prisons and Reformatories Act* states that "[w]here remission is credited against a sentence being served by a prisoner, . . . the prisoner is entitled to be released from imprisonment before the expiration of the sentence."

[74] This historical overview reveals that the severity of loss of remission as a punishment has been recognized by experts and legislators alike. This is so because this punishment is functionally equivalent to extending an inmate's sentence of incarceration. For an inmate subject to this sanction, additional days of imprisonment have been imposed.

(iii) Summary

[75] In sum, these sources all point to the conclusion that disciplinary segregation and loss of earned remission are forms of imprisonment. Disciplinary segregation is a distinct form of imprisonment because it significantly curtails an inmate's residual freedom of movement and further limits their access to human interaction. Loss of earned remission is also a sanction of imprisonment, since it has the effect of extending an inmate's period of incarceration.

[76] Accordingly, both disciplinary segregation and loss of earned remission pass *Wigglesworth*'s true penal consequence test. Because they are available forms of punishment for the commission of a major disciplinary offence under s. 77(1) of the *Act*, s. 11 of the *Charter* is engaged by those offences. I leave for another day the issue of whether s. 11 of the *Charter* is engaged if an inmate in Saskatchewan commits a minor disciplinary offence.

[77] Finally, I would note that this holding does not mean that s. 11 necessarily applies anytime a person faces a deprivation of liberty by the state as severe as that resulting from a sentence of imprisonment. Section 11 applies only when a person is "charged with an offence" that carries the risk that such consequences will be imposed. This mitigates any concern that, if a functional understanding of imprisonment is embraced for the purposes of the *Wigglesworth* true penal consequence test, s. 11 will become too broad in scope and will apply to *all* proceedings or circumstances involving severe deprivations of liberty by the state.

(4) Section 68 of the *Regulations* Infringes Section 11(d) of the *Charter*

[78] Where an accused person faces penal consequences for an offence, s. 11(d)'s guarantee of the presumption of innocence requires that the state prove every element of the offence beyond a reasonable doubt (*Oakes*, at p. 121; *R. v. Wholesale Travel Group Inc.*, [1991] 3 S.C.R. 154, at p. 196; *R. v. Brown*, 2022 SCC 18, [2022] 1 S.C.R. 374, at para. 99).

[79] Section 68 of the *Regulations* permits findings of guilt for a major disciplinary offence to be made where the offences have not been proven beyond a reasonable doubt. As a result, this provision infringes s. 11(d).

C. *Section 7 of the Charter Is Infringed*

[80] Even if I had concluded that s. 11 does not apply to major disciplinary offences, I am of the opinion that s. 68 of the *Regulations* infringes the presumption of innocence protected under s. 7 of the *Charter*, which, in these circumstances, necessitates the application of a criminal standard of proof.

[81] In *Pearson*, Lamer C.J. made it clear that s. 11(d) of the *Charter* does not "exhaust" the operation of the presumption of innocence and that s. 7 provides independent protection of this principle of fundamental justice in proceedings where s. 11 does not apply (p. 688). This holding built on Dickson C.J.'s observation in *Oakes* that the presumption of innocence is "referable and integral to the general protection of life, liberty and security of the person contained in s. 7 of the *Charter*" (p. 119). The specific requirements of the presumption of innocence, however, vary according to the

context of the proceeding at issue (*Pearson*, at p. 684). This explains why not every proceeding where a s. 7 interest is engaged requires a standard of proof beyond a reasonable doubt (*ibid.*).

[82] Lamer C.J. provided two examples of proceedings where a heightened standard of proof would likely be required to conform with the dictates of s. 7's protection of the presumption of innocence. The first example cited by Lamer C.J., relying on this Court's reasoning in *R. v. Gardiner*, [1982] 2 S.C.R. 368, was sentencing proceedings with contested aggravating factors (*Pearson*, at p. 686). In *Gardiner*, it was held that, at common law, the Crown has a persuasive burden to prove aggravating factors beyond a reasonable doubt (p. 415). In justifying its holding, this Court explained that "[c]rime and punishment are inextricably linked" and that "the facts which justify the sanction are no less important than the facts which justify the conviction" (*ibid.*). In *D.B.*, this Court cited Lamer C.J.'s example in *Pearson* with approval, holding that a provision of the *Youth Criminal Justice Act*, S.C. 2002, c. 1, that relieved the Crown of its burden of proving aggravating factors beyond a reasonable doubt violated the presumption of innocence guaranteed under s. 7 of the *Charter* (paras. 78-82).

[83] The second example cited by Lamer C.J. was civil contempt proceedings. While he recognized that civil contempt may constitute an "offence" that triggers the protections of s. 11 of the *Charter*, he noted that, even if it did not, the presumption of innocence under s. 7 would likely require a criminal standard of proof in these

proceedings (*Pearson*, at pp. 686-87). To support this claim, he noted that both the common law and Quebec civil law require this heightened standard (p. 687).

[84] The features of these two types of proceedings cited in *Pearson* assist in discerning when s. 7's protection of the presumption of innocence will require proof beyond a reasonable doubt. Both circumstances involve proceedings where the state (a) accuses an individual of moral wrongdoing and (b) seeks to punish the individual with severe liberty-depriving consequences for such wrongdoing. And importantly, as Lamer C.J.'s reference to the civil contempt proceedings exemplifies, proceedings that fall outside of the criminal process, strictly speaking, can have both of these features.

[85] This Court's subsequent application of *Pearson* in *Demers* is consistent with this guidance. In that case, this Court considered whether the proceedings outlined in Part XX.1 of the *Criminal Code* with respect to accused who are unfit to stand trial violated s. 7's presumption of innocence guarantee. In declaring that the presumption of innocence was respected, this Court noted that a heightened standard of proof is unnecessary in Review Board disposition proceedings because they do not involve a "determination of guilt or innocence" with respect to an unfit accused, nor do they presume that the accused is dangerous (para. 34). Instead, the Review Board is required to "perform an assessment" of an unfit accused and impose the "least onerous condition on his or her liberty" (*ibid.*). In other words, Review Board proceedings involve no accusation by the state of moral wrongdoing — the first requirement in order for s. 7 to mandate proof beyond a reasonable doubt.

[86] The presumption of innocence under s. 7 of the *Charter* requires Saskatchewan's proceedings for major disciplinary offences to use a criminal standard of proof. First, the preceding analysis shows that major disciplinary offence proceedings in Saskatchewan may lead to the imposition of severe consequences that affect an inmate's residual liberties, satisfying the second requirement outlined in *Pearson*. By functionally elevating the severity of a sentence, both disciplinary segregation and loss of earned remission represent consequences similar to those that result from proving an aggravating factor at sentencing.

[87] Second, disciplinary proceedings also meet the first requirement outlined in *Pearson* since they involve an accusation of moral wrongdoing. It is true that *Shubley*'s analysis of the criminal in nature test established that disciplinary offences do not involve an inmate "being called to account to society for a crime violating the public interest" (p. 20). Assuming, without deciding, that this characterization remains authoritative, I am not convinced that it forecloses a determination that disciplinary proceedings accuse inmates of moral wrongdoing.

[88] For example, civil contempt proceedings meet the two requirements outlined in *Pearson* but arguably do not call an individual to account to society for a crime. As this Court held in *Carey v. Laiken*, 2015 SCC 17, [2015] 2 S.C.R. 79, the distinction between criminal contempt and civil contempt is that only the former rests on "the element of public defiance", while the latter is focused on coercion and the protection of private interests (para. 31). Even so, proceedings for civil contempt

involve an accusation of moral wrongdoing because such conduct shows disrespect "for the role and authority of the courts" (*Vidéotron Ltée v. Industries Microlec Produits Électroniques Inc.*, [1992] 2 S.C.R. 1065, at p. 1075).

[89] Similar logic applies to inmate disciplinary proceedings. While such proceedings seek to achieve private, disciplinary objectives, they also serve a public function by signalling moral and social disapproval of certain behaviours while encouraging an inmate's rehabilitation and preparation for re-entry into society. As the Queen's Prison Law Clinic explains, the moral nature of inmate disciplinary regimes has "obvious parallels" with the criminal justice system (I.F., at para. 9).

[90] In sum, major disciplinary offence proceedings involve an accusation of moral wrongdoing and the potential imposition of severe liberty-depriving consequences. As a result, s. 7's protection of the presumption of innocence requires these offences to be proven beyond a reasonable doubt. Because s. 68 of the *Regulations* permits findings of guilt on a lesser standard, s. 7 of the *Charter* is infringed.

D. *The Infringements Are Not Justified Under Section 1 of the Charter*

[91] The AGS has the burden of showing on a balance of probabilities that the limit on ss. 7 and 11(d) of the *Charter* is reasonable and demonstrably justified under s. 1 (*Oakes*, at pp. 135 and 137). Under the *Oakes* test, s. 68's objective must be pressing and substantial and there must be proportionality between this objective and

the chosen means. Proportionality has three requirements: (a) a rational connection between the means and the objective; (b) minimal impairment of the right; and (c) proportionality between the deleterious and salutary effects of the law (pp. 138-39).

[92] While JHS concedes that s. 68 of the *Regulations* has a pressing and substantial objective, there is some variation in how the parties articulate this objective. For example, JHS frames the purpose of using a balance of probabilities standard as being "'to maintain order in the prisons' by utilizing expeditious and informal hearings" (A.F., at para. 106). In contrast, the AGS articulates the provision's objective in different ways: ". . . creating operational efficiencies and improving security in provincial correctional centres"; and "further ensur[ing] a procedurally fair disciplinary review system" (R.F., at paras. 169-70).

[93] To be of value in the *Oakes* test, the purpose of the infringing measure must be characterized appropriately (see *Brown*, at para. 116; *Frank v. Canada (Attorney General)*, 2019 SCC 1, [2019] 1 S.C.R. 3, at para. 46). The purpose should not be stated too broadly, nor should it be described too narrowly by simply reiterating the means chosen to achieve it.

[94] In my view, the objective of using a standard of proof on a balance of probabilities is to promote the expeditious resolution of inmate disciplinary proceedings. I agree that this constitutes a pressing and substantial objective. This Court has recognized the importance of preserving efficiency in the administration of

inmate discipline so as to maintain order and promote safety in correctional institutions (*Cardinal*, at pp. 654-55).

[95] A measure will be minimally impairing if there are not any less harmful means of achieving its objective "in a real and substantial manner" (*Brown*, at para. 135, quoting *K.R.J.*, at para. 70, and *Alberta v. Hutterian Brethren of Wilson Colony*, 2009 SCC 37, [2009] 2 S.C.R. 567, at para. 55). Legislatures have a margin of appreciation in selecting the means to achieve the objective, but only insofar as the means chosen impair rights as little as reasonably possible (*Brown*, at para. 135; see also *R. v. C.P.*, 2021 SCC 19, [2021] 1 S.C.R. 679, at para. 179, per Kasirer J., concurring).

[96] In this case, there is an obvious *Charter*-compliant alternative, which is to use the standard of proof beyond a reasonable doubt. This heightened standard of proof has been used in federal penitentiaries' inmate disciplinary proceedings for decades and is now required by s. 43(3) of the *Corrections and Conditional Release Act*, S.C. 1992, c. 20 (see also *Martineau v. Matsqui Institution Inmate Disciplinary Board*, [1978] 1 S.C.R. 118, at p. 128). The AGS has presented no evidence to suggest that this standard has undermined the federal government's capacity to administer prison discipline in an expeditious manner. In fact, s. 28 of the *Corrections and Conditional Release Regulations*, SOR/92-620, requires inmate disciplinary proceedings to take place "as soon as practicable" and, according to *Commissioner's Directive 580: Discipline of Inmates* (June 28, 2021 (online)), these proceedings "will normally take

place within 10 working days of laying of the charge" (s. 30). This suggests that inmate discipline in federal penitentiaries has not become unduly burdened by the use of a standard of proof beyond a reasonable doubt.

[97] As a result, s. 68 of the *Regulations* fails the minimal impairment test and is not saved by s. 1 of the *Charter*.

V. Conclusion

[98] When a person is charged with an offence punishable by disciplinary segregation or loss of earned remission, ss. 7 and 11(d) of the *Charter* require that the offence be proven beyond a reasonable doubt. To the extent that s. 68 of the *Regulations* permits the imposition of these penalties for an inmate disciplinary offence on a lower standard of proof, it is inconsistent with the Constitution and must therefore be declared to be of no force or effect. This declaration must be effective immediately, given that the AGS has not demonstrated that "an immediately effective declaration would endanger a compelling public interest" (*Ontario (Attorney General) v. G*, 2020 SCC 38, [2020] 3 S.C.R. 629, at para. 139).

[99] I would allow the appeal, set aside the judgments below, and declare s. 68 of the *Regulations* to be of no force or effect under s. 52 of the *Constitution Act, 1982*, with costs throughout. JHS seeks special costs, but such costs are exceptional and the circumstances do not, in my view, warrant exercising the Court's discretion to award them.

The reasons of Côté, Rowe and Jamal JJ. were delivered by

CÔTÉ J. —

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I. Overview

[100] This appeal poses the following question: To find that an inmate has committed a disciplinary offence under Saskatchewan's inmate disciplinary proceedings, does the *Canadian Charter of Rights and Freedoms* require proof beyond a reasonable doubt, or is a lesser standard of proof, i.e., on a balance of probabilities, constitutionally compliant?

[101] This question was raised by the John Howard Society of Saskatchewan ("John Howard Society") after it was granted public interest standing to pursue an originating application seeking an order declaring that s. 68 of *The Correctional Services Regulations, 2013*, R.R.S., c. C-39.2, Reg. 1 ("*Regulations*"), is contrary to s. 7 of the *Charter*.

[102] Section 68 provides that the standard of proof[1] for inmate disciplinary proceedings is that of a balance of probabilities. John Howard Society takes particular issue with the disciplinary sanctions of segregation and loss of earned remission, insofar as they stem from disciplinary charges being proven on a standard lower than beyond a reasonable doubt, arguing that the deprivation of liberty stemming from those sanctions constitutionally requires proof beyond a reasonable doubt.

[103] After the Saskatchewan Court of Queen's Bench and the Court of Appeal for Saskatchewan dismissed its s. 7 challenge, John Howard Society was granted leave to appeal to our Court. Since then, John Howard Society has added a new argument: Not only does s. 68 of the *Regulations* violate s. 7 of the *Charter*, but it also violates the presumption of innocence guaranteed by s. 11(d) of the *Charter*.

[104] Our Court must first decide whether to hear the new issue relating to s. 11(d). If we do hear the new issue, we must then decide whether s. 11(d) applies to Saskatchewan's inmate disciplinary proceedings. If it does apply, we must decide whether s. 68 of the *Regulations* infringes s. 11(d). We must also decide whether s. 68 of the *Regulations* infringes the presumption of innocence as a principle of fundamental justice under s. 7.

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[1] While the *Regulations* use the term "burden of proof", it is more accurately described as a "standard of proof", and I will therefore be using that term throughout these reasons.

[105] I am of the view that our Court should hear the new issue, as this case meets the stringent test for hearing a new issue on appeal. As I explain later in these reasons, there is no concern with procedural prejudice, and the s. 7 analysis of the courts below is intrinsically linked to considerations under s. 11(d). Moreover, hearing the new issue provides our Court with the opportunity to clarify the analytical framework applicable under s. 7 and s. 11(d), in the context of the intersection between criminal proceedings and administrative proceedings. To refuse to hear the issue would be counter to the broader interests of the administration of justice.

[106] That being said, I am of the view that s. 11(d) of the *Charter* does not apply to Saskatchewan's inmate disciplinary proceedings. This is because facing a charge of inmate misconduct is not the same as being "charged with an offence" within the meaning of s. 11 of the *Charter*. To arrive at this conclusion, we must apply the test established by our Court in *R. v. Wigglesworth*, [1987] 2 S.C.R. 541. That test sets out how a proceeding can attract the application of s. 11: the proceedings must be criminal in nature or lead to consequences that are considered true penal consequences. We must also be guided by *R. v. Shubley*, [1990] 1 S.C.R. 3, where our Court applied the test set out in *Wigglesworth* and found that inmate disciplinary proceedings that included disciplinary segregation and loss of earned remission as prospective consequences did not engage the application of s. 11. Similarly, in this case the inmate disciplinary proceedings are not criminal in nature — they are administrative in nature and designed to regulate and maintain prison order, not to redress a wrong to society. Further, as in *Shubley*, the sanctions stemming from the disciplinary proceedings are not true penal

consequences within the meaning of s. 11 because their purpose is not to redress a public wrong, but rather to maintain internal discipline within a limited sphere of activity (*Wigglesworth*, at p. 561). Therefore, s. 11 does not apply. To hold differently would require overturning *Shubley*. As I explain below, *Shubley* remains good law. John Howard Society has not demonstrated that it is an unworkable precedent. Nor has it established foundational erosion arising from modification of the criminal in nature test or an evolution in the understanding of segregation and loss of remission.

[107] With respect to s. 7 of the *Charter*, I conclude that it is not infringed by Saskatchewan's inmate disciplinary proceedings. While s. 7 is implicated because of the evident engagement of an inmate's liberty interests, there is no infringement because the presumption of innocence as a principle of fundamental justice under s. 7 does not require a standard of proof beyond a reasonable doubt in the context of Saskatchewan's inmate disciplinary process. This is all the more true when s. 68 of the *Regulations* is combined with the requirements of procedural fairness serving as residual protection under s. 7.

[108] This case engages a narrow question, namely whether the standard of proof selected by Saskatchewan's legislature to apply to the inmate disciplinary proceedings in its correctional institutions violates the presumption of innocence protected by s. 7 or s. 11(d). It does not engage s. 12 of the *Charter*; we are not being asked to declare whether the sanctions at issue amount to cruel and unusual treatment or punishment, either as a general matter or in relation to a particular offender in a particular context.

[109] Having found no breach of s. 7 or s. 11(d), I would dismiss the appeal and uphold the rulings of the Court of Queen's Bench and the Court of Appeal in this matter.

II. Facts

[110] John Howard Society is a non-profit corporation that, among other things, assists persons in their interactions with the criminal justice system. Part of its mandate is to advocate for humane conditions for persons who are incarcerated and to provide assistance on prisoners' rights matters. As such, the organization was granted public interest standing to pursue an order declaring s. 68 of the *Regulations* contrary to s. 7 of the *Charter*. That standing is not challenged in this appeal.

[111] The Government of Saskatchewan operates four provincial correctional centres, along with a remand centre for women. The inmate disciplinary system for offences that occur within those institutions is codified in *The Correctional Services Act, 2012*, S.S. 2012, c. C-39.2 ("*Act*"). If an offence is alleged, a discipline panel is convened within the institution to adjudicate the alleged offence. The panel examines the matter under an inquisitorial system, rather than an adversarial one; it then determines on a balance of probabilities whether the inmate committed the offence.

[112] The standard of proof is set out in s. 68 of the *Regulations*:

Burden of proof

> **68** A discipline panel shall not find an inmate responsible for a disciplinary offence unless it is satisfied on a balance of probabilities that the inmate committed that offence.

[113] The *Inmate Disciplinary Hearing Manual* describes this standard of proof in the following way:

> In theory, the balance of probabilities means an event either did or did not happen. In practice, there is some flexibility: the decision-maker(s) must determine, based on the evidence before them, whether it is more likely than not that the event happened as described. If it is unclear, or the probability of the event occurring/not occurring are equal, then the balance of probabilities has not been met. Further, when assessing probability, it is important to note that the burden of proof — the obligation to prove one's case — is on the correctional facility to demonstrate the inmate committed the offence, rather than on the inmate to prove that they did not commit the offence. If the panel is unsure, the charge must be dismissed.
>
> Essentially, the question the discipline panel must ask is whether the evidence, facts and arguments demonstrate that it is more likely than not that the inmate committed the offence.
>
> (Saskatchewan, Adult Custody Services, *Inmate Disciplinary Hearing Manual*, June 8, 2021, at p. 25, reproduced in A.R., at p. 137.)

[114] In 2019, approximately 6,201 disciplinary charges were laid within Saskatchewan's four correctional centres for various offences, including: fights, assaults, staff assaults, possession of weapons, possession of other contraband, impairment, disruptive behaviour, disobeying lawful orders, obstructing or interfering with security measures, and uttering threats. There were 3,367 hearings held in Saskatchewan in 2019, amounting to an average of approximately 9 hearings per calendar day.

[115] Disciplinary sanctions are set out in the *Act* and differ in severity based on whether the offence in question was major or minor. For major offences, the sanctions vary: loss of privileges, segregation to a cell, or even forfeiture of a period of remission earned. For minor offences, many similar sanctions exist, though segregation and loss of earned remission cannot be imposed. In 2019, the percentages of sanctions imposed where an inmate was found to have committed a disciplinary offence were as follows: disciplinary segregation (39 percent), loss of privileges (30 percent), confinement to the inmate's cell, room, or unit during leisure time (13 percent), assignment of extra duties (8 percent), restitution (3.5 percent), reprimand (2 percent), and loss of earned remission (0.3 percent).

[116] Before the courts below, John Howard Society argued that s. 68 of the *Regulations* violates s. 7 of the *Charter* because it allows for disciplinary offences allegedly committed by an inmate in a correctional facility to be proven merely on a balance of probabilities, even though the punishment imposed for major offences could be segregation or additional days of incarceration (resulting from a loss of earned remission). John Howard Society argued that because the punishment for committing a disciplinary offence could result in a loss of liberty, s. 7 requires that this offence be proven beyond a reasonable doubt. Therefore, it argued that the lower standard enshrined in s. 68 of the *Regulations* is constitutionally invalid.

III. Judicial History

A. *Court of Queen's Bench of Saskatchewan, 2021 SKQB 287 (Layh J.)*

[117] The application judge dismissed the application, holding that the standard of proof beyond a reasonable doubt is not a principle of fundamental justice in the inmate disciplinary context and therefore s. 68 of the *Regulations* does not violate s. 7 of the *Charter*.

[118] In reference to the legislative framework and the disciplinary process laid out therein, the application judge considered whether John Howard Society had successfully established that a principle of fundamental justice — an existing or a novel one — necessitated proof beyond a reasonable doubt for an inmate to be found responsible for a disciplinary offence. The parties agreed that some of the penalties imposed may deprive inmates of their "liberty" as that term is used in s. 7 of the *Charter*.

[119] The application judge canvassed *Charter* decisions dealing with s. 11. He noted that John Howard Society conceded that s. 11(d) did not apply. He cited *Shubley* as conclusively holding that s. 11 rights do not apply to prison discipline. He noted that McLachlin J. (as she then was) made it clear that the sanction of forfeiture of remission did not deprive inmates of a "right". Instead, cancellation of earned remission amounted to the withholding of a reward, a tool for prison administrators to run an orderly prison. Neither the sanction of forfeiture of remission nor the sanction of segregation involved a punitive fine or imprisonment. The application judge also noted that the Court's characterization of the nature and purpose of prison disciplinary proceedings in *Shubley* animates and informs any possible applicability of s. 7 rights

to such proceedings and that McLachlin J.'s description does not establish that, as a principle of fundamental justice, an inmate's non-compliance with prison rules must be demonstrated only by proof beyond a reasonable doubt.

[120] As regards the standard of proof, the application judge held that merely calling a finding in a proceeding a finding of "guilt" cannot be determinative of the standard of proof. He explained that conduct that attracts consequences — even conduct that would establish guilt pursuant to a criminal charge — does not necessarily have to be proven beyond a reasonable doubt in non-criminal proceedings. He referred to McLachlin J.'s holding in *Shubley*, where she explained that prison discipline is not a call to answer to the public for "a crime violating the public interest", which would ordinarily attract the standard of proof beyond a reasonable doubt, but rather a call "to account to the prison officials for breach of his obligation as an inmate of the prison to conduct himself in accordance with prison rules" (p. 20).

[121] With respect to the nature of the penalties, the application judge felt bound to the majority's holding in *Shubley* and found nothing in the evidence to suggest that "segregation" should be equated to "solitary confinement" or "dissociation" (para. 86). Acknowledging the reality of prisons, he said that *Shubley* recognized that prison discipline merits a different understanding and stands distinctly separate from criminal proceedings.

[122] The application judge canvassed other jurisdictions to survey the various standards of proof for prison disciplinary offences, noting that only the legislation

governing federal penitentiaries requires proof beyond a reasonable doubt. In Manitoba, Nova Scotia, and Saskatchewan, an infraction of a prison rule must be proven on a balance of probabilities (para. 94). In Alberta, British Columbia, Prince Edward Island, and Yukon, an employee of the institution must have "reasonable grounds to believe that an inmate has broken a prison rule" (para. 92). New Brunswick, Newfoundland and Labrador, Ontario, Quebec, the Northwest Territories, and Nunavut "seemingly make even less mention of an applicable standard of proof" (para. 93).

B. *Court of Appeal for Saskatchewan, 2022 SKCA 144, 476 D.L.R. (4th) 641 (Schwann, Tholl and McCreary JJ.A.)*

[123] The Court of Appeal dismissed the appeal and upheld the lower court's decision that s. 68 of the *Regulations* does not violate s. 7 of the *Charter*. The Court of Appeal held that the first step of the two-step process in *Carter v. Canada (Attorney General)*, 2015 SCC 5, [2015] 1 S.C.R. 331, was satisfied, as the government conceded that the inmate discipline regime engages the liberty interests of inmates.

[124] When dealing with determining the second part of the test — whether the interference with or deprivation of liberty accords with the principles of fundamental justice — the Court of Appeal found that the presumption of innocence as a principle of fundamental justice does not require proof beyond a reasonable doubt in the context of the inmate discipline regime. The Court of Appeal did not consider a novel principle

of fundamental justice, as John Howard Society explicitly indicated that the recognition of a new principle was not at issue.

[125] The Court of Appeal undertook its analysis against the backdrop of the overall purpose of the inmate discipline regime. It did this by examining what is at stake for an inmate who is subject to the disciplinary process and the nature of the sanctions themselves.

[126] Like the application judge, the Court of Appeal considered whether conduct that attracts a "consequence" should be proven beyond a reasonable doubt in non-criminal proceedings. John Howard Society had argued that *R. v. Pearson*, [1992] 3 S.C.R. 665, and *R. v. Demers*, 2004 SCC 46, [2004] 2 S.C.R. 489, advanced its position. The Court of Appeal found that they did not, finding instead that the application of the presumption of innocence in a s. 7 *Charter* claim will depend on the circumstances. The court acknowledged that s. 7 rights could clearly apply outside of the criminal sphere, but cautioned that statements addressing such issues in the criminal realm cannot simply be imported and applied directly to other contexts.

[127] The court found that the latter was especially true in the face of *Shubley*, as that case was adjudicated against the backdrop of the prison discipline regime. The Court of Appeal found that the s. 11 analysis from *Shubley* was relevant to the s. 7 analysis in this case and held that where there is overlap between s. 7 and s. 11, those portions of the analyses can be considered together, referring to *R. v. J.J.*, 2022 SCC 28. The Court of Appeal noted that while the presumption of innocence has long been

recognized as a principle of fundamental justice under s. 7, it is expressly protected in s. 11(d), meaning that there is a unique interplay between this principle and other applicable *Charter* provisions. The court concluded that the presumption of innocence cannot be extended to require proof beyond a reasonable doubt for offences under the inmate discipline regime, as the possible liberty infringement arises from a proceeding that has an administrative, not criminal, nature and purpose.

IV. Issues

[128] The issues on appeal are as follows:

1. Should John Howard Society be permitted to raise a new issue on appeal?

2. How should the Court approach this case?

3. Does s. 11 of the *Charter* apply to Saskatchewan's inmate disciplinary proceedings?

4. Does s. 68 of the *Regulations* infringe s. 11(d) of the *Charter*?

5. Does s. 68 of the *Regulations* violate s. 7 of the *Charter*?

6. If s. 68 of the *Regulations* infringes s. 7 or s. 11(d) of the *Charter*, is that infringement justified under s. 1?

V. Analysis

A. *Should John Howard Society Be Permitted To Raise a New Issue on Appeal?*

[129] This question pertains to a new constitutional issue raised before this Court. John Howard Society concedes that the question of whether *Shubley* remains good law — and by extension whether s. 68 of the *Regulations* infringes s. 11(d) of the *Charter* — is a new issue on appeal (A.F., at para. 7). Before the application judge and the Court of Appeal, John Howard Society did not raise s. 11(d), but rather based its challenge on s. 7, alleging that the presumption of innocence operates as a principle of fundamental justice in a non-criminal setting. In fact, in its application for leave to appeal to our Court, John Howard Society explicitly recognized that s. 11(d) of the *Charter* does not apply to inmate disciplinary hearings.

[130] That being said, whether to hear a new constitutional issue on appeal is a matter of discretion for our Court, as was reiterated in *Guindon v. Canada*, 2015 SCC 41, [2015] 3 S.C.R. 3. Pursuant to *Guindon*, at para. 22, the Court can use its discretion to hear a new issue only in rare cases and if two conditions are met:

(1) Doing so will cause no procedural prejudice to the opposing party.

(2) The refusal to consider the issue would risk an injustice.

[131] The test is a stringent one, as the Court's discretion should not be exercised "routinely or lightly" (*Guindon*, at para. 22). The Court may take multiple considerations into account when assessing whether it should hear a new issue, including "the state of the record, fairness to all parties, the importance of having the issue resolved by this Court, its suitability for decision and the broader interests of the administration of justice" (para. 20). New constitutional questions engage additional considerations as the Court must ensure that no attorney general has been denied the opportunity to address the question (para. 23).

[132] Although our Court will agree to hear a new question only in one of those "rare cases" (*Guindon*, at para. 37; *R. v. Bird*, 2019 SCC 7, [2019] 1 S.C.R. 409, at para. 147), I am of the view that it should exercise its discretion and decide the new issue raised by John Howard Society in this instance.

[133] With respect to the state of the record, both the respondent and the intervener the Attorney General of Quebec argue that it would be unwise for our Court to decide a new question that raises the issue of overturning a precedent without having the evidentiary record to support or oppose such a change in the law. However, before the courts below, the respondent based its s. 7 argument on considerations connected to s. 11(d). In fact, before our Court, the respondent argued that the Court of Appeal was correct in stating at para. 55 that "principles of trial fairness and the accused's right to make a full answer and defence are expressions of procedural principles of

fundamental justice under s. 7, and are also embodied in s. 11(d)" (R.F., at para. 51). Therefore, the respondent had the opportunity to produce the evidence that it needed to support its argument.

[134] Further, given that it is John Howard Society that is asking this Court to overturn one of its precedents, it, therefore, has the burden to produce evidence supporting the evolution in the foundational legislative and social facts in relation to inmate discipline. In these circumstances, any gap in the evidence is also prejudicial to John Howard Society.

[135] Regarding the question of procedural prejudice, it should first be noted John Howard Society issued a notice of constitutional question, including the new issue, on February 9, 2024 (A.R., at p. 73). Therefore, the respondent cannot reasonably argue that it was denied the opportunity to respond to the new question. To the contrary, the respondent and the other attorneys general all submitted factums addressing the new issue raised by John Howard Society without any indication that they would be disadvantaged if the Court were to consider it. In particular, when questioned at the hearing, the respondent was unable to point to any concrete prejudice that could result from the new issue being heard.

[136] Refusing to hear this new question would also be incompatible with the broader interest of the administration of justice and may cause a potential injustice. First, there is a risk of unnecessary expense and delay in not considering the question of whether *Shubley* remains good law. How this Court answers one question will have

significant implications for the other question. In my view, it would be disproportionate for this Court to consider whether s. 7 is infringed and then refuse to consider the status of *Shubley*. It should not be forgotten that John Howard Society is acting to clarify the rights of prisoners, most of whom do not have the financial resources to undertake this type of proceeding. Significant costs would have to be incurred to initiate new proceedings to challenge *Shubley*. Second, if our Court were to accept John Howard Society's submission that *Shubley* should be overturned, delaying such a decision would possibly result in continued infringement of inmates' s. 11 rights. There is a strong public interest in deciding the new issue on appeal.

[137] I will now proceed to address the constitutional issues by first examining the appropriate methodology for assessing infringements under s. 7 and s. 11(d) of the *Charter*.

B. *How Should the Court Approach This Case?*

[138] Before our Court, not only did John Howard Society choose to raise a new issue on appeal respecting s. 11(d), but it presented this claim as the main one, thus relegating the claim under s. 7 to a residual analysis in case *Shubley* were to be upheld and confirmed (A.F., at para. 68). Given this framing, I discuss how the Court should approach this case; I am of the view that s. 7 and s. 11(d) should be considered separately, with s. 11(d) considered first.

[139] Our Court has written extensively on s. 7 in relation to the specific provisions of ss. 8 to 14 of the *Charter*. In fact, in *Re B.C. Motor Vehicle Act*, [1985] 2 S.C.R. 486, the Court concluded that ss. 8 to 14 "are illustrative of deprivations of those rights to life, liberty and security of the person in breach of the principles of fundamental justice" (p. 502). Consequently, it is not uncommon for s. 7 of the *Charter* to be invoked at the same time as one or more of the guarantees set out in ss. 8 to 14 (*R. v. Brunelle*, 2024 SCC 3, at para. 69). As it was reiterated recently by O'Bonsawin J. in *Brunelle*, this Court has consistently rejected the premise that such provisions should always be assessed together and has preferred a highly contextual and fact-specific approach to deciding the correct methodology when assessing multiple *Charter* breaches (para. 70, citing *J.J.*, at para. 115).

[140] The more particular question of how to analyze *Charter* breaches when violations are alleged under both s. 7 and s. 11 is discussed in *J.J.* In that case, Wagner C.J. and Moldaver J., writing for the majority, held that since s. 7 and s. 11(d) are "inextricably intertwined", they must be assessed together where they are co-extensive and separately where a concern falls specifically under one of the rights (para. 114, citing *Thomson Newspapers Ltd. v. Canada (Director of Investigation and Research, Restrictive Trade Practices Commission)*, [1990] 1 S.C.R. 425, at pp. 536-38; *R. v. L. (D.O.)*, [1993] 4 S.C.R. 419, at p. 460; *R. v. Levogiannis*, [1993] 4 S.C.R. 475, at p. 494; *R. v. Fitzpatrick*, [1995] 4 S.C.R. 154, at para. 19; *R. v. Darrach*, 2000 SCC 46, [2000] 2 S.C.R. 443; *R. v. Mills*, [1999] 3 S.C.R. 668, at para. 69).

[141] In the present case, the question of the analytical framework for s. 7 and s. 11(d) arises from a different angle. In *J.J.*, it was not disputed that both s. 7 and s. 11(d) could be invoked by the respondent in order for the Court to assess whether the impugned provisions compromised the right to a fair trial and the right to make full answer and defence. Conversely, in the present case, the issue is whether s. 11(d) applies to the Saskatchewan inmate discipline regime. Thus, before observing the guidance in *J.J.* on whether s. 7 and s. 11(d) should be assessed together or separately, this Court must first determine whether s. 11(d) can actually apply. If it can, only then will it be necessary to consider whether the rights are co-extensive or not.

C. *Does Section 11 of the Charter Apply to Saskatchewan's Inmate Disciplinary Proceedings?*

(1) Introduction

[142] Section 11 of the *Charter* contains a variety of procedural protections for persons "charged with an offence". The text reads as follows:

> **11** Any person charged with an offence has the right
>
> **(a)** to be informed without unreasonable delay of the specific offence;
>
> **(b)** to be tried within a reasonable time;
>
> **(c)** not to be compelled to be a witness in proceedings against that person in respect of the offence;
>
> **(d)** to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal;

> **(e)** not to be denied reasonable bail without just cause;
>
> **(f)** except in the case of an offence under military law tried before a military tribunal, to the benefit of trial by jury where the maximum punishment for the offence is imprisonment for five years or a more severe punishment;
>
> **(g)** not to be found guilty on account of any act or omission unless, at the time of the act or omission, it constituted an offence under Canadian or international law or was criminal according to the general principles of law recognized by the community of nations;
>
> **(h)** if finally acquitted of the offence, not to be tried for it again and, if finally found guilty and punished for the offence, not to be tried or punished for it again;

[143] These protections are available to those charged with criminal offences. In *Wigglesworth*, Wilson J. wrote that the "rights guaranteed by s. 11 of the *Charter* are available to persons prosecuted by the State for public offences involving punitive sanctions, i.e., criminal, quasi-criminal and regulatory offences, either federally or provincially enacted" (p. 554).

[144] An offence under the *Criminal Code*, R.S.C. 1985, c. C-46, will always attract the application of s. 11. To determine whether s. 11 applies to another process, a court must ask whether the "proceeding is, by its very nature, criminal," or whether "a 'true penal consequence' flows from the sanction" — this is known as the "*Wigglesworth* test" (*Wigglesworth*, at pp. 554-55 and 559; *Guindon*, at para. 44; *Martineau v. M.N.R.*, 2004 SCC 81, [2004] 3 S.C.R. 737, at para. 19). This framework recognizes that in a penal proceeding, a person is charged with a criminal offence and faces serious sanctions intended to maintain public order and redress a wrong done to

society at large (*Wigglesworth*, at p. 561; *Shubley*, at p. 20; *Guindon*, at para. 45). It also recognizes that, in contrast, a non-penal proceeding involves "regulatory, protective or corrective" matters "primarily intended to maintain discipline, professional integrity and professional standards or to regulate conduct within a limited private sphere of activity" (*Wigglesworth*, at p. 560; *Martineau*, at para. 57).

[145] Maintaining this distinction between the criminal law context and the administrative and regulatory contexts is in keeping with our Court's deliberate adoption of a "somewhat narrow definition of the opening words of s. 11" (*Wigglesworth*, at p. 558; *Guindon*, at para. 44). It is also in keeping with our Court's jurisprudence cautioning against the direct application of criminal justice standards outside of the criminal law context (*Blencoe v. British Columbia (Human Rights Commission)*, 2000 SCC 44, [2000] 2 S.C.R. 307, at paras. 87-88).

(2) The *Wigglesworth* Test

[146] Deciphering when a proceeding is by its very nature criminal or where a true penal consequence flows from the sanction is not always straightforward. As noted, there can be occasions where a proceeding or a sanction arising from that proceeding will attract the application of s. 11, even outside of the pure criminal law context. To make the determination of whether an individual has been "charged with an offence" within the meaning of s. 11, our Court developed the *Wigglesworth* test and later elaborated on it in *Martineau*.

[147] In *Wigglesworth*, the question centred on whether a "major service offence" heard before the RCMP Service Court engaged s. 11. While the RCMP Service Court was not a criminal court, the proceedings could have given rise to a sanction of up to one year of imprisonment for an RCMP member. That case prompted Wilson J., writing for the Court, to set out a test to determine the *threshold* question of the application of s. 11. The test is twofold. First, it asks whether the proceedings themselves are "criminal in nature". Second, it asks whether a sanction arising from the proceedings can amount to a "true penal consequence". Both prongs need not be satisfied to trigger the application of s. 11; one is sufficient.

(a) *The Criminal in Nature Prong of the Test*

[148] To satisfy the criminal in nature prong, the proceeding in question lies at the heart of the analysis. The underlying act which gave rise to the proceeding is not relevant.

[149] When considering the nature of the proceeding, it is important to bear in mind the jurisprudential backdrop. As Wilson J. stated in *Wigglesworth*, to attract s. 11 protection, the matter must be "intended to promote public order and welfare within a public sphere of activity", which is in contrast to "private, domestic or disciplinary matters which are regulatory, protective or corrective and which are primarily intended to maintain discipline, professional integrity and professional standards or to regulate conduct within a limited private sphere of activity" (pp. 559-60).

[150] In our Court's most recent pronouncement on this prong of the test, in *Guindon*, Rothstein and Cromwell JJ., writing for the majority, found that Ms. Guindon was not "charged with an offence" within the meaning of s. 11 when the Minister of National Revenue assessed her for penalties under the *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.), s. 163.2, because proceedings under that provision of the *Income Tax Act* were of an administrative nature (para. 5). Rothstein and Cromwell JJ. provided a helpful jurisprudential overview of the principles underlying this prong of the test at para. 51:

> The criminal in nature test asks whether the proceedings by which a penalty is imposed are criminal. The test is not concerned with the nature of the underlying act. As Wilson J. stated in *Wigglesworth*, the test is whether a matter "fall[s] within s. 11 . . . because by its very nature it is a criminal proceeding": p. 559 (emphasis added). This was confirmed in *Shubley*, at pp. 18-19, where McLachlin J. (as she then was) stated explicitly: "The question of whether proceedings are criminal in nature is concerned not with the nature of the act which gave rise to the proceedings, but the nature of the proceedings themselves" (emphasis added). Fish J., writing for the Court in *Martineau*, reaffirmed the conclusion in *Shubley* that the criminal in nature test is concerned solely with the proceedings themselves: see paras. 18-19. The text of s. 11 supports this conclusion. As Wilson J. noted in *Wigglesworth*:
>
> > Section 11 contains terms which are classically associated with criminal proceedings: "tried", "presumed innocent until proven guilty", "reasonable bail", "punishment for the offence", "acquitted of the offence" and "found guilty of the offence". Indeed, some of the rights guaranteed in s. 11 would seem to have no meaning outside the criminal or quasi-criminal context. [p. 555]

[151] It is clear that the nature of the proceeding is the sole and central focus of this prong. Both *Martineau* and *Guindon* provide helpful general guidance as to how to carry out an analysis under this prong. Despite the fact that *Martineau* concerned a

civil collection mechanism in the customs context and *Guindon* concerned an administrative monetary penalty in the income tax realm, this guidance can still be used in other administrative and regulatory contexts, such as an inmate disciplinary process.

[152] In *Martineau*, Fish J. identified three criteria as helpful to consider under this prong: (1) the objectives of the legislation; (2) the purpose of the sanction; and (3) the process leading to the sanction (paras. 19-24). It is important to emphasize that the process is the focus of the analysis at this step, not the nature of the underlying act. Therefore, assessing whether the "traditional hallmarks" of a criminal proceeding exist in the impugned administrative proceeding can be helpful to this inquiry (*Guindon*, at para. 63; see also *Martineau*, at para. 45).

(b) *The True Penal Consequences Prong of the Test*

[153] While the criminal in nature prong involves an examination of the nature of the proceeding, the true penal consequences prong involves an examination of the purpose of the sanction in connection with its magnitude, although, as I explain below, the magnitude is not determinative. The purpose of the sanction remains the focus of the inquiry to preserve the dichotomy between a sanction within the criminal realm intended to serve the purposes of denunciation, punishment, and stigma for a wrong done to society at large and a sanction designed to maintain compliance (*Canada (Attorney General) v. Whaling*, 2014 SCC 20, [2014] 1 S.C.R. 392, at para. 44; *Wigglesworth*, at p. 561; *Guindon*, at paras. 83-85). Accordingly, penalties arising from criminal or quasi-criminal offences are by their nature penal because the purpose of

those sanctions is to promote public order and welfare within a public sphere of activity (*Martineau*, at para. 21). By contrast, sanctions of an administrative — private, internal, disciplinary — nature are not criminal (para. 22). Administrative and regulatory penalties and sanctions that do not seek to redress a wrong to society are not penal unless the *Wigglesworth* test is met.

[154] Differentiating the purposes of penalties is important in the determination of whether a sanction arising from a proceeding is a "true penal consequence". In *Wigglesworth*, Wilson J. opted to use the phrase "true penal consequences" rather than merely "penal consequences". That distinction was made to reinforce the high bar that must be met before an administrative or regulatory sanction can be deemed to be truly penal in nature. A sanction is truly penal in nature when "by its magnitude [it] would appear to be imposed for the purpose of redressing the wrong done to society at large rather than for the maintenance of internal discipline within the limited sphere of activity" (p. 561). If traditional criminal law sentencing principles, such as denunciation, retribution, or an assessment of moral blameworthiness, are at play — or if the sanction seems aimed at redressing a wrong to society — the sanction can be viewed as "truly penal in nature" (*R. v. Cross*, 2006 NSCA 30, 241 N.S.R. (2d) 349, at paras. 30-31; *R. v. Samji*, 2017 BCCA 415, 357 C.C.C. (3d) 436, at para. 51; *Sivia v. British Columbia (Superintendent of Motor Vehicles)*, 2014 BCCA 79, 55 B.C.L.R. (5th) 1, at para. 142). If stigma is associated with the sanction, this will militate in favour of the sanction being classified as truly penal in nature (*Guindon*, at paras. 76, 84 and 89; *Whaling*, at para. 47; *Martineau*, at para. 64).

[155] In addition to the purpose, the magnitude of the sanction is relevant to the analysis, but not determinative (*Guindon*, at para. 77). Regard must be had to whether the magnitude of the sanction is determined by regulatory considerations rather than by principles of criminal sentencing (para. 76), and ultimately it will be a weighing exercise, taking into account the size and scope of a prospective sanction. To what extent a sanction's magnitude impacts the analysis will depend on the facts of a given case.

[156] Our Court has previously recognized the high bar required to attract the application of s. 11 in non-criminal matters, as stated in *R. v. K.R.J.*, 2016 SCC 31, [2016] 1 S.C.R. 906, at para. 38:

> . . . the "true penal consequence" test sets an indisputably high bar, it was developed to determine whether a person is nonetheless "charged with an offence" even if he or she is the subject of proceedings *outside* the criminal context. Within the criminal law context, the concerns motivating a narrow construction of "penal consequences" or "punishment" largely fall away. [Emphasis in original.]

[157] This underscores that the test seeks to preserve the narrow focus of s. 11 on procedural protections within the criminal law context. When it comes to conducting a s. 11 analysis, this backdrop is important to bear in mind. Similarly important to consider is distinguishing between a penalty that seeks to punish or denounce (truly penal in nature) and a penalty that aims to deter (non-penal, or administrative) (*Canada (Attorney General) v. United States Steel Corp.*, 2011 FCA 176, 333 D.L.R. (4th) 1, at para. 74).

(c) *Application of the Test in Wigglesworth*

[158] In *Wigglesworth*, Wilson J. held that the RCMP internal proceedings were not "criminal in nature" because they were designed to "regulate conduct within a limited private sphere of activity" (p. 562). While the first prong of the test was not met, she did find that the second prong was met because the administrative proceeding could involve "true penal consequences" with the imprisonment of an RCMP member for up to one year. She found it to be one of the rare cases where there was a conflict between the two prongs of the test, but ruled that in such cases, the true penal consequences prong must take precedence over the criminal in nature prong (*ibid.*).

(3) Application of *Wigglesworth* in *Shubley*

[159] The *Wigglesworth* test formed the basis of the analysis in *Shubley*. In that case, the issue was whether Ontario's inmate disciplinary proceedings attracted the application of s. 11. Under the Ontario regime, when an inmate was subject to a disciplinary proceeding, he or she would be brought before the detention centre superintendent, who would hear the facts pertaining to the alleged misconduct before making a finding and imposing a penalty, as the case may be. In *Shubley*, the inmate was brought before the superintendent, who decided that the misconduct had occurred and ordered the inmate to be placed in solitary confinement for five days with a restricted diet (p. 13). The inmate later sought the protections of s. 11.

[160] To determine whether the inmate discipline regime existing in Ontario at that time attracted the protection of s. 11, our Court applied the *Wigglesworth* test. Writing for the majority, McLachlin J. held that the criminal in nature prong was not met because the proceeding's purpose was not to "mete out criminal punishment, but to maintain order in the prison" (p. 20). The fact that the proceedings were informal, swift, and in private stood in contrast to how a court would operate and therefore militated against a finding that the proceeding was "criminal in nature" (*ibid.*). Turning to the true penal consequence prong, McLachlin J. found that neither close confinement nor loss of remission is a true penal consequence. Of the latter, she said it "does not constitute the imposition of a sentence of imprisonment", opting to instead view it as a "loss of a privilege" (p. 23). She said both were confined to "the manner in which the inmate serves his time" and involved neither a punitive fine nor a sentence of imprisonment (*ibid.*). In reference to the magnitude of the sanctions, she held both to be "entirely commensurate with the goal of fostering internal prison discipline and . . . not of a magnitude or consequence that would be expected for redressing wrongs done to society at large" (*ibid.*). Accordingly, s. 11 did not apply in that case.

(4) Is *Shubley* Still Good Law?

[161] When seeking leave to this court, John Howard Society expressly acknowledged that *Shubley* "found that s. 11 does not apply to inmate discipline proceedings" (Appellant's memorandum of argument, reproduced in the application for leave to appeal, at p. 68). Having moved away from that position, John Howard

Society now asks us to overturn *Shubley*. To do this, it points to the framework for departing from a precedent, which has since been cited by our Court in *Canada (Attorney General) v. Power*, 2024 SCC 26, at paras. 98 and 209, and *Auer v. Auer*, 2024 SCC 36, at para. 32.

[162] John Howard Society argues that the threshold for overturning a precedent has been met. This issue must first be addressed before deciding on the applicability of s. 11. For the reasons that follow, I am of the view that John Howard Society has not demonstrated the required basis on which to overturn *Shubley*. I have also had the advantage of reading the reasons of the majority and, with great respect, I disagree with their conclusion and the reasoning underlying it, as I explain more fully below.

(a) *Governing Principles for Overturning a Precedent*

[163] The principle of *stare decisis* is a foundational doctrine that calls on courts to stand by previous decisions and not disturb settled matters. This doctrine promotes legal certainty and stability (*Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65, [2019] 4 S.C.R. 653, at paras. 20, 270 and 281; R. J. Sharpe, *Good Judgment: Making Judicial Decisions* (2018), at p. 147), the rule of law (*Vavilov*, at paras. 260 and 281), and the legitimate and efficient exercise of judicial authority (*Watkins v. Olafson*, [1989] 2 S.C.R. 750, at pp. 760-61). It requires judges to give effect to legal principles that are well settled and depart from them only when there is a proper basis for doing so.

[164] Under the framework advanced by John Howard Society, there are three bases on which to depart from a precedent: (1) the precedent at issue was rendered without regard to a binding authority or a relevant statute, *per incuriam*; (2) the precedent has proven unworkable; or (3) the precedent's rationale has been eroded by societal or legal change. Only the last two are at issue in this appeal.

[165] To be "unworkable", a precedent must undermine at least one of the purposes that *stare decisis* is intended to promote: legal certainty, the rule of law, and judicial efficiency. Legal certainty will be undermined when a precedent is "unclear and unduly complex" (*Vavilov*, at para. 21). The rule of law will be undermined when a precedent makes the law indeterminate or subject to a judge's personal preferences, rather than a principled framework. Judicial efficiency will be undermined when a precedent is unnecessarily complex or cumbersome to the point where it unnecessarily drains judicial resources.

[166] To meet the threshold of foundational erosion, a party seeking to overturn a precedent must demonstrate either (1) societal change or (2) legal change. A societal change can include when fundamental change to societal conditions in the social, economic, or technological realm undermines the precedent's rationale, making it moot or inconsistent with contemporary societal norms. A legal change can arise from constitutional amendments, such as the introduction of the *Charter*, or when incremental jurisprudential change amounts to "attenuating" the precedent.

(b) *Reasons Advanced To Overturn Shubley*

[167] John Howard Society urges us to overturn *Shubley* on the basis that it has become "unworkable" and because its holding has been subject to "foundational erosion". It says that two trends underlie its position.

[168] First, regarding "unworkability", by denying the application of s. 11 to inmate disciplinary proceedings, *Shubley* has left such proceedings subject to *Charter* scrutiny under s. 7 only. This has led to "vastly inconsistent" conceptions of the requirements of the principles of fundamental justice across the country, resulting in a patchwork of procedural protections for inmates depending on which jurisdiction they find themselves in (A.F., at para. 11). Therefore, legal certainty and the rule of law are implicated and make the precedent unworkable (paras. 15-17, 20-22 and 26).

[169] Second, regarding "foundational erosion", John Howard Society suggests that the *Wigglesworth* test has evolved since its application in *Shubley*, so much so that the result would be different today (A.F., at paras. 11, 13 and 28). Additionally, there has been a profound evolution in the way that delayed release and solitary confinement are viewed in the jurisprudence. Consequently, the majority's reasoning in *Shubley* with respect to the non-application of s. 11 is subject to foundational erosion and is no longer correct (paras. 11 and 33).

[170] For its part, the majority finds that *Shubley*'s conclusion that disciplinary segregation and loss of earned remission are not true penal consequences was formed on the basis of an overly formalistic interpretation of what constitutes "imprisonment".

That approach, they say, is no longer consistent with case law in the wake of *Shubley* (paras. 40-41).

(c) *Shubley Remains Good Law*

[171] If *Shubley* remains good law, it is a precedent that binds our Court to find that neither loss of earned remission nor disciplinary segregation in the inmate disciplinary context satisfies the *Wigglesworth* test. Indeed, even the majority acknowledges this in its reasons (para. 32). For the reasons that follow, I am of the view that *Shubley* remains good law. I am not persuaded by the arguments advanced to the contrary.

(i) Unworkability

[172] John Howard Society's first argument — that *Shubley* has led to a patchwork of provisions and uneven procedural protections across the country resulting from different statutory schemes and varied results from courts and therefore has eroded the rule of law — is unconvincing. Differing levels of protection for inmates in different provinces are to be expected in a federation where the division of powers allows for the creation of different rules concerning the management of correctional facilities in each province alongside of the interpretation of laws by the courts in each province. The fact that provinces may impose different inmate disciplinary mechanisms does not give rise to unworkability. Rather, it is a function of our federation. Similarly, the application of s. 7 is a fact-driven exercise tailored to the

circumstances of a given case. For its part, the majority finds it unnecessary to address the assertion that *Shubley* should be overturned on the basis of unworkability (para. 32).

(ii) Erosion of Legal Foundation

1. *Erosion of the Legal Foundation of the Criminal in Nature Prong*

[173] John Howard Society's second argument — that *Shubley* is subject to foundational erosion — is equally unconvincing. To make this point, John Howard Society first submits that the criminal in nature prong of the *Wigglesworth* test has been modified by *Martineau* and *Guindon*, such that inmate disciplinary proceedings now meet what it calls the "modern test" (A.F., at para. 33). It argues that *Shubley* focussed on the extent of the procedural protections imparted to the regime by the legislature, whereas *Martineau* and *Guindon* shifted the focus from formality and the procedural protections inherent in the regime to the objectives and purpose of the process and sanction (paras. 39-40).

[174] I do not agree. Neither *Martineau* nor *Guindon* changed the focus of the criminal in nature prong, which remains squarely on the nature of the proceeding. In both cases, our Court highlighted the importance of factors relating to the proceeding in question: the objectives of the legislation, the purpose of the sanction, and the process leading to the imposition of the sanction (*Martineau*, at para. 24). Consequently, the proceeding still remains paramount to the analysis, as it was in the *Shubley* analysis.

[175] I agree with the following statement, made by the intervener the Attorney General of British Columbia: "In articulating [the *Martineau*] criteria, Fish J. was not displacing or modifying the *Wigglesworth* 'criminal in nature' test. To the contrary, Fish J. grounded these criteria in *Wigglesworth* and *Shubley*. He was elaborating upon *Shubley*, not modifying it" (I.F., at para. 39). The Attorney General also rightly points out that our Court subsequently characterized *Guindon* as a reaffirmation of the *Wigglesworth* test (*Goodwin v. British Columbia (Superintendent of Motor Vehicles)*, 2015 SCC 46, [2015] 3 S.C.R. 250, at para. 40).

[176] For its part, the majority does not address the foundational erosion of the criminal in nature prong (para. 32).

2. *Erosion of the True Penal Consequences Prong*

[177] The second point that John Howard Society makes in support of its argument that *Shubley* is subject to foundational erosion is that increasing judicial scrutiny of the actions of prison officials and confinement conditions has led to an evolution in the jurisprudence that has eroded *Shubley*'s foundation (A.F., at para. 33). The majority is of the view that *Shubley*'s interpretation of *Wigglesworth*'s true penal consequences prong rests on an eroded legal foundation, as it relies on a formalistic method of interpretation that has since been consistently eschewed (paras. 32 and 34).

[178] Respectfully, I am not persuaded by either line of reasoning. Let me explain.

[179] The jurisprudence since *Shubley* has not disturbed its rationale. For instance, with regard to loss of earned remission, both John Howard Society and the majority cite *Whaling*. In that case, a legislative scheme provided for the retrospective application of the abolition of early parole to offenders already serving sentences. It was challenged on the basis that it violated the *Charter*'s s. 11(h) guarantee not to be punished again. Our Court found that there was a breach of s. 11(h) because the retroactive nature of the change disturbed an inmate's "settled expectation of liberty" (para. 63). The majority also cites *Cunningham v. Canada*, [1993] 2 S.C.R. 143, where our Court considered whether retrospective changes to the parole system violated s. 7 of the *Charter*. Putting aside the fact that *Cunningham* actually *upheld* the constitutionality of the legislative changes and that the case concerned s. 7 as opposed to s. 11, I am of the view that neither *Whaling* nor *Cunningham* is comparable to the instant case.

[180] Loss of earned remission is not akin to a retroactive legislative change to a sentence already being served. In *Shubley*, McLachlin J. succinctly described remission and its relationship to a sentence (at pp. 22-23):

> Remission does not shorten a sentence for imprisonment; that can be done only by appeal. Rather, it permits an inmate who has "applied himself industriously" to the prison program, to serve part of his sentence outside the prison. The privilege of remission (it is not a right) is conferred as a matter of prison administration to provide incentives to inmates to rehabilitate themselves and co-operate in the orderly running of the prison. The removal of that privilege for conduct that violates these standards is equally a matter of internal prison discipline. Forfeiture of remission does not constitute the imposition of a sentence of imprisonment by the

> superintendent, but merely represents the loss of a privilege dependent on good behaviour. [Citations omitted.]

[181] In other words, reliance on *Whaling*, in particular, fails to consider that an inmate housed in a correctional facility understands the rules of that facility. In the instant case, the *Regulations* require that inmates be advised of the correctional facility's rules and disciplinary procedures as soon "as is reasonably practicable" (s. 6(1)). Should the inmate abide by those rules, they will earn remission. Should the inmate not abide by those rules, there is a possibility that earned remission will be lost. This is an individual exercise, unlike the blanket application at play in *Whaling*. Therefore, I see no major shift in the foundation of *Shubley*'s holding on the loss of earned remission.

[182] Regarding segregation, John Howard Society further suggests that in the time that has elapsed since *Shubley*, "there has been significant jurisprudential movement in consideration of the punitive nature of solitary confinement", including appellate decisions moving away from the view of solitary confinement as "a benign administrative sanction" (A.F., at paras. 64-65).

[183] I do not accept the premise of John Howard Society's assertion that *Shubley* characterized segregation as "a benign administrative sanction", nor do I accept that the appellate court cases cited by John Howard Society — *British Columbia Civil Liberties Association v. Canada (Attorney General)*, 2019 BCCA 228, 377 C.C.C. (3d) 420 ("*BCCLA*"), and *Canadian Civil Liberties Assn. v. Canada (Attorney General)*,

2019 ONCA 243, 144 O.R. (3d) 641 ("*CCLA*") — represent the type of sea change required to overturn *Shubley*.

[184] In both of those cases, the appellate courts were seized with a provision of the *Corrections and Conditional Release Act*, S.C. 1992, c. 20, that authorized an institutional head to order an inmate incarcerated in a federal penitentiary to be confined indefinitely in "administrative segregation" for safety or security reasons.

[185] The *Act* in the instant case provides that administrative segregation is available in cases where an inmate jeopardizes the security of the correctional facility or the safety of the inmates, staff members or the public, or in such cases where an inmate's presence in the general inmate population would interfere with an investigation or would jeopardize the inmate's own safety (s. 58). Administrative segregation differs from disciplinary segregation, which is a punishment for committing a disciplinary offence or offences.

[186] Those decisions address administrative segregation as opposed to disciplinary segregation, which is the focus of the instant case, but that fact aside, the concern in those decisions is the constitutionality of provisions authorizing *indefinite confinement in administrative segregation*. Both courts found prolonged administrative confinement — segregation beyond 15 days — not to survive constitutional scrutiny (*BCCLA*, at paras. 148 and 151; *CCLA*, at paras. 4 and 150). Both cases found administrative segregation of up to 15 days to be constitutionally compliant, with the Court of Appeal for British Columbia calling it a "defensible standard" (*BCCLA*, at

paras. 16, 146 and 151; *CCLA*, at paras. 4 and 150). The appellant in *Shubley* had been placed in solitary confinement for a period of five days with a restricted diet. Consequently, the foundational erosion required to overturn *Shubley* has not been established.

[187] I also note that in *BCCLA*, the Court of Appeal for British Columbia made a point of stating that the issue it confronted had been decided in the courts below on the basis of an "extensive record" (para. 14). This stands in contrast to the instant case, particularly as regards to John Howard Society's claims that foundational erosion requires our Court to no longer apply *Shubley*. The assertions being made about the nature of disciplinary segregation are not based on any factual findings in the courts below. In fact, the application judge made an explicit factual finding that disciplinary segregation in Saskatchewan did not constitute what John Howard Society calls "solitary confinement" (para. 86). I am of the view that such assertions are contested factual issues and that they are best resolved on evidence in trial courts. In both *BCCLA* and *CCLA*, expert evidence was relied upon. This is in contrast to the instant case, where John Howard Society relies on those cases in place of factual findings or evidence. While the findings in those cases may be relevant to consider, they should not be instructive to the current case, nor do they, on their own, provide a sufficient basis on which to disturb *Shubley*.

[188] Before addressing the majority reasons on this point, I raise one final consideration. John Howard Society suggests that foundational erosion has occurred

since *Shubley* was decided because of the evolution in the judicial treatment of segregation generally. However, it is clear from Cory J.'s dissenting reasons in *Shubley*, as well as from other case law that I will outline in the paragraphs below, such as the trilogy, that at the time *Shubley* was decided there was an understanding of the various degrees of liberty deprivation that may occur within a prison. For instance, Cory J. in *Shubley* stated that the "grievous effects of solitary confinement have been almost instinctively appreciated since imprisonment was devised as a means of punishment. . . . Close or solitary confinement is a severe form of punishment" (p. 9). It is clear that courts were alive to the severity of segregation at the time *Shubley* was decided. This further undercuts the argument that the manner in which courts have treated segregation in the wake of *Shubley* is sufficient to overturn it on the basis of foundational erosion. It also demonstrates that the reasoning relied upon in *BCCLA* and *CCLA* is not novel.

[189] The majority reasons rely on s. 10(c) and s. 7 jurisprudence to make the point that in other *Charter* contexts our Court has not used a formalistic method of interpretation in maintaining a distinction between a sentence of imprisonment and conditions of imprisonment. While that may not be suggesting that these cases have direct application to the instant case, I respectfully find reliance on that line of jurisprudence to be problematic, factually and legally.

[190] Section 10(c) of the *Charter* guarantees everyone the right to have the validity of their detention determined by way of *habeas corpus* and to be released if

the detention is found to be unlawful. In citing a trilogy of cases — *R. v. Miller*, [1985] 2 S.C.R. 613, *Morin v. National Special Handling Unit Review Committee*, [1985] 2 S.C.R. 662, and *Cardinal v. Director of Kent Institution*, [1985] 2 S.C.R. 643 — the majority posits that they collectively stand for the proposition that our Court has ruled that administrative segregation is a distinct form of imprisonment, which undermines *Shubley*'s holding as a result (paras. 42-43). The majority further cites *Dumas v. Leclerc Institute*, [1986] 2 S.C.R. 459, as a case in which an expansive approach to *habeas corpus* was taken. Respectfully, both the trilogy and *Dumas* present factual and legal differences that are not possible to ignore in this instance.

[191] Factually, each of the trilogy cases involved severe segregation in separate wings and institutions and a lack of procedural fairness.

[192] In *Miller*, an inmate was transferred to another institution and placed in administrative segregation in a special handling unit following a disturbance in his penitentiary. He was advised that he had been placed there because of his participation in the disturbance but was never given any opportunity to confront the evidence, if any, of his involvement in the incident.

[193] In *Morin*, an inmate charged with murder following the death of a fellow inmate was confined to a special handling unit in another institution. After being acquitted of the murder charge, he remained in segregation, and his request to be transferred back to a medium security institution was refused. This prompted his application to the Superior Court for a writ of *habeas corpus*. On appeal, the sole issue

was whether a superior court had jurisdiction to issue a writ of *habeas corpus* to determine the validity of the confinement of an inmate of a federal penitentiary in a special handling unit.

[194] In *Cardinal*, the inmates were allegedly involved in a hostage-taking incident within their penitentiary, which led to criminal charges and a transfer to another institution, where they were placed in administrative dissociation or segregation on the ground that it was necessary for the maintenance of good order and discipline in the institution. The Director declined to conduct an independent inquiry, instead opting to rely on the words of a fellow warden. When the Segregation Review Board recommended that the appellants be released from administrative segregation into the general prison population, the Director refused to comply. He did not inform the inmates of his reasons for refusal, nor did he give them an opportunity to be heard. They challenged their confinement by applications for *habeas corpus*.

[195] In each of the cited cases, severe segregation in separate wings and institutions combined with a lack of procedural fairness was at issue. The same cannot be said about the regime in the instant case, where the application judge found that inmates subject to segregation are generally confined to their own cells and, for the most part, still have access to cellmates, natural light, and television (in cases where there was a television in the cell prior to the segregation) (paras. 23 and 85). Further, all inmates facing disciplinary sanctions in Saskatchewan have access to procedural rights. As for *Dumas*, the appeal centred around an application for *habeas corpus* made

further to the appellant's day parole being revoked as a result of accusations of prison disciplinary offences. It did not involve segregation, and, in any event, our Court ruled that the appellant had no right to *habeas corpus* (p. 465).

[196] From a legal standpoint, I am of the view that in the present instance these cases have — to say the least — attenuated value for two reasons. First, each of the trilogy cases was decided in 1985, and *Dumas* was decided in 1986, which means that they predate *Shubley* by five years and four years, respectively. To overturn a precedent on the basis of foundational erosion, proper methodology requires that foundational erosion must have occurred *after* the precedent was decided (*R. v. Tutton*, [1989] 1 S.C.R. 1392, at pp. 1410-11, per Wilson J.; *R. v. Bernard*, [1988] 2 S.C.R. 833, at pp. 855-56, per Dickson C.J., dissenting, but not on this point; *R. v. Hynes*, 2001 SCC 82, [2001] 3 S.C.R. 623, at paras. 116 and 119, per Major J., dissenting, but not on this point; *Nishi v. Rascal Trucking Ltd.*, 2013 SCC 33, [2013] 2 S.C.R. 438, at para. 24; *R. v. Alex*, 2017 SCC 37, [2017] 1 S.C.R. 967, at para. 95, per Rowe J., dissenting, but not on this point). In other words, the source of the erosion must be rooted in *subsequent* case law. To suggest otherwise would mean that this Court can rewrite prior jurisprudence that it believes was simply "wrong". Such an approach runs counter to the purposes of *stare decisis* and its foundational underpinnings of providing legal certainty and stability by way of a principled approach to overturning a precedent.

[197] Second, even putting aside the issue of the erosion having occurred before the precedent was even decided, I respectfully remain unconvinced because the

interpretative approaches to s. 10(c) and s. 11 are markedly different. Section 10(c) of the *Charter* guarantees everyone the right to have the validity of their detention determined by way of *habeas corpus* and to be released if the detention is found to be unlawful. *Habeas corpus* concerns itself with the "protection of individuals against erosion of their right to be free from wrongful restraints upon their liberty", is "broad", and is not "a static, narrow, formalistic remedy" (*Canada (Public Safety and Emergency Preparedness) v. Chhina*, 2019 SCC 29, [2019] 2 S.C.R. 467, at paras. 19 and 21, quoting *May v. Ferndale Institution*, 2005 SCC 82, [2005] 3 S.C.R. 809, at para. 21). It should therefore come as no surprise that *Dumas* continued to widen the availability of *habeas corpus*, even if the ultimate disposition in that case was to deny *habeas corpus* to the appellant (p. 465).

[198] By contrast, s. 11 has been given a "narrower interpretation" as the rights contained therein "are available to persons prosecuted by the State for public offences involving punitive sanctions" (*Wigglesworth*, at p. 554). Specifically, Wilson J. expressed concern for the "future coherent development" of s. 11 "if it is made applicable to a wide variety of proceedings" (p. 558). This reflects the narrow interpretation that our Court has adopted in every s. 11 analysis. I understand the majority as sharing the concern that "s. 11 will become too broad in scope" (para. 77). On this point, I agree.

[199] Finally, as noted earlier, the trilogy and *Dumas* and the other historical sources cited by the majority were all available to our Court at the time *Shubley* was

decided. When our Court found that the right to strike is inherent in s. 2(d) of the *Charter* in *Saskatchewan Federation of Labour v. Saskatchewan*, 2015 SCC 4, [2015] 1 S.C.R. 245, Rothstein J. and Wagner J. (as he then was) dissented in part, stating:

> Many of the sources identified by the majority existed at the time this Court rendered its decisions in the Labour Trilogy. For instance, the history of strike activity in Canada and abroad canvassed by the majority at paras. 36 to 55 was information available to this Court when it considered the Labour Trilogy appeals. It cannot now form the basis for an entirely different result than that reached by this Court in 1987. The criterion that, in order for a precedent to be overruled, there must be "a change in the circumstances or evidence that fundamentally shifts the parameters of the debate" ([*Canada (Attorney General) v. Bedford*, 2013 SCC 72, [2013] 3 S.C.R. 1101], at para. 42) is manifestly unsatisfied. [para. 143]

[200] I agree entirely with that sentiment, as expressed then, and respectfully suggest that the same could be considered in the instant case. The cases the majority reasons now seek to rely on as a basis for overturning *Shubley* existed at the time and did not prevent the majority in *Shubley* from taking the position that it did. This must be respected.

[201] For the foregoing reasons, I reject the reasons advanced to overturn *Shubley*. *Shubley* remains good law and a binding precedent. Therefore, we must apply it in the present case.

D. *Does Section 68 of the Regulations Infringe Section 11(d) of the Charter?*

(1) Application of the *Wigglesworth* Test in This Case

[202] As already noted, *Shubley* found that the Ontario inmate discipline regime was not subject to the application of s. 11. But *Shubley* also pointed out the following (at p. 18):

> . . . the logic of *R. v. Wigglesworth* is to proceed not by a category approach, but by application of the general principles there laid down. Thus, one must examine whether the particular proceedings here at issue meet the tests set forth in *R. v. Wigglesworth*.

[203] Therefore, I proceed to the analysis.

(a) *The Criminal in Nature Prong of the Test*

[204] In *Shubley*, McLachlin J. noted the fact that the conduct giving rise to the proceeding had no bearing on her analysis. She found that the Ontario inmate in that case was being called to account to the prison officials for a breach of his obligation as an inmate of the prison to conduct himself in accordance with prison rules. She found that he was not being called to account to society (p. 20).

[205] McLachlin J. analyzed the proceedings as lacking the "essential characteristics of a proceeding on a public, criminal offence" (p. 20). In reference to their purpose, she said it was not to "mete out criminal punishment, but to maintain order in the prison" (*ibid.*). In surveying the traditional hallmarks of a criminal proceeding, she noted that the proceedings were informal, swift, and in private, with no court involvement. She found that they did not meet *Wigglesworth*'s standard that

they be "of a public nature, intended to promote public order and welfare within a public sphere of activity" (*Wigglesworth*, at p. 560; *Shubley*, at p. 20).

[206] I find no substantial difference between the circumstances present in *Shubley* and those in the instant case. This is so even with the use of the elaborated *Martineau* criteria, which I will now proceed to consider in the same sequence as Rothstein and Cromwell JJ. did in *Guindon*. In that case, they first considered two *Martineau* factors (the objectives of the legislation and the process leading to the imposition of the sanction) under the criminal in nature prong, and they left the final factor (the purpose of the sanction) for consideration under the true penal consequences prong (para. 52). However, as Rothstein and Cromwell JJ. emphasized, while there will "inevitably [be] some overlap in the analysis" between the criminal in nature prong and the true penal consequences prong, they are separate and have independent value (para. 49).

(i) Objectives of the Legislation

[207] When the objectives of the legislation are considered, the question is whether the *Regulations* and/or the *Act* provide for a penal proceeding that is criminal in nature, as noted by the Court of Appeal at para. 3:

> The inmate disciplinary system for offences that occur within those institutions is codified in detail in Part VIII of *The Correctional Services Act, 2012*, SS 2012, c C-39.2 [*CS Act*], and Part XIII of *The Correctional Services Regulations, 2013*, RRS c C-39.2 Reg 1 [*Regulations*]. Disciplinary offences are divided into minor and major offences: s. 72 and

> s. 73(2)(a) of the *CS Act* and s. 50, s. 54, and s. 55 of the *Regulations*. The hearing process differs on the basis of this classification, but not in a manner relevant to this appeal. The [standard] of proof is the same for both categories of offences. [First text in brackets in original.]

[208] Both the application judge and the Court of Appeal found that the overall purpose of the inmate discipline regime established in the aforementioned sections of the *Act* and the *Regulations* is "to maintain order, security, and safety in the institutions" (C.A. reasons, at para. 30; application judge's reasons, at paras. 1 and 69-71; ss. 3(d) and 23 to 25 of the *Act*).

[209] John Howard Society suggests that the purpose of the legislation is to "create a world separate from society" (A.F., at para. 43), though later it conceded that the purpose of s. 68 of the *Regulations* is "to maintain order in the prisons" by utilizing expeditious and informal hearings and that this constitutes a pressing and substantial objective (para. 106). The respondent argues that the objectives of the legislation are to "creat[e] operational efficiencies and improv[e] security in provincial correctional centres" and to ensure "a procedurally fair disciplinary review system" (R.F., at paras. 169-70).

[210] I agree with the courts below, as well as with both the respondent and John Howard Society's later concession, that the objective of the legislation is to maintain order and discipline in correctional facilities in Saskatchewan. This is in accordance with *Shubley*, where the Court upheld the decision of the Ontario Court of Appeal in finding that the inmate disciplinary proceedings under review in that case

were "implicitly aimed at promoting the orderly regulation and over-all good government of correctional institutions" (p. 16).

[211] As noted by the Court of Appeal in this case, "[g]iven the high volume of offences that occur in correctional facilities, and the need to deal with them quickly, an efficient, yet fair, system is required" (para. 30). The objective of maintaining order is advanced by the standard of proof that was chosen for the purpose of providing both adequate procedural protection to inmates and administrative agility to administrators of institutions.

(ii) The Process Leading to the Sanction

[212] As was the case in *Martineau* and *Guindon*, this point in the analysis is an opportune time to consider the extent to which the proceeding bears the traditional hallmarks of a criminal proceeding. In *Guindon*, Rothstein and Cromwell JJ. stated the following, at para. 63:

> Fish J. referred to some of the relevant considerations in *Martineau*, including whether the process involved the laying of a charge, an arrest, a summons to appear before a court of criminal jurisdiction, and whether a finding of responsibility leads to a criminal record: para. 45. The use of words traditionally associated with the criminal process, such as "guilt", "acquittal", "indictment", "summary conviction", "prosecution", and "accused", can be a helpful indication as to whether a provision refers to criminal proceedings.

[213] In *Shubley*, a superintendent of an Ontario prison could determine by way of an informal hearing on the day following the alleged misconduct whether an inmate had committed misconduct and impose one or more penalties (s. 31 of Regulation 649, R.R.O. 1980; *Shubley*, at pp. 13 and 21-22). McLachlin J. noted that the proceeding in that case lacked "the essential characteristics of a proceeding on a public, criminal offence" because its "purpose [was] not to mete out criminal punishment, but to maintain order in the prison" (p. 20). She noted that the proceeding was conducted informally, swiftly, in private, and with no court involvement. She also noted that the purpose of the proceeding was not to call the inmate "to account to society for a crime violating the public interest" (*ibid.*).

[214] By contrast, the Saskatchewan inmate discipline regime has more formality in its proceedings. For instance, the *Regulations* set out a list of offences, classify them as minor or major, and assign severity of sanction on that basis. The *Regulations* require the prison administration to issue a notice of charge, provide for a full and fair hearing, and prescribe the rights of the inmate in this process. While there is no right to call witnesses and the panel is not bound by the rules of evidence, the inmate may question witnesses or request additional ones, and a record of decisions is mandated to be kept (ss. 50 to 71 of the *Regulations*).

[215] While these factors militate towards a finding that the proceeding in this case was criminal in nature, they alone are insufficient to satisfy the criminal in nature prong. John Howard Society argues that there are sufficient traditional hallmarks of a

criminal process in this case (A.F., at para. 55). I disagree. In the present case, there was no arrest, there was no appearance before a court of criminal jurisdiction, no criminal record has resulted from it, and none of the words Fish J. listed in the above excerpt were used. There is no basis on which to suggest that these hearings are anything but administrative and regulatory in nature, intended to further the purpose of maintaining internal prison discipline.

(iii) Conclusion on the Criminal in Nature Prong

[216] To hold that these proceedings are criminal in nature would fly in the face of both *Shubley* and *Wigglesworth*, which require us to distinguish between proceedings "of a public nature, intended to promote public order and welfare within a public sphere of activity" and administrative — private, internal, or disciplinary — proceedings (*Wigglesworth*, at p. 560).

[217] McLachlin J. was right to find that "[p]rison discipline proceedings must be expeditious and informal if the crises that inevitably occur in centres of incarceration are to be avoided" (*Shubley*, at p. 24). She found that conferring s. 11 rights on inmates facing internal disciplinary proceedings "would be to make the task of those charged with maintaining order in our prisons immeasurably more difficult" (*ibid.*).

[218] I agree with both statements and find that the criminal in nature prong is not satisfied here. Therefore, I conclude that Saskatchewan's inmate disciplinary proceedings are not criminal in nature.

(b) *The True Penal Consequence Prong of the Test*

[219] In *Shubley*, McLachlin J. found that Ontario's internal disciplinary proceedings did not satisfy this prong. The sanction at issue was "close confinement for five days on a special diet that fulfils basic nutritional requirements" (p. 21). Though it was not invoked in *Shubley*, loss of earned remission was an available sanction within the regime and was subject to analysis (p. 22). She found that the loss of earned remission did not constitute imprisonment because it was the removal of a privilege dependent on good behaviour and did not constitute the imposition of a sentence (pp. 22-23). She found both sanctions to be "entirely commensurate with the goal of fostering internal prison discipline and . . . not of a magnitude or consequence that would be expected for redressing wrongs done to society at large" (p. 23).

[220] In the instant case, segregation and loss of remission as possible consequences are at issue. Segregation in this regime is provided as a sanction for major disciplinary offences. Section 77(1)(d) of the *Act* provides for "segregation to a cell, unit or security area for a period not exceeding 10 days". Loss of earned remission is also available as a sanction for major disciplinary offences. Section 77(1)(h) provides for "forfeiture of a period, not exceeding 15 days, of remission earned". We now turn to the analysis of the purpose of the sanctions and their magnitude.

(i) Purpose of the Sanction

[221] As noted, I have already considered two *Martineau* factors (the objectives of the legislation and the process leading to the sanction) under the criminal in nature prong. This mirrors the analytical approach taken by Rothstein and Cromwell JJ. in *Guindon*. Now, I turn to the third *Martineau* factor: the purpose of the sanction.

[222] John Howard Society urges us to find the purpose of the sanction to be similar to that of a criminal sanction: deterrence and denunciation, separation from society, recognition of harm done through offending, and an emphasis on offender responsibility (A.F., at para. 47).

[223] As noted earlier, regard to the purpose of the sanction should guide the analysis. The sanction's magnitude is also relevant, though not determinative. We must ask whether the sanction intends to serve the criminal law purposes of denunciation, punishment, and stigma for a wrong done to society at large, as opposed to serving the purpose of maintaining compliance (*Whaling*, at para. 44; *Wigglesworth*, at p. 561; *Guindon*, at paras. 83-85). We must also ask whether the sanction seeks to promote public order and welfare within a public sphere of activity or seek to redress a wrong to society, or by contrast whether it furthers the purpose of private, internal, and disciplinary objectives.

[224] A significant line of jurisprudence reiterates that it will be a rare case where one prong of the *Wigglesworth* test is met but the other is not (*Wigglesworth*, at p. 561; *Martineau*, at para. 57; *Guindon*, at para. 46). This highlights the very high bar the

Wigglesworth test imposes to preserve our Court's narrow interpretation of s. 11 application beyond the criminal law context.

[225] *Wigglesworth* was one of those rare cases, because the sanction arising from the proceeding was up to one year of imprisonment. McLachlin J. decided that *Shubley* was not one of those rare cases, ruling that both sanctions concerned "the manner in which the inmate serves his time" rather than consisting of the imposition of a new sentence (p. 23). She also found their purpose to be "entirely commensurate with the goal of fostering internal prison discipline" (*ibid.*).

[226] I see no basis on which to disturb McLachlin J.'s holdings. Applied to the instant case, the outcome is the same. The purpose of disciplinary segregation and loss of earned remission is not to impose a sanction to "redres[s] wrongs done to society at large" (*Shubley*, at p. 23). The sanctions amount to seeking to foster discipline within correctional facilities in Saskatchewan, and as such, they are non-penal consequences within the context of existing sentences. Likewise, she found those sanctions to be "not of a magnitude or consequence that would be expected for redressing wrongs done to society at large" (p. 23). This reasoning applies to the instant case.

(ii) Consideration of the Impugned Sanctions

[227] As stated, the purpose of the sanction must guide the analysis. In addition, alongside of the magnitude of the sanctions, consideration of both the jurisprudential

treatment of the sanctions and how they are used in Saskatchewan provides helpful context when an analysis is carried out under this prong.

1. *Segregation*

[228] In *Shubley*, close confinement for five days with a special diet that fulfilled basic nutritional requirements was declared constitutionally compliant. The maximum available period for that type of close confinement under the Ontario inmate disciplinary scheme was 10 days (p. 22). In the instant case, the *Act* provides for segregation to a cell, unit, or security area for a period not exceeding 10 days (s. 77(1)(d)).

[229] The application judge made the following findings on the conditions for segregated inmates in Saskatchewan at para. 23 of his reasons:

> Unless safety concerns exist, inmates remain on their unit and are not placed in more secure units. Inmates are permitted a minimum of one hour of leisure time outside their cells each day when they can make phone calls (unless they have received a sanction of loss of telephone privileges), shower, engage with other inmates, watch television, exercise and spend time outside. Commonly, the cells have natural light by way of windows and sanctioned inmates often have a cellmate. Inmates have access to health care and can request to see a nurse at any time. Inmates also have access to Elders, Chaplains and program staff.

[230] The courts below did not find this segregation to be the same thing as solitary confinement. The application judge stated the following, at para. 86:

> I find nothing in the evidence to suggest that what Corrections calls "segregation" is as severe as one might associate with the term "solitary confinement" or "dissociation." In some situations, segregating a prisoner from other prisoners may be for the safety of all, including the offending inmate. I must decide this application on the facts before the court. Those facts do not raise "segregation" in Saskatchewan's correctional centres to the level of concern that [John Howard Society] suggests.

The Court of Appeal stated the following, at para. 32:

> The John Howard Society submits that segregation is a harsh sanction. It cites *British Columbia Civil Liberties Association v Canada (Attorney General)*, 2019 BCCA 228, 377 CCC (3d) 420, for the proposition that legislation that permits prolonged, indefinite segregation "constitute[s] cruel and unusual treatment . . ." (at para 95). It also points to *Corporation of the Canadian Civil Liberties Association v Canada (Attorney General)*, 2019 ONCA 243 at para 68, 433 DLR (4th) 157, which found that any period of solitary confinement exceeding 15 days represents cruel and unusual punishment. However, the segregation that is utilized as a sanction under the *CS Act* is neither indefinite nor was it found by the Chambers judge to be the same thing as solitary confinement. Section 77(1)(c) and s. 77(1)(d) of the *CS Act* limit the period of confinement or segregation to 10 days. [Brackets in original.]

[231] These findings stand in contrast to the position taken by the majority reasons in the instant case, which cite a number of reports dating back to the 1800s relating to segregation (paras. 60-65). The historical developments surveyed by the majority reasons include the opening of the Kingston penitentiary in 1835 (para. 60), an 1891-92 report on segregation that labelled the segregation cells as "the dungeon" (para. 62), the 1894 construction of a segregation wing in the Kingston penitentiary labelled as the "Prison of Isolation" (para. 63), and successive 20th century reports that emphasized the isolating nature of segregation (paras. 64-65). The majority says that while disciplinary segregation has evolved over time, its nature has the effect of

curtailing an inmate's residual freedom of movement while exacerbating their segregation from society, thus making it a distinct form of imprisonment (paras. 66-67). He states that this effect is present in Saskatchewan's practice of disciplinary segregation (para. 67).

[232] First, it is noteworthy that the reports cited by the Chief Justice writing for the majority are not in the record before this Court, and therefore the respondent did not have an opportunity to respond to them. Second, the information surveyed by the majority would have, in large part, been available at the time *Shubley* was decided, yet it did not stop the majority in that case from rendering the decision that it did. This is a point that the Chief Justice himself, along with Rothstein J., made in *Saskatchewan Federation of Labour*, as I noted earlier, when they stated in their dissenting reasons that reliance on historical reports "cannot now form the basis for an entirely different result than that reached by this Court" (para. 143). I agree.

[233] With great respect, this line of reasoning, where there is properly admitted evidence in the record, would be better suited to a case that invokes s. 12 of the *Charter*. This is not the case, and in my view the factual findings made by the application judge are owed deference, particularly in the absence of evidence to the contrary. There is no basis on which to depart from the conclusions reached in *Shubley*. Those conclusions, in conjunction with the purpose of the sanction being clearly of an administrative and regulatory nature, militate against a finding of segregation being a true penal consequence.

2. *Loss of Earned Remission*

[234] In *Shubley*, an inmate in Ontario could lose up to 15 days of earned remission (p. 22). The same is true in the instant case (s. 77(1)(h) of the *Act*). At the outset, I agree with the Court of Appeal that even though loss of earned remission was imposed in only 0.3 percent of disciplinary cases in 2019, it remains an available sanction and therefore is subject to scrutiny (para. 35).

[235] As the Court of Appeal noted, generally an inmate serving a sentence within a provincial correctional centre is credited with 15 days of remission against their sentence for every month that they serve (para. 36).

[236] John Howard Society relies on our Court's findings in *Whaling* to suggest that remission constitutes part of an inmate's "settled expectation of liberty" (para. 63). But, as stated earlier, this fails to take into account the nature of remission. It is *earned*, not automatically, but by way of good behaviour. This underscores its purpose: it exists to foster better inmate conduct and thus maintain order within correctional facilities. It should come as no surprise that if good behaviour is not consistent, some of that remission could be taken away. McLachlin J. makes this very point in *Shubley* (at pp. 22-23) and underscores that is a privilege, not a right.

[237] The purpose of imposing a loss of remission is not to add to an inmate's sentence. It is to maintain order within a correctional institution. The application judge rightly referred to the cancellation of earned remission as "a tool for prison

administration to ensure the orderly running of a prison" (para. 71). The sanction is imposed not to punish or denounce, but rather to encourage compliance and deter breaches of the facility rules. This makes the consequence non-penal.

(iii) Conclusion on the True Penal Consequences Prong

[238] To find that these sanctions amount to true penal consequences would not be in keeping with *Shubley*. Having determined that *Shubley* remains good law, our Court is bound to follow it.

[239] However, even beyond *Shubley*, a fresh analysis of the *Wigglesworth* test would lead me to the same conclusion, that is, that neither sanction amounts to a true penal consequence because neither sanction's purpose is to redress a public wrong, nor is it to impose punishment or promote denunciation. Therefore, I find that the segregation and loss of earned remission within Saskatchewan's inmate discipline regime do not constitute true penal consequences.

(2) Conclusion: Neither Prong of the *Wigglesworth* Test Is Met

[240] I conclude that neither the criminal in nature prong nor the true penal consequences prong of the *Wigglesworth* test is met. Therefore, an inmate facing disciplinary sanctions in Saskatchewan is not "charged with an offence" within the meaning of s. 11. Because the *Wigglesworth* test is not met, s. 11 has no application to

Saskatchewan's inmate discipline regime. It is therefore unnecessary to decide whether s. 11(d) is infringed.

E. *Does Section 68 of the Regulations Violate Section 7 of the Charter?*

[241] Given my finding that the inmate disciplinary proceedings do not meet the two-step test in *Wigglesworth* and therefore do not engage s. 11, the question remains whether similar safeguards are available to inmates under s. 7 of the *Charter*.

[242] Section 7 provides:

> 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.

[243] Its purpose was well described by the Court in *Gosselin v. Quebec (Attorney General)*, 2002 SCC 84, [2002] 4 S.C.R. 429, at para. 77:

> . . . the dominant strand of jurisprudence on s. 7 sees its purpose as guarding against [those] deprivation[s] of life, liberty and security of the person . . . "that occur as a result of an individual's interaction with the justice system and its administration": *New Brunswick (Minister of Health and Community Services) v. G. (J.)*, [1999] 3 S.C.R. 46, at para. 65. "[T]he justice system and its administration" refers to "the state's conduct in the course of enforcing and securing compliance with the law" (*G. (J.)*, at para. 65).

[244] The test to determine whether there has been a violation of s. 7 unfolds in three steps (*R. v. White*, [1999] 2 S.C.R. 417, at para. 38):

(1) First, was there a real or imminent deprivation of life, liberty, security of the person, or a combination of these interests?

(2) If so, one must identify and define the relevant principle of fundamental justice.

(3) Finally, was the deprivation in accordance with the principle of fundamental justice?

(1) Step One: The Deprivation of Liberty

[245] The first step of the analysis pursuant to s. 7 is not under debate in the instant case. It has been conceded by the respondent that the liberty interests of inmates are engaged (R.F., at para. 6). I agree. In a prison environment, inmates retain certain residual liberties and "there may be significant degrees of deprivation of liberty" within a penitentiary environment (*Miller*, at p. 637). As a result, when an inmate is faced with a sanction that includes the loss of earned remission and/or disciplinary segregation, there is a direct deprivation of liberty.

(2) Step Two: Identify the Principle of Fundamental Justice

[246] It is undisputed that the presumption of innocence is a principle of fundamental justice guaranteed by s. 7 in the criminal context. In that regard, writing for the majority of the Court in *Pearson*, Lamer C.J. quoted *R. v. Oakes*, [1986] 1

S.C.R. 103, at p. 119, to state that the presumption of innocence, "[a]lthough protected expressly in s. 11(*d*) of the *Charter* . . . is referable and integral to the general protection of life, liberty and security of the person contained in s. 7 of the *Charter*" (p. 683 (emphasis added)). The fact that s. 11(d) applies "in its strict evidentiary sense at trial" does not undercut the fact that the presumption of innocence found in s. 7 is a "broad substantive principle" that applies "throughout the criminal justice process" (*Pearson*, at pp. 683 and 687).

[247] In the instant case, John Howard Society has explicitly stated before the courts below that *it was not* seeking recognition of a new principle of fundamental justice (see C.A. reasons, at para. 68). Rather, before our Court, John Howard Society argues that the presumption of innocence found in s. 7 of the *Charter* extends to the inmate discipline regime and requires proof beyond a reasonable doubt. The respondent agrees that the presumption of innocence is an applicable principle of fundamental justice when one decides to deprive inmates of their residual liberty. The respondent disagrees, however, that this principle of fundamental justice requires the application of the criminal standard of proof beyond a reasonable doubt.

[248] Consequently, the question before us is simply whether the presumption of innocence as a principle of fundamental justice requires application of the criminal standard of proof beyond a reasonable doubt in inmate disciplinary proceedings.

(3) Step Three: Was the Deprivation in Accordance With the Principles of Fundamental Justice?

[249] In its reasons, the majority finds that s. 7 of the *Charter* would require Saskatchewan's proceedings for major disciplinary offences to use a criminal standard of proof. It draws from *Pearson* two requirements of assistance when discerning whether proof beyond a reasonable doubt will be required under s. 7: proceedings where the state (1) accuses an individual of moral wrongdoing and (2) seeks to punish the individual with severe liberty-depriving consequences for such wrongdoing (para. 84). It concludes that major disciplinary offence proceedings meet those two requirements.

[250] Respectfully, I do not agree with that conclusion nor with that reading of *Pearson*. I do not find any requirement in *Pearson* suggesting that proof beyond a reasonable doubt is required when a proceeding both seeks to punish an individual for a moral wrongdoing and impose severe liberty-depriving consequences for such wrongdoing. Not only do I disagree that *Pearson* stands for that proposition but I am also of the view that the implications of such an approach would be far-reaching and problematic. To accept that interpretation would be to risk displacing long-standing flexible evidentiary rules for summary proceedings and legislated standards of proof that ensure the efficiency of criminal and non-criminal proceedings.

[251] Interim release proceedings provide a salient example of my point. Every day, courts across Canada grapple with proceedings to decide if those who stand accused of crimes by the state should be released while they await trial. As it was said by our Court in *R. v. St-Cloud*, 2015 SCC 27, [2015] 2 S.C.R. 328, these summary

proceedings require "more flexible rules of evidence" to assess the strength of the prosecution's cases (para. 57). As such, at that stage, the Crown is not obliged to prove beyond a reasonable doubt that the accused committed the offence for which he or she is charged (para. 58). An accused person in an interim release proceeding has been accused by the state of a moral wrong and faces severe liberty-depriving consequences should his or her application for judicial interim release not be granted. The seriousness of the offence can contribute to the denial of bail, leading to incarceration. This is a severe a deprivation of liberty, although the person is presumed innocent.

[252] Applying a proof beyond a reasonable doubt standard here would mean that the flexibility necessary in such proceedings would be displaced with the effect of neglecting the other objectives, namely the protection or safety of the public, and maintaining the confidence of the public in the administration of justice (*St-Cloud*, at paras. 1-2). In my view, this is why the Court of Appeal correctly insisted that "all that can be taken from *Pearson*, and adapted into the present case, is the idea that the application of the presumption of innocence in a s. 7 *Charter* claim will depend on the circumstances" (para. 50).

[253] Another example of the far-reaching impact of this line of reasoning can be seen in the immigration context, which is by its very nature administrative, not criminal. For example, Division 4 of Part 1 of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27, sets out rules of inadmissibility for permanent residents and foreign nationals. Specifically, s. 36(1) sets out the grounds on which a permanent

resident or a foreign national is inadmissible for serious criminality, including when he or she has committed an act outside Canada that is an offence in the place where it was committed and that, if it was committed in Canada, would constitute an offence under an act of Parliament punishable by a maximum term of imprisonment of at least 10 years (s. 36(1)(c)). The *Immigration and Refugee Protection Act* sets out that the determination of whether a permanent resident has committed an act described in s. 36(1)(c) is to be based on a balance of probabilities (s. 36(3)(d)). It is conceivable that such a non-criminal, administrative proceeding could attract the application of s. 7's presumption of innocence because there is both a moral wrong (violation of immigration laws, or the underlying serious criminality itself) and severe liberty deprivation (deportation or inadmission). This extension of the residual presumption of innocence to non-criminal, administrative proceedings surely was not contemplated by *Pearson*.

[254] Moreover, and with respect, I do not agree that civil contempt fits within what is framed as the two requirements from *Pearson*. For one thing, civil contempt is not an accusation by the state; rather, it rests on the power of the courts, *not the state*, to enforce their process and maintain their dignity and respect (*Carey v. Laiken*, 2015 SCC 17, [2015] 2 S.C.R. 79, at para. 30, citing *United Nurses of Alberta v. Alberta (Attorney General)*, [1992] 1 S.C.R. 901, at p. 931). In addition, the purpose of civil contempt is not to punish an individual with severe liberty-depriving consequences, but rather to, first and foremost, declare a party as having acted in defiance of a court order (*Carey*, at para. 30, citing *Pro Swing Inc. v. Elta Golf Inc.*, 2006 SCC 52, [2006] 2

S.C.R. 612, at para. 35, cited in *Bell ExpressVu Limited Partnership v. Torroni*, 2009 ONCA 85, 94 O.R. (3d) 614, at para. 20).

[255] Therefore, I suggest the following analysis to decide whether a beyond a reasonable doubt standard is required under s. 7. The concern, as articulated in a variety of cases decided by our Court, is to ensure that the presumption of innocence within s. 11(d), which firmly operates during a criminal trial, applies at other stages of the criminal law process. Section 7, therefore, acts as residual protection of the liberty interests of the accused persons during the criminal process and may, depending on the context, require proof beyond a reasonable doubt outside the trial stage of the criminal process. A correct interpretation of *Pearson* suggests that the *only* possible requirements that can be drawn from that case and of assistance to determine which standard of proof applies under s. 7 are (1) whether the proceeding involves a determination of guilt or (2) whether the proceeding entails serious consequences analogous to a criminal sentence (pp. 685-86). As these two requirements are not met in this case, I am of the view that the deprivation of liberty stemming from s. 68 of the *Regulations* is in accordance with the principles of fundamental justice at issue.

(a) *The Principles Governing Pearson*

[256] John Howard Society relies on jurisprudence of this Court, with particular reliance on *Pearson* and *Demers*, to argue that the presumption of innocence, as a principle of fundamental justice guaranteed by s. 7, can be extended to require proof beyond a reasonable doubt in a prison discipline setting. Much like the Court of Appeal,

I am of the view that these decisions do not assist John Howard Society's position. The jurisprudence seeks to ensure that the presumption of innocence under s. 7 addresses residual liberty in a contextual manner at other stages of the criminal law process, up until sentencing. In doing so, our Court recognized, for instance, that proof beyond a reasonable doubt is required when aggravating factors are contested in the sentencing process following a criminal trial. The inmate disciplinary process, however, cannot be understood as equivalent to the sentencing process. Let me further explain.

[257] In *R. v. Gardiner*, [1982] 2 S.C.R. 368, a pre-*Charter* case, our Court was faced with deciding whether facts relied upon to support a lengthier sentence at a sentencing hearing following a guilty plea to a charge of assault causing bodily harm should be proven on the higher standard of proof beyond a reasonable doubt, or whether the standard of proof on a balance of probabilities was sufficient. The Crown in that case relied heavily on American authorities to suggest the existence of a "sharp demarcation between the trial process and the sentencing process" (p. 406). It was of the view that "[o]nce a plea or finding of guilty is entered the presumption of innocence no longer operates and the necessity of the full panoply of procedural protection for the accused ceases" (*ibid.*). By contrast, the offender argued that from his "point of view, sentencing is the most critical part of the whole trial process, . . . and the standard of proof required with respect to controverted facts should not be relaxed at this point" (*ibid.*).

[258] Dickson J. (as he then was) agreed with the offender. On sentencing, he noted that the "stakes are high for society and for the individual. . . . A substantial liberty interest of the offender is involved and the information obtained should be accurate and reliable" (*Gardiner*, at p. 414). This imperative is amplified in the face of the reality that "the vast majority of offenders plead guilty", therefore requiring the sentencing judge to "get his [or her] facts after plea" (*ibid.*). As such, he stated the following:

> To my mind, the facts which justify the sanction are no less important than the facts which justify the conviction; both should be subject to the same burden of proof. Crime and punishment are inextricably linked. "It would appear well established that the sentencing process is merely a phase of the trial process" ([J. A. Olah, "Sentencing: The Last Frontier of the Criminal Law" (1980), 16 C.R. (3d) 97], at p. 107). Upon conviction the accused is not abruptly deprived of all procedural rights existing at trial: he has a right to counsel, a right to call evidence and cross-examine prosecution witnesses, a right to give evidence himself and to address the court. [Emphasis added; p. 415.]

[259] The importance of ensuring that accused persons have the benefit of the presumption of innocence throughout the criminal trial process, not just the trial itself, is clear from Dickson J.'s reasons (*Gardiner*, at p. 415). As chief justice, writing for our Court in *Oakes*, he picked up on a similar thread at pp. 119-20 of those reasons:

> The presumption of innocence is a hallowed principle lying at the very heart of criminal law. Although protected expressly in s. 11(*d*) of the *Charter*, the presumption of innocence is referable and integral to the general protection of life, liberty and security of the person contained in s. 7 of the *Charter* (see *Re B.C. Motor Vehicle Act*, [1985] 2 S.C.R. 486, *per* Lamer J.) The presumption of innocence protects the fundamental liberty and human dignity of any and every person accused by the State of criminal conduct. An individual charged with a criminal offence faces

> grave social and personal consequences, including potential loss of physical liberty, subjection to social stigma and ostracism from the community, as well as other social, psychological and economic harms. In light of the gravity of these consequences, the presumption of innocence is crucial. It ensures that until the State proves an accused's guilt beyond all reasonable doubt, he or she is innocent. This is essential in a society committed to fairness and social justice. The presumption of innocence confirms our faith in humankind; it reflects our belief that individuals are decent and law-abiding members of the community until proven otherwise. [Emphasis added.]

[260] The Attorney General of Alberta argues that the unique social stigma and ostracism that come along with a criminal conviction — in addition to the loss of liberty — form part of the unique rationale for why a higher standard of proof is required by the presumption of innocence under s. 7. I agree. This is particularly the case at sentencing when a person who, as Dickson C.J. put it, has been presumed to be a "decent and law-abiding membe[r] of the community" until convicted now faces the "ultimate jeopardy" as he or she is being sentenced (*Oakes*, at p. 120; *Pearson*, at p. 686, quoting *Gardiner*, at p. 415).

[261] In *Pearson*, our Court was seized with a *Charter* challenge of a provision of the *Criminal Code* which precluded bail for certain narcotics-related offences, among others. Writing for the majority, Lamer C.J. found that the impugned provision would not violate s. 7 unless it were found that it failed to meet the procedural requirements of s. 11(e). In reaching this conclusion, he expanded on the presumption of innocence under s. 7.

[262] Lamer C.J. noted the express protection of the presumption of innocence in s. 11(d) of the *Charter*, but reiterated Dickson C.J.'s conclusion in *Oakes* that the presumption of innocence extends beyond s. 11(d) and is "referable and integral to the general protection of life, liberty and security of the person contained in s. 7 of the *Charter*". At several junctures, Lamer C.J. referenced s. 11(d)'s operation at the trial of an accused person while stressing that this does not "exhaust the operation in the criminal process of the presumption of innocence as a principle of fundamental justice" (*Pearson*, at p. 683). Then, the question was to determine which standard of proof comes into play when the presumption of innocence under s. 7 is triggered.

[263] For Lamer C.J., this was a contextual consideration. Not every deprivation of life, liberty, and security of the person requires the standard of proof beyond a reasonable doubt (*R. v. Whitty* (1999), 174 Nfld. & P.E.I.R. 77 (Nfld. C.A.), at paras. 26 and 48-49). The principles of fundamental justice "are not immutable; rather, they vary according to the context in which they are invoked" (*R. v. Lyons*, [1987] 2 S.C.R. 309, at p. 361). As Lamer C.J. explained in *Pearson*, "[w]hile the presumption [of innocence under s. 7] is pervasive in the criminal process, its particular requirements will vary according to the context in which it comes to be applied" (p. 684).

[264] He went on to note that the "[e]xamples are legion of how the various stages of the criminal process have accommodated themselves to the fundamental principle that the assumed innocence of an accused or a suspect is the starting point for any proposed interference with that person's life, liberty or security of the person"

(p. 685 (emphasis added)). In sum, the residual application of the presumption of innocence protected under s. 7 of the *Charter* is flexible and does not automatically require proof beyond a reasonable doubt.

(i) Determination of Guilt

[265] When discussing whether s. 7 would require proof beyond a reasonable doubt, Lamer C.J. suggested that it would be required when a particular step of the criminal process involves a determination of guilt (*Pearson*, at p. 685). These comments were relied upon by our Court in *R. v. Noble*, [1997] 1 S.C.R. 874, when it refused to consider that proof beyond a reasonable doubt was required in the context of the appeal of a conviction because "the presumption of innocence does not operate with the same vigour" when a guilty verdict has been entered and it is no longer incumbent on the Crown to establish guilt (paras. 107-8).

[266] This was also a consideration in *Demers* when our Court had to decide whether Part XX.1 of the *Criminal Code* violated the s. 7 presumption of innocence. In that case, the appellant argued that it had been violated in two ways: first, by treating accused persons unfit to stand trial as offenders without taking into account that it had not been proved beyond a reasonable doubt that they had indeed committed a criminal offence, and second, by subjecting permanently unfit accused to the criminal justice system during an indeterminable period (para. 32). Our Court dismissed those arguments, finding that the "deprivation of the unfit accused's liberty accords with the presumption of innocence as a principle of fundamental justice" because the Review

Board proceedings under that Part of the *Criminal Code* did not involve a determination of guilt: "They simply require[d] the Review Board to perform an assessment of the accused and impose the least onerous condition on his or her liberty" (paras. 33-34).

[267] John Howard Society argues the conclusion reached through the inmate disciplinary process amounts to a determination of guilt. I do not agree. An inmate disciplinary proceeding cannot be analogized to a criminal trial, where it is incumbent on the prosecution to establish guilt beyond a reasonable doubt (*Noble*, at para. 108). In fact, inmate disciplinary proceedings are administrative in nature, which means that they do not automatically attract the criminal standard of proof nor involve a determination of guilt in the criminal, penal sense (*Martineau v. Matsqui Institution Disciplinary Board*, [1980] 1 S.C.R. 602, at p. 629). Nor does the language contained in the *Act* support the conclusion that an inmate disciplinary proceeding leads to a determination of "guilt". At the conclusion of an inmate disciplinary proceeding, an inmate is not declared "guilty" or "innocent", but rather the discipline panel will either "find that the inmate committed the disciplinary offence" or "dismiss the charge" (s. 75 of the *Act*).

[268] A determination of guilt, as contemplated by *Pearson*, involves more than simply a conclusion at the end of a process to determine if a person has done what it is alleged was done. Such a determination is reached to hold a person accountable for a wrong that society has determined is worthy of punishment. Additionally, a criminal

conviction carries unique social stigma and transforms a person from a law abiding citizen into a convicted criminal. That is not the case in an administrative setting.

[269] I find the nature of the inmate disciplinary process to be analogous to the role of the Review Board in *Demers*, which performed an administrative role. Much like in *Demers*, the inmate disciplinary proceedings in this case are "perform[ing] an assessment" of the inmate's conduct to impose "the least onerous condition" on their residual liberty depending on the seriousness of the offence. This is true because Saskatchewan's scheme is structured to make severe forms of punishment, such as those under appeal in the instant case, available only as a consequence of a "major disciplinary offence" (s. 77 of the *Act*).

(ii) Serious Consequences Analogous to a Criminal Sentence

[270] Further, in *Pearson*, Lamer C.J. considered two examples where s. 7 would require proof beyond a reasonable doubt, outside of a criminal trial, as an illustration of the "pervasive presence of the broad substantive principle throughout the criminal process" (p. 687): (1) in the context of contested aggravating factors at sentencing and (2) in the context of civil contempt. As to this latter example, for the reasons I explain above, I would be cautious about giving too much weight to this incidental remark, as civil contempt proceedings are readily distinguishable from the facts at issue. However, the first example relates to the criminal process and has been incorporated into our Court's jurisprudence, namely in *R. v. D.B.*, 2008 SCC 25, [2008] 2 S.C.R. 3. Therefore, it warrants greater consideration.

[271] Lamer C.J. explained the following with respect to the standard of proof required for aggravating factors during the sentencing process:

> The presumption of innocence as set out in s. 11(*d*) arguably has no application at the sentencing stage of the trial. However, it is clear law that where the Crown advances aggravating facts in sentencing which are contested, the Crown must establish those facts beyond reasonable doubt: *R. v. Gardiner*, [1982] 2 S.C.R. 368. The Court in *Gardiner* cited with approval at p. 415 the following passage from J. A. Olah, "Sentencing: The Last Frontier of the Criminal Law" (1980), 16 C.R. (3d) 97, at p. 121:
>
> > . . . because the sentencing process poses **the ultimate jeopardy to an individual** . . . in the criminal process, it is just and reasonable that he be granted the protection of the reasonable doubt rule at this vital juncture of the process.
>
> Although, of course, *Gardiner* was not a *Charter* case, the problem it confronted can readily be restated in terms of ss. 7 and 11(*d*) of the *Charter*. While the presumption of innocence as specifically articulated in s. 11(*d*) may not cover the question of the standard of proof of contested aggravating facts at sentencing, the broader substantive principle in s. 7 almost certainly would. The specific application of the right would take account of the serious consequences adverted to in the passage from Olah, cited by the Court in *Gardiner*. [Emphasis added.]
>
> (*Pearson*, at p. 686; see also *D.B.*, at para. 80.)

[272] John Howard Society relies on these statements to argue that the "serious consequences" to which an inmate is exposed are similar to those facing an accused when aggravating facts are contested in the sentencing process. With respect, this analogy is flawed. I do not agree that this concern can be extended to the imposition of an inmate's disciplinary sanction, which clearly differs from the handing down of a sentence by a criminal court. It is clear that, in *Pearson*, the main concern for our Court

was the availability of protection for persons being sentenced following a finding of criminal guilt.

[273] The "serious consequences" referenced in *Pearson*, drawn from *Gardiner*, are in relation to the criminal sentencing process. It was understood in both cases that a person who is going to be sentenced following conviction faces the "ultimate jeopardy" (*Gardiner*, at p. 415; *Pearson*, at p. 686). As a result of the seriousness of the sanction that could flow from the imposition of a sentence, our Court was concerned with ensuring those sanctions be based on a higher standard of proof stemming from the presumption of innocence found within s. 7. By contrast, Saskatchewan's inmate disciplinary proceedings are not tantamount to a sentencing proceeding following a criminal conviction.

[274] The Saskatchewan inmate discipline regime permits the imposition of a sanction, not a sentence in a criminal context. For the reasons I have laid out in the above s. 11 analysis, the sanction, in contrast to a sentence, is not for the purpose of redressing a moral wrong to society. Nor does it carry social stigma or the profound effects, or the "ultimate jeopardy", that *Pearson* and *Gardiner* warned of. As such, the comments from *Pearson* have no application in this context. The foregoing also supports the conclusion that s. 7 does not require proof beyond a reasonable doubt with respect to inmate disciplinary proceedings.

[275] Finally, John Howard Society submits that the sanctions at issue are harsh. However, John Howard Society was not prevented from making those arguments on

the basis of s. 12 of the *Charter* before the courts below. I reiterate that we must decide this case on the narrow question before us respecting the standard of proof. This is not a s. 12 case. I am in agreement with the application judge at para. 86 of his reasons: we must decide the application on the facts before us and on the arguments advanced. John Howard Society has not made its arguments based on s. 12. We must defer to the factual findings of the courts below, and we must maintain our focus on ss. 11(d) and 7 in our analysis. With respect, emphasizing the functional analysis of the severity of the sanction on s. 7 would change the nature of the constitutional challenge before us.

(4) Inmate Disciplinary Records Should Only Be Used in Future Sentencing Hearings if Proven Beyond a Reasonable Doubt

[276] John Howard Society and some interveners further argue that because disciplinary records can be treated as aggravating at future sentencing hearings, it would only make logical and practical sense that s. 7 requires proof beyond a reasonable doubt. I am sympathetic to these concerns.

[277] Aggravating factors that the Crown seeks to rely upon at sentencing must be proven beyond a reasonable doubt (*D.B.*, at paras. 78-80, citing *Pearson*, at p. 686, and *Gardiner*, at pp. 414-15). Nothing in these reasons changes that longstanding holding of our Court. As such, if reliance on disciplinary records is sought in future sentencing hearings, the decision-maker must bear in mind the standard on which those records were proven.

[278] Like any aggravating factor that has not already been proven beyond a reasonable doubt at sentencing, inmate disciplinary records originally proven on a balance of probabilities will need to be established beyond a reasonable doubt at sentencing to avoid an injustice to an offender.

(5) The Procedural Guarantees of the *Correctional Services Act* Are Sufficient To Ensure a Fair Process

[279] Our Court's jurisprudence clearly indicates that the question of standard of proof under s. 7 can be folded into discussions of procedural fairness (*Lyons*, at p. 361; *Gardiner*, at pp. 415-16). Consequently, consideration of the procedural safeguards available, if any, can be relevant to the inquiry. Although I recognize that the identification of the available procedural safeguards with respect to inmate disciplinary proceedings must remain an analytical question distinct from that of the standard of proof required under s. 7, the two analyses do not operate in isolation either. In cases where the standard required by s. 7 is unclear, the presence of strong procedural guarantees may be decisive in determining whether s. 7 is infringed. In the present case, I am of the view that the procedural guarantees provided to inmates in the *Act* are sufficient to ensure a fair process.

[280] In general terms, procedural fairness requires a fair process, having regard to the nature of the proceedings at stake (*Charkaoui v. Canada (Citizenship and Immigration)*, 2008 SCC 38, [2008] 2 S.C.R. 326, at para. 20), although it does not guarantee the most favourable procedure or a perfect process (*Ruby v. Canada*

(Solicitor General), 2002 SCC 75, [2002] 4 S.C.R. 3, at para. 46; *Canada (Citizenship and Immigration) v. Harkat*, 2014 SCC 37, [2014] 2 S.C.R. 33, at paras. 43 and 69).

[281] This Court has noted that inmate disciplinary proceedings "must be expeditious and informal if the crises that inevitably occur in centres of incarceration are to be avoided" (*Shubley*, at p. 24; see also *Cardinal*, at p. 654; *Matsqui*, at p. 630). In that regard, the comments made by MacGuigan J. of the Federal Court of Appeal in *Howard v. Stony Mountain Institution*, [1984] 2 F.C. 642, at pp. 681-82, are particularly instructive:

> [In penitentiaries,] [o]rder is both more necessary and more fragile than in even military and police contexts, and its restoration, when disturbed, becomes a matter of frightening immediacy.
>
> It would be an ill-informed court that was not aware of the necessity for immediate response by prison authorities to breaches of prison order and it would be a rash one that would deny them the means to react effectively.
>
> But not every feature of present disciplinary practice is objectively necessary for immediate disciplinary purposes. The mere convenience of the authorities will serve as no justification . . . . Even what may be necessary but nevertheless delayable cannot be given priority. All that is not immediately necessary must certainly yield to the fullest exigencies of liberty.

[282] As I mentioned earlier in these reasons, approximately 6,201 disciplinary charges were laid across the province in 2019, and 3,367 disciplinary hearings were held, averaging about 9 hearings per day (R.F., at para. 73, referring to the affidavit of L. Tokarski). Offences such as physical attacks and drug-related offences, are of particular concern because they pose a danger to the charged inmate as well as to other

inmates and staff (paras. 74-75). I agree with the respondent's submission that the use of the criminal standard of proof beyond a reasonable doubt may seriously erode the efficiency required in the inmate disciplinary system because of the time-intensive nature of investigating and proving offences on that standard (para. 76).

[283] Of course, as the Court of Appeal noted, "practicality, convenience, and efficiency cannot come at the expense of the principles of fundamental justice" (para. 30, citing *R. v. Ndhlovu*, 2022 SCC 38, at paras. 78 and 103). Indeed, when the liberty interest of an inmate is engaged by the discipline regime, the principles of fundamental justice incorporate the protections of the common law duty of procedural fairness (*Suresh v. Canada (Minister of Citizenship and Immigration)*, 2002 SCC 1, [2002] 1 S.C.R. 3, at paras. 113-15; *Singh v. Minister of Employment and Immigration*, [1985] 1 S.C.R. 177, at pp. 212-13; *Lyons*, at p. 361; *Ruby*, at para. 39).

[284] In the particular context of prison discipline, it is all the more important to strike a balance between the need for procedural fairness and the need to ensure fast and efficient proceedings in order to maintain order in a correctional institution. Thus, it is not surprising that in *Perron v. Canada (Attorney General)*, 2020 FC 741, the Federal Court found that [TRANSLATION] "the requirements relating to procedural fairness are less stringent for disciplinary offences in correctional facilities" (para. 165).

[285] Consequently, the question is whether the procedural safeguards in place in Saskatchewan's legislative and regulatory scheme deprive inmates of their liberty in

a manner that accords with the presumption of innocence protected under s. 7. This question needs to be answered while keeping in mind that s. 7 entitles inmates to procedural fairness.

[286] Providing guidance respecting procedural fairness in the context of prison discipline, Professors Patrice Garant and Paule Halley drew from the rules of *audi alteram partem* (the right to be heard) and *nemo judex in sua causa* (the right to impartial treatment) to identify several procedural guarantees that an inmate faced with disciplinary sanctions may claim, such as:

> [TRANSLATION] . . . the right to be informed [of the facts alleged against him or her], the right to a hearing that he or she can attend, the right to make his or her arguments, the right to be represented by counsel, the right to consult the record, the right to call witnesses, the right to cross-examine, the right to certain rules of evidence, the right to an adjournment, the right to a reasoned decision, etc.
>
> ("L'article 7 de la Charte canadienne et la discipline carcérale" (1989), 20 *R.G.D.* 599, at p. 615)

Although these guarantees are not absolute, they are nonetheless available when

> [TRANSLATION] [t]he inmate who has been deprived of his or her liberty or security . . . demonstrate[s] that in the particular circumstances of the case he or she should be granted this right. [p. 615]

[287] In the instant case, most of the protections mentioned above are included in the current regime of the *Act*. Therefore, I have no difficulty in finding that the

procedural guarantees offered to the inmates under that regime are sufficient to ensure a fair process as required by s. 7 of the *Charter*.

[288] The guiding principles of the *Act* set out that inmates must "comply with correctional facility rules" but "are entitled to fair treatment" (s. 3(d) and (e)). Section 60(1) of the *Regulations* stipulates that inmates will be provided with a full and fair hearing and that a thorough and objective inquiry will be conducted into all matters relating to the charge. In addition, inmates have the right to be present at the hearing (unless their presence would jeopardize someone's safety, they waive this right, or their presence would be disruptive); the right to be advised as to the nature and factual basis of the charge; the right to respond to the charge; the right to present information relevant to their defence of the charge (s. 61(1) of the *Regulations*); and, the right to appeal any decision (ss. 79 and 80 of the *Act*).

[289] It is in this context that the impugned provision, s. 68 of the *Regulations*, sets out that "[a] discipline panel shall not find an inmate responsible for a disciplinary offence unless it is satisfied on a balance of probabilities that the inmate committed that offence." It is also worth referring to the excerpt from the *Inmate Disciplinary Hearing Manual* quoted above in para. 113 of these reasons that provides guidance to discipline panels on the nature of this standard of proof. In addition, the Government of Saskatchewan has implemented seven of the nine recommendations set out in the 2019 Ombudsman's report, most of which go to providing inmates with more access to

evidence and resources to mount a defence and eliminating the bias of panel members (see Ombudsman Saskatchewan, *Annual Report 2019* (2020)).

[290] In the present case, inmates are subject to a discipline system in order to ensure that the correctional facility operates in a safe and efficient manner. Within this system, they are provided with rights that allow them to make full answer and defence to the allegations of misconduct. The disciplinary scheme provided for in the *Act* may not be ideal, but it is far from clear that inmates' liberty interests are limited more than what is required for the operation of a safe correctional facility.

(6) Conclusion on Section 7

[291] Proof beyond a reasonable doubt is not required in the context of Saskatchewan's inmate disciplinary proceedings under s. 7, and the procedural guarantees provided for in the *Act* are sufficient to ensure a fair process. Thus, the standard of proof provided for in s. 68 of the *Regulations* does not infringe s. 7.

F. *Are Any Possible Infringements of Section 7 or Section 11(d) of the Charter Justified Under Section 1?*

[292] Having found no infringement of s. 7 or s. 11(d), I am of the view that there is no need to proceed to a s. 1 analysis. This was also the approach taken by the courts below, having found no infringement of s. 7. However, if I had been of the opinion that s. 68 was not constitutionally compliant, I, as did the Court of Appeal below, would

have remitted the s. 1 determination to the application judge. On that basis and with respect, I cannot agree with the majority's conclusion that s. 68 fails the proportionality test having regard to the standard of proof beyond a reasonable doubt codified for inmate disciplinary proceedings in the federal regime. I am of the view that such a conclusion fails to account for the province's ability and resources to administer its own prison system. It is not our Court's role to question a province's ability to efficiently administer its correctional institutions on the basis of the legislative choices of the federal government.

VI. Conclusion

[293] Saskatchewan's inmate disciplinary proceedings are administrative, not criminal, in nature. They are designed to maintain prison order and provide efficient, yet fair, resolution of misconduct allegations. They are not designed to redress wrongs to society as criminal proceedings are apt to do. This makes the standard of proof set out in s. 68 of the *Regulations* constitutionally compliant, as our Court previously held in *Shubley*.

[294] Section 11 does not apply to Saskatchewan's inmate disciplinary proceedings. Having found that the proceedings are not criminal in nature and the sanctions are not true penal consequences, I am of the opinion that to face a charge of inmate misconduct is not akin to being "charged with an offence" within the meaning of s. 11 of the *Charter*.

[295] Section 7 is engaged but is not infringed. This is because the presumption of innocence, as a principle of fundamental justice guaranteed by s. 7, is applied in conjunction with the requirements of procedural fairness that serve as residual protection under s. 7. As demonstrated, these combined guarantees are sufficient to ensure respect of the principles of fundamental justice in Saskatchewan's inmate disciplinary proceedings.

[296] Having found no breach of either s. 11(d) or s. 7, I would dismiss the appeal and find s. 68 of the *Regulations* constitutional.

[297] I would not allow costs because the respondent has not sought any against John Howard Society.

Appeal allowed with costs throughout, CÔTÉ, ROWE *and* JAMAL JJ. *dissenting.*

Solicitors for the appellant: John Howard Society of Saskatchewan, Regina; Greenspan Humphrey Weinstein, Toronto.

Solicitor for the respondent: Ministry of Justice (SK), Legal Services Division, Regina.

Solicitors for the intervener the Attorney General of Canada: Department of Justice Canada, British Columbia Region — National Litigation Sector, Vancouver; Department of Justice Canada, Ontario Region — National Litigation Sector, Toronto.

Solicitor for the intervener the Attorney General of Ontario: Civil Law Division — Constitutional Law Branch — Ministry of the Attorney General, Toronto.

Solicitor for the intervener the Attorney General of Quebec: Ministère de la Justice du Québec — Direction du droit constitutionnel et autochtone, Québec.

Solicitor for the intervener the Attorney General of British Columbia: Ministry of Attorney General (British Columbia) — Legal Services Branch, Vancouver.

Solicitors for the intervener the Attorney General of Alberta: Alberta Justice — Constitutional and Aboriginal Law, Edmonton; Alberta Justice — Civil Law, Edmonton.

Solicitors for the intervener the Alberta Prison Justice Society: Nanda & Company, Edmonton.

Solicitors for the intervener Federation of Sovereign Indigenous Nations: LeBlanc Jensen, Regina; Sunchild Law, Battleford, Sask.

Solicitor for the intervener Aboriginal Legal Services Inc.: Aboriginal Legal Services, Toronto.

Solicitors for the intervener the British Columbia Civil Liberties Association: Davies Ward Phillips & Vineberg, Montréal.

Solicitors for the intervener the Criminal Lawyers' Association (Ontario): Neubauer Law, Toronto; Embry Dann, Toronto.

Solicitors for the intervener the Queen's Prison Law Clinic: Addario Law Group, Toronto.

Solicitors for the intervener Association des avocats.es carcéralistes du Québec: Trudel Johnston & Lespérance, Montréal.

Solicitors for the intervener the Canadian Civil Liberties Association: Norton Rose Fulbright Canada, Ottawa.

Solicitor for the intervener the Canadian Prison Law Association: Prisoners' Legal Services, Burnaby.

Solicitors for the intervener the West Coast Prison Justice Society: Rice Harbut Elliott, Vancouver.

A-79-03
2004 FCA 152

Les Plastiques Algar (Canada) Ltée et al. (*Appellant*)

v.

Minister of National Revenue (*Respondent*)

and

ModernWoodFabricators(M.W.F.)Inc. (*Appellant*)

v.

Minister of National Revenue (*Respondent*)

and

Snapshot Theatrical Productions Inc. (*Appellant*)

v.

Minister of National Revenue (*Respondent*)

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Paras. 4-6 *per* Letourneau J.A.

Federal Court of Appeal, Desjardins, Létourneau and Nadon JJ.A.—Montréal, January 13; Ottawa, April 6, 2004.

Paras. 51 and 59 *per* Nadon J.A.

Income Tax — Seizures — Appeal by three corporate taxpayers from F.C.T.D. decision Charter rights not violated by service with Income Tax Act, s. 231.2(1)(b) requirements to provide documents — At issue: when does inquiry become investigation attracting Charter rights — CCRA's Special Investigations Division investigating certain charities, including the Rabbinical College of Montréal, for false issuance of tax receipts — Appellants having made large donations to College — When does adversarial relationship crystallize — Powers under ss. 231.1(1), 231.2(1) not for use in criminal investigation — Necessity for search warrant — R. v. Jarvis, considered — Evidence revealing clear decision to pursue criminal investigation — Extension of unsuccessful investigation of College — M.N.R. attempting to attenuate impact of investigator's admission tax evasion objective of investigation by reliance on U.S. Supreme Court decision investigator's personal opinion not dispositive — Case distinguished as context thereof American multilayered review system for enforcement decisions — Investigator resorted to s. 231.2(1) as lacking sufficient evidence for search warrant —

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Please see in particular paras. 4-6, 51 and 59

c.

Ministre du Revenu national (*intimé*)

et

Modern Wood Fabricators (M.W.F.) Inc. (*appelante*)

c.

Ministre du Revenu national (*intimé*)

et

Snapshot Theatrical Productions Inc. (*appelante*)

c.

Ministre du Revenu national (*intimé*)

RÉPERTORIÉ: KLIGMAN c. M.R.N. (C.A.)

Cour d'appel fédérale, juges Desjardins, Létourneau et Nadon, J.C.A.—Montréal, 13 janvier; Ottawa, 6 avril 2004.

Impôt sur le revenu — Saisies — Appel interjeté par trois sociétés contre la décision par laquelle la C.F. 1re inst. avait statué que la signification de demandes péremptoires visant la production de documents conformément à l'art. 231.2(1)b) de la Loi de l'impôt sur le revenu n'avait pas porté atteinte à leurs droits reconnus par la Charte — Il s'agissait de savoir à quel moment un examen devient une enquête mettant en jeu des droits garantis par la Charte — La section des enquêtes spéciales de l'ADRC avait enquêté sur certains organismes de charité, dont le Collège rabbinique de Montréal, par suite de la remise de faux reçus à des fins fiscales — Les appelantes avaient consenti des dons importants au Collège — Il s'agit de savoir à quel moment la relation contradictoire se cristallise — Les pouvoirs conférés par les art. 231.1(1) et 231.2(1) ne peuvent pas servir dans une enquête criminelle — Un mandat de perquisition est nécessaire — Examen de l'arrêt R. c. Jarvis — La preuve révélait une décision claire de procéder à une enquête criminelle — Extension de l'enquête infructueuse visant le Collège — Le M.R.N. avait tenté d'atténuer l'effet de l'aveu de l'enquêteur selon lequel l'objectif était d'enquêter

Noteworthy that contrary to situation in Jarvis, case in hands of investigator, not auditors — Appeal allowed by majority opinion.

Constitutional Law — Charter of Rights — Unreasonable Search or Seizure — Appeal by three corporations from F.C.T.D. decision Charter ss. 7, 8 rights not violated by requirement under Income Tax Act to provide charitable donation receipts, other documents — Canada Customs and Revenue Agency investigating certain charities, to one of which appellants claimed large donations, for false issuance of tax receipts — Whether inquiry had become criminal investigation attracting Charter rights — When adversarial relationship crystallizes — Income Tax Act, ss. 231.1(1), 231.2(1) powers not for use in criminal investigation — Judge held Charter s. 7 inapplicable to corporations, latter had very limited privacy interest under s. 8 — Appeal allowed — R. v. Jarvis, considered — Argument appellants should comply, then object to admission into evidence of information, rejected — Charter protection diminished if s. 24(2) discretionary remedy only relief — Once M.N.R. resorts to criminal investigatory techniques, taxpayer may invoke all Charter protections relevant in criminal context — No distinction in that regard between corporate, individual taxpayer.

Practice — Appeals and New Trials — Appeal by three corporate taxpayers from decision of F.C.T.D. Motions Judge Charter rights not violated by requirements to provide documents under Income Tax Act — Preliminary issue: whether M.N.R. required to file cross-appeal to attack finding inquiry's predominant purpose penal liability for tax evasion determination — Issue estoppel held inapplicable as no identity of parties acting in same qualities — No necessity for cross-appeal under Federal Court Rules, 1998, r. 341 — Issue considered at length by Desjardins J.A. in dissent — What is a "collateral attack"? — Decision of Motions Judge res

sur une fraude fiscale en se fondant sur une décision de la Cour suprême américaine selon laquelle l'opinion personnelle de l'enquêteur n'était pas déterminante — Cette affaire a fait l'objet d'une distinction étant donné qu'elle s'inscrivait dans le contexte du système d'examen américain à multiples paliers de décisions en matière d'application — L'enquêteur avait eu recours à l'art. 231.2(1) parce qu'il ne disposait pas d'une preuve suffisante lui permettant de demander un mandat de perquisition — Il est à noter que contrairement à la situation existant dans l'arrêt Jarvis, l'affaire relevait de l'enquêteur plutôt que des vérificateurs — Appel accueilli par une décision majoritaire.

Droit constitutionnel — Charte des droits — Fouilles, perquisitions ou saisies abusives — Appel interjeté par trois sociétés contre une décision de la C.F. 1re inst. ayant statué qu'une demande péremptoire délivrée en vertu de la Loi de l'impôt sur le revenu aux fins de la production de reçus pour dons de charité et d'autres documents ne portait pas atteinte aux droits reconnus par les art. 7 et 8 de la Charte — L'Agence des douanes et du revenu du Canada avait enquêté sur certains organismes de charité, les appelantes ayant déduit des dons importants à l'égard de l'un d'eux, par suite de la remise de faux reçus à des fins fiscales — Il s'agissait de savoir si l'examen était devenu une enquête criminelle mettant en jeu des droits reconnus par la Charte, et à quel moment la relation contradictoire se cristallise — Les pouvoirs conférés par les art. 231.1(1) et 231.2(1) de la Loi de l'impôt sur le revenu ne peuvent pas servir dans une enquête criminelle — Le juge avait statué que l'art. 7 de la Charte ne s'appliquait pas aux sociétés et que celles-ci n'avaient qu'un droit fort restreint, en vertu de l'art. 8, pour ce qui est de la protection des renseignements personnels — Appel accueilli — Examen de l'arrêt R. c. Jarvis — La prétention selon laquelle les appelantes devaient se conformer et s'opposer par la suite à l'admissibilité en preuve des renseignements a été rejetée — La protection fournie par la Charte serait moindre si la réparation discrétionnaire prévue à l'art. 24(2) était la seule réparation possible — Une fois que le M.R.N. a recours aux techniques d'enquête criminelle, le contribuable peut invoquer toutes les protections fournies par la Charte qui sont pertinentes dans le contexte criminel — Il n'y a pas de distinction sur ce point entre les sociétés et le contribuable individuel.

Pratique — Appels et nouveaux procès — Appel interjeté par trois sociétés contre une décision par laquelle un juge des requêtes de la C.F. 1re inst. avait statué que des demandes péremptoires visant la production de documents émises en vertu de la Loi de l'impôt sur le revenu ne portaient pas atteinte aux droits reconnus par la Charte — À titre préliminaire, il s'agissait de savoir si le M.R.N. était tenu d'interjeter un appel incident pour contester la conclusion selon laquelle l'examen avait pour objet prédominant d'établir la responsabilité pénale découlant d'une fraude fiscale — Il a été conclu que l'irrecevabilité découlant d'une question déjà

judicata between individual taxpayers (who were successful and did not appeal), not between corporations, M.N.R.

This was an appeal by three corporations from the decision of a Federal Court Trial Division Motions Judge, holding that their sections 7 and 8 Charter rights were not violated when they were served with requirements to provide documents under *Income Tax Act*, paragraph 231.2(1)(*b*). At issue was the scope of the Minister's powers to conduct an inquiry into the affairs of these taxpayers and the determination of when the predominant purpose of the inquiry became an investigation attracting Charter rights.

On January 12, 2001 the CCRA Special Investigations Division issued letters titled Requirements to Provide Information and Documents pursuant to Act, paragraph 231.2(1)(*b*). Information was required concerning donations to four charitable organizations. The requested material included cancelled cheques, bank statements and donation receipts as well as the cash disbursements journal, general ledger, adjusting entries and trial balance for certain specified periods. The letters contained a warning as to the applicable statutory provisions in case of non-compliance with the requirements. One of the charities at issue—the Rabbinical College of Montréal—had been investigated regarding the false issuance of tax receipts but no charge had been laid. Taxpayers sought judicial review of the requirements, arguing breach of their rights under Charter, sections 7 and 8 and gave notice as required by *Federal Courts Act*, section 57.

The Motions Judge explained that, while taxpayers have to cooperate with CCRA auditors for tax assessment purposes, an adversarial relationship crystallizes when the predominant purpose of the inquiry becomes the determination of taxpayer's penal liability. It is then that the Charter protection against self-incrimination comes into play. The powers granted by subsections 231.1(1) and 231.2(1) cannot be used for a criminal investigation. For that purpose, a search warrant under

tranchée (issue estoppel) ne s'appliquait pas parce que les parties n'étaient pas les mêmes et n'agissaient pas au même titre — Il n'était pas nécessaire d'interjeter un appel incident en vertu de la règle 341 des Règles de la Cour fédérale (1998) — La question a été examinée à fond par la juge Desjardins en dissidence — Qu'est qu'une «contestation indirecte»? — La décision du juge des requêtes était chose jugée entre les contribuables individuels (qui avaient eu gain de cause et n'avaient pas interjeté appel) mais non entre les sociétés et le M.R.N.

Il s'agissait d'un appel interjeté par trois sociétés contre la décision par laquelle un juge des requêtes de la Section de première instance de la Cour fédérale avait statué que la signification de demandes péremptoires visant la production de documents conformément à l'alinéa 231.2(1)*b*) de la *Loi de l'impôt sur le revenu* n'avait pas porté atteinte aux droits qui leur étaient reconnus par les articles 7 et 8 de la Charte. Le litige portait sur l'étendue des pouvoirs du ministre de procéder à un examen des affaires de ces contribuables et sur la détermination du moment où l'objet prédominant de l'examen devenait une enquête mettant en jeu des droits garantis par la Charte.

Le 12 janvier 2001, la section des enquêtes spéciales de l'ADRC avait envoyé des lettres intitulées «Demande de communication de renseignements et de documents» conformément à l'alinéa 231.2(1)*b*) de la Loi. Des renseignements étaient demandés au sujet de dons qui avaient été faits à quatre organismes de charité. Les renseignements demandés se rapportaient notamment à des chèques oblitérés, à des relevés bancaires et à des reçus pour des dons ainsi qu'au journal des décaissements, au grand livre, à des écritures d'ajustement et à la balance de vérification pour certaines périodes précises. Les lettres renfermaient un avertissement au sujet des dispositions législatives applicables en cas de défaut d'observation des demandes. L'un des organismes de charité en cause—le Collège rabbinique de Montréal—avait fait l'objet d'une enquête par suite de la remise de faux reçus à des fins fiscales, mais aucune accusation n'avait été portée. Les contribuables avaient demandé le contrôle judiciaire des demandes péremptoires en alléguant qu'il avait été porté atteinte aux droits qui leur étaient reconnus aux articles 7 et 8 de la Charte et ils avaient donné l'avis requis par l'article 57 de la *Loi sur les Cours fédérales*.

Le juge des requêtes a dit que les contribuables étaient tenus de coopérer avec les vérificateurs de l'ADRC aux fins de l'établissement des cotisations d'impôt, mais qu'une relation contradictoire était créée lorsque l'examen avait pour objet prédominant d'établir la responsabilité pénale du contribuable. C'est alors que la protection contre l'auto-incrimination fournie par la Charte entre en jeu. Les pouvoirs conférés par les paragraphes 231.1(1) et 231.2(1) ne peuvent pas servir dans

Act, section 231.3 must be obtained. The Judge concluded that the evidence revealed that there had been, from the outset, an investigation in which penal sanctions for tax evasion were sought. Charter section 7 does not, however, apply to corporations and they have but a very limited privacy interest under section 8. Accordingly, while quashing the requirements received by certain individuals herein, those received by the corporations were upheld.

A preliminary issue was whether the Minister had to file a cross-appeal if he wished to attack the finding of the Motions Judge that the predominant purpose of the inquiry was the determination of the corporate appellants' penal liability for tax evasion. Concerns were expressed as to a possibility of conflicting decisions whereby the inquiry would be considered a criminal matter in respect of the individual taxpayers but civil or administrative in respect of the corporations. It was, however, concluded that issue estoppel had no application, there being no identity of parties acting in the same qualities. The corporate appellants were legal entities and parties different from the individual taxpayers. Nor had the Minister to file a cross-appeal under rule 341, since he was not seeking a disposition different from the order under appeal.

On this preliminary issue, Desjardins J.A. in her dissenting reasons for judgment, wrote that the corporations submitted that the finding that the inquiry's predominant purpose was penal in nature was binding on the individuals, corporate appellants and the Minister. The latter, not having cross-appealed, could not seek to have reopened the finding *vis-à-vis* corporate appellants as to do so would constitute a collateral attack on a vital point of the Motion Judge's reasons in a proceeding to which he was a party. The corporations had a reasonable expectation that the application of Charter sections 7 and 8 would be the only issue on appeal. In the absence of cross-appeal, corporate appellants were taken by surprise. This position could not be accepted. The Minister was entitled to question the dominant purpose finding without filing a cross-appeal. A cross-appeal is appropriate only where respondent seeks a disposition different from that of the judgment under appeal. The M.N.R. could not have filed a cross-appeal against corporate appellants since that part of the disposition of the case dealing with them was favourable to him. The Minister did not have to cross-appeal that part of the decision concerning the individuals to reach corporate appellants. By appealing the decision, corporate appellants afforded the M.N.R. the opportunity of raising all of the issues that had been before the Judge below. Corporate appellants

une enquête criminelle. Un mandat de perquisition doit être obtenu à cette fin conformément à l'article 231.3 de la Loi. Le juge avait conclu que la preuve révélait qu'il y avait dès le départ une enquête dans laquelle on cherchait à imposer des sanctions pénales pour fraude fiscale. Toutefois, l'article 7 de la Charte ne s'applique pas aux sociétés et celles-ci n'ont qu'un droit fort restreint, en vertu de l'article 8, pour ce qui est de la protection des renseignements personnels. Par conséquent, les demandes péremptoires reçues par certains particuliers en l'espèce ont été annulées, mais celles que les sociétés avaient reçues ont été confirmées.

Une question préliminaire était de savoir si le ministre était tenu d'interjeter un appel incident s'il voulait contester la conclusion du juge des requêtes selon laquelle l'examen avait pour objet prédominant d'établir la responsabilité pénale des sociétés appelantes à l'égard d'une fraude fiscale. Certaines préoccupations ont été exprimées au sujet de la possibilité que des décisions contradictoires soient rendues, par lesquelles l'enquête serait qualifiée de nature criminelle pour les contribuables individuels, mais de nature civile ou administrative pour les sociétés. Toutefois, il a été conclu que l'irrecevabilité découlant d'une question déjà tranchée (*issue estoppel*) ne s'appliquait pas parce que les parties en cause n'étaient pas les mêmes et n'agissaient pas au même titre. Les sociétés appelantes étaient des personnes morales et des parties différentes des contribuables individuels. Le ministre n'avait pas non plus à interjeter un appel incident en vertu de la règle 341 parce qu'il ne demandait pas la réformation de l'ordonnance portée en appel.

Sur cette question préliminaire, la juge Desjardins, J.C.A., dans les motifs de jugement qu'elle a prononcés en dissidence, a dit que les sociétés avaient soutenu que la conclusion selon laquelle l'objet prédominant de l'examen était de nature pénale liait les particuliers, les sociétés appelantes et le ministre. Ce dernier, qui n'avait pas interjeté d'appel incident, ne pouvait pas revenir sur la conclusion tirée à l'égard des sociétés appelantes étant donné que, ce faisant, il contesterait d'une façon indirecte un point crucial des motifs énoncés par le juge des requêtes dans une procédure à laquelle il était partie. Les sociétés pouvaient avec raison s'attendre à ce que la seule question en appel soit liée à l'application des articles 7 et 8 de la Charte. En l'absence d'un appel incident, les sociétés appelantes avaient été prises par surprise. Cette position ne pouvait pas être acceptée. Le ministre pouvait à bon droit mettre en question la conclusion relative à l'objet prédominant sans interjeter un appel incident. Il ne convient d'interjeter un appel incident que lorsque l'intimé entend demander la réformation du jugement porté en appel. Le M.R.N. n'aurait pas pu interjeter un appel incident contre les sociétés appelantes étant donné que la partie de la décision qui concernait celles-ci lui était favorable. Le ministre n'était pas tenu, afin d'atteindre les sociétés appelantes, d'interjeter un appel incident contre la partie de la décision qui concernait les

were not taken by surprise nor was the Minister launching a collateral attack on the decision below. A collateral attack presupposes an attack in the wrong forum of a decision which could have been directly attacked. The decision of the Motions Judge was *res judicata* between the M.N.R. and the individuals but not between him and the corporations.

Held (Desjardins J.A. dissenting), the appeal should be allowed.

Per Létourneau J.A. (Nadon J.A. concurring): The Minister's contention, that appellants should comply with the requirements and, as in *R. v. Jarvis*, (S.C.C.), later oppose the admission into evidence of the information, could not be accepted. In *Jarvis*, the documents already having been obtained, accused's only option at his trial for tax evasion was to challenge admissibility. The protection afforded taxpayer by the Charter would be substantially diminished if his sole relief is a discretionary remedy under subsection 24(2). In *Hunter v. Southam Inc.*, the Supreme Court of Canada stressed the importance of prior authorization before a search is conducted and the rationale given by Dickson J. in that case was extended to seizures in the reasons of Wilson J. in *Thomson Newspapers Ltd. v. Canada (Director Investigation and Research, Restrictive Trade Practices Commission)*. Furthermore, the Court in *Jarvis* made it clear that Act, subsection 231.2(1) is not available for criminal investigation purposes—investigations the predominant purpose of which is to establish a taxpayer's penal liability. When the Minister has to resort to criminal investigatory techniques, taxpayer is entitled to invoke all the Charter protections relevant in the criminal context. The Court did not distinguish between a corporate and an individual taxpayer in this regard.

The Motions Judge did not err in concluding that appellants were the subject of a criminal investigation. Investigator Faribault admitted on discovery that such was the purpose of the investigation. The evidence revealed that a clear decision had been made to pursue a criminal investigation. CCRA had undertaken a criminal investigation of several charitable organizations including the Rabbinical College of Montréal and appellants had made very substantial donations to the College. It was in the context of that criminal investigation that

particuliers. En interjetant appel de la décision, les sociétés appelantes donnaient au M.R.N. la possibilité de soulever toutes les questions dont le juge de première instance avait été saisi. Les sociétés appelantes n'ont pas été prises par surprise et le ministre ne contestait pas indirectement la décision rendue par l'instance inférieure. Une contestation indirecte présuppose une contestation devant le mauvais tribunal d'une décision qui aurait pu être contestée directement. La décision du juge des requêtes était devenue chose jugée entre le M.R.N. et les particuliers, mais non entre le M.R.N. et les sociétés.

Arrêt (la juge Desjardins, J.C.A. étant dissidente): l'appel est accueilli.

Le juge Létourneau, J.C.A. (le juge Nadon, J.C.A. souscrivant à son avis): La prétention du ministre selon laquelle les appelantes devaient se conformer aux demandes péremptoires et, comme on l'avait fait dans l'affaire *R. c. Jarvis*, (C.S.C.), s'opposer par la suite à l'admissibilité en preuve des renseignements ne pouvait pas être acceptée. Dans l'affaire *Jarvis*, les documents avaient déjà été obtenus et la seule possibilité qui s'offrait à l'accusé dans son procès pour fraude fiscale était de s'opposer à l'admissibilité des documents. La protection fournie au contribuable par la Charte serait beaucoup moindre si celui-ci pouvait uniquement demander une réparation discrétionnaire en vertu du paragraphe 24(2). Dans l'arrêt *Hunter c. Southam Inc.*, la Cour suprême du Canada a insisté sur le fait qu'il est important d'obtenir au préalable l'autorisation nécessaire pour procéder à une fouille ou à une perquisition et le raisonnement du juge Dickson dans ce jugement-là a été appliqué aux saisies dans les motifs prononcés par la juge Wilson dans l'arrêt *Thomson Newspapers Ltd. c. Canada (Directeur des enquêtes et recherches, Commission sur les pratiques restrictives du commerce)*. En outre, la Cour a clairement dit, dans l'arrêt *Jarvis*, que le paragraphe 231.2(1) de la Loi ne peut pas être invoqué pour les besoins d'une enquête criminelle,—c'est-à-dire une enquête dont l'objet prédominant est d'établir la responsabilité pénale du contribuable. Lorsque le ministre a recours aux techniques d'enquête criminelle, le contribuable peut à bon droit invoquer toutes les protections fournies par la Charte qui sont pertinentes dans le contexte criminel. La Cour n'a pas fait de distinction entre une société et un contribuable individuel sur ce point.

Le juge des requêtes n'a pas commis d'erreur en concluant que les appelantes faisaient l'objet d'une enquête criminelle. L'enquêteur Faribault a admis lors de l'interrogatoire préalable que tel était l'objet de l'enquête. La preuve révélait qu'une décision claire avait été prise de procéder à une enquête criminelle. L'ADRC avait entrepris une enquête criminelle sur plusieurs organismes de charité, notamment le Collège rabbinique de Montréal auquel les appelantes avaient consenti des dons importants. C'était dans le contexte de cette enquête

CCRA began its investigation of appellants. In fact, one of the charities investigated was charged and pleaded guilty to providing false charitable gift receipts. For reasons unknown to the Court, the College was not charged. Faribault's investigation of appellants was nothing more than extension of the unsuccessful criminal investigation of the Rabbinical College of Montréal. His attempt was to secure evidence of fraud by looking at the same matter from a different perspective: that of the donors. Counsel for the Minister sought to attenuate the adverse impact of Faribault's admission under oath, that the objective was to investigate tax evasion and not just to issue tax assessments, by suggesting that this was merely the investigator's personal view and by making reference to an American case—*United States v. La Salle Nat'l Bank*—in which it was held that while a special agent is an important actor in the process, his motivation is hardly dispositive of the issue. The Court could not agree, on the facts herein, that Faribault's admission was just an expression of personal opinion. His duty, as a Special Investigations member, was to investigate significant cases of suspected tax evasion and to obtain evidence for prosecution in the courts. A further duty was to publicize convictions as a deterrence to others. The American case cited by the Minister was distinguished on its facts and its context was the American multilayered system of reviews of enforcement decisions. Furthermore, strong dissenting opinions were delivered in that United States Supreme Court decision, handed down 26 years ago, and it may no longer be good law even in the U.S.A.

Faribault had suspicions that a crime had been committed but, lacking sufficient evidence to seek a search warrant, resorted to the subsection 231.2(1) requirement powers thereby circumventing the hurdle of judicial scrutiny. He was attempting to do indirectly what he could not do directly: obtain incriminating evidence without a warrant. It was noted that this was done prior to the decision in *Jarvis* and at a time when the line between use of the requirement and search powers pursuant to warrant was not clearly drawn.

A consideration of the non-exhaustive list of factors for determining whether the relationship between state and taxpayer has become adversarial, set forth by the Supreme Court in *Jarvis*, was unnecessary but was carried out and it

criminelle que l'ADRC avait entrepris son enquête sur les appelantes. De fait, l'un des organismes de charité visés par l'enquête avait été accusé et avait plaidé coupable d'avoir remis de faux reçus de dons de charité. Pour des raisons que la Cour ne connaissait pas, aucune accusation n'avait été portée contre le Collège. L'enquête que M. Faribault avait menée à l'égard des appelantes était purement une extension de l'enquête criminelle infructueuse visant le Collège rabbinique de Montréal. M. Faribault essayait d'obtenir une preuve de fraude en examinant la même affaire sous une perspective différente, c'est-à-dire en s'attachant aux donateurs. L'avocat du ministre a tenté d'atténuer l'effet défavorable de l'aveu que M. Faribault avait fait sous serment, à savoir que l'objectif était d'enquêter sur une fraude fiscale et non simplement d'établir des cotisations d'impôt, en soutenant qu'il s'agissait simplement d'une opinion personnelle de la part de l'enquêteur et en se fondant sur une décision américaine—*United States v. La Salle Nat'l Bank*—où il avait été statué qu'un agent spécial est un acteur important dans le processus, mais que ses motifs sont loin d'être déterminants. Eu égard aux faits de l'espèce, la Cour ne pouvait pas souscrire à l'avis selon lequel l'aveu de M. Faribault était une simple expression d'une opinion personnelle. Sa responsabilité, à titre de membre des enquêtes spéciales, était d'enquêter sur des cas importants de présumée fraude fiscale et de recueillir des preuves aux fins de poursuites devant les tribunaux. Il était aussi chargé de faire connaître les condamnations judiciaires au public dans le but de dissuader d'autres personnes. La décision américaine citée par le ministre a fait l'objet d'une distinction eu égard à ses faits; elle s'inscrivait dans le contexte du système américain d'examen à multiples paliers de décisions en matière d'application. De plus, cette décision de la Cour suprême américaine, rendue 26 ans plus tôt, contenait de vigoureuses opinions dissidentes et elle ne représente peut-être plus l'état du droit même aux États-Unis.

M. Faribault soupçonnait qu'un crime avait été commis mais, en l'absence d'une preuve suffisante lui permettant de demander un mandat de perquisition, il avait eu recours aux pouvoirs de contrainte prévus au paragraphe 231.2(1), éliminant ainsi l'entrave représentée par un examen judiciaire. Il tentait de faire indirectement ce qu'il ne pouvait pas faire directement: obtenir des preuves incriminantes sans mandat. Les événements remontaient à une époque où la ligne de démarcation entre le recours aux pouvoirs de contrainte et le recours aux pouvoirs de perquisition conformément à un mandat était floue et où la décision n'avait pas encore été rendue dans l'affaire *Jarvis*.

Un examen de la liste non exhaustive des facteurs dont il faut tenir compte pour décider si la relation entre l'État et un contribuable est devenue contradictoire, liste dressée par la Cour suprême dans l'arrêt *Jarvis*, était inutile; cet examen a

confirmed the conclusion that the investigation had indeed become criminal in nature.

Per Nadon J.A. (concurring): The issue here was whether a clear decision to proceed with a criminal investigation had been made, not whether such an investigation ought to have been commenced. It was important to note that in *Jarvis*—a case relied upon by both Létourneau J.A. in his majority opinion and by Desjardins J.A. in dissent—the inquiry had at all times been in the hands of auditors rather than investigators. That was the context of the discussion in that part of the Supreme Court's reasons subtitled "Delineating the Bounds Between Audit and Investigation: Nature of the Inquiry". The Court's intention was to prevent the audit section from conducting a disguised criminal investigation. It wished to remind judges that there is a line which the auditors must not cross and to make it clear that once a criminal investigation has been undertaken, a taxpayer cannot be forced to comply with the subsections 231.1(1) and 231.2(1) requirement powers. The facts herein were quite different in that, when the requirements were sent, the matter was clearly in the hands of an investigator. Whether CCRA had at that time enough information to initiate a criminal investigation was irrelevant. When the matter is in the hands of the investigators, as it was here, there is no necessity for considering the factors set forth at paragraph 94 of *Jarvis*.

Per Desjardins J.A. (dissenting): The Judge below did not err in applying *Jarvis* to the case at bar. As was said in that judgment by Iacobucci and Major JJ., it "would be a fiction to say that the adversarial relationship only comes into being when charges are laid". Their Lordships added that situations where Charter rights are violated should be avoided rather than remedied.

Courts have characterized the *Income Tax Act* as essentially regulatory and administrative in nature and taxpayers are kept honest by a system of random monitoring. The success of the scheme also demands the resort to adequate investigation and provision for effective penalties. The Act requires disclosure of a substantial amount of information by taxpayers and non-compliance with the filing requirements is a summary conviction offence. Additional offences are created by section 239 but that section does not alter the Act's administrative nature. Non-compliance with the mandatory provisions of the legislation can, however, result in the laying of criminal charges under that section. At that stage, the Charter must receive contextual application. The Minister's subsections 231.1(1) and 231.2(1) powers to administer the Act do not extend to section 239 prosecutions. As noted by the Court in

quand même été effectué et il a confirmé la conclusion selon laquelle l'enquête était devenue une enquête criminelle.

Le juge Nadon, J.C.A. (souscrivant quant au résultat): Il s'agissait ici de savoir si une décision claire de procéder à une enquête criminelle avait été prise plutôt que de décider s'il fallait entreprendre une telle enquête. Il était important de noter que dans l'arrêt *Jarvis*—sur lequel le juge Létourneau, dans les motifs qu'il a prononcés au nom de la majorité, et la juge Desjardins en dissidence se sont fondés—l'examen avait toujours relevé des vérificateurs plutôt que des enquêteurs. Tel était le contexte de l'analyse figurant dans la partie des motifs de la Cour suprême intitulée: «La délimitation de la frontière entre une vérification et une enquête: la nature de l'examen». La Cour voulait empêcher la section de la vérification de mener une enquête criminelle déguisée. Elle voulait rappeler aux juges qu'il y a une ligne de démarcation que les vérificateurs ne doivent pas franchir et dire clairement qu'une fois une enquête criminelle engagée, le contribuable ne peut pas être contraint à se soumettre aux pouvoirs prévus aux paragraphes 231.1(1) et 231.2(1). Les faits de la présente espèce étaient fort différents en ce sens que, lorsque les demandes péremptoires ont été envoyées, l'affaire était clairement entre les mains d'un enquêteur. Il importait peu de savoir si l'ADRC avait à ce moment-là suffisamment de renseignements pour entreprendre une enquête criminelle. Lorsque l'affaire est entre les mains des enquêteurs, comme c'était ici le cas, il n'est pas nécessaire d'examiner les facteurs énoncés au paragraphe 94 de l'arrêt *Jarvis*.

La juge Desjardins, J.C.A. (dissidente): Le juge de première instance n'a pas commis d'erreur en appliquant l'arrêt *Jarvis* en l'espèce. Comme l'ont reconnu les juges Iacobucci et Major dans ce jugement, ce «serait une fiction de dire que la relation de nature contradictoire ne prend naissance qu'au moment du dépôt des accusations». Ils ont ajouté qu'il faut éviter des situations dans lesquelles il est porté atteinte aux droits garantis par la Charte plutôt que d'y remédier.

Les tribunaux judiciaires ont dit que la *Loi de l'impôt sur le revenu* est essentiellement de nature réglementaire et administrative et qu'un système de vérification au hasard assure l'honnêteté des contribuables. L'efficacité du régime exige également la tenue d'enquêtes appropriées et l'existence de sanctions efficaces. La Loi exige que les contribuables révèlent une multitude de renseignements et le non-respect des exigences de production constitue une infraction punissable sur déclaration de culpabilité par procédure sommaire. L'article 239 crée des infractions additionnelles, mais cette disposition ne change en rien la nature administrative de la Loi. Toutefois, l'inobservation des dispositions obligatoires de la législation peut donner lieu à des accusations criminelles en vertu de cette disposition. À ce stade, la Charte doit être appliquée suivant une approche contextuelle. Les pouvoirs du ministre

Jarvis, when the predominant purpose of the inquiry becomes the determination of penal liability, CCRA officials must relinquish the subsections 231.1(1) and 231.2(1) inspection and requirement powers and seek a search warrant under section 231.3.

A finding as to the predominant purpose of an inquiry is a question of mixed fact and law. Absent a clear decision to undertake a criminal investigation, the Court has to assess the totality of the circumstances to determine whether the relationship between the state and the individual has become adversarial in nature. A number of the criteria identified in *Jarvis* were inapplicable herein since, as acknowledged by the Minister, the CCRA's Audit Section was at no time involved with this case. But the Motions Judge failed to actually consider the three *Jarvis* criteria which he identified as requiring analysis. The characterization of whether a clear decision to pursue a criminal investigation had been made should not be considered from a pure criminal law perspective. Rather, it flows from the Act's purpose and nature which is essentially administrative. The evidence did not satisfy the *Jarvis* test for a clear decision. While CCRA instructed investigator Faribault to look principally for evidence of a penal nature, it could not be taken from that directive that the Agency had decided to pursue a criminal investigation. It had no evidence upon which to base such a decision. An adversarial relationship had yet to crystallize and the administrative process could legally continue. The request to produce was in order. A clear decision must be distinguished from the appearance of a decision.

It was accordingly necessary to conduct a detailed analysis of three of the *Jarvis* factors. (1) The Faribault evidence revealed that when the requirements were issued, CCRA was without reasonable grounds to lay charges. A decision to proceed with a criminal investigation could not then have been made. (2) The general conduct of the authorities herein was not such as to support a conclusion that a criminal investigation was in progress as these words are to be understood in an income tax context. Even if there are reasonable grounds to suspect an offence, that does not necessarily mean that the inquiry has become an investigation. (3) The final relevant *Jarvis* factor was the question whether the evidence sought related to taxpayer's liability generally or only to penal liability. While it could not be determined from the record whether the Minister was out of time to reassess, the superior interest of the income tax system had to prevail. The Judge erred by misapplying of the tests in *Jarvis*.

d'administrer la Loi, en vertu des paragraphes 231.1(1) et 231.2(1) n'incluent pas les poursuites fondées sur l'article 239. Comme la Cour l'a fait remarquer dans l'arrêt *Jarvis*, lorsqu'un examen a pour objet prédominant d'établir la responsabilité pénale, les fonctionnaires de l'ADRC doivent renoncer aux pouvoirs d'inspection et de contrainte conférés par les paragraphes 231.1(1) et 231.2(1) et demander un mandat de perquisition conformément à l'article 231.3.

Une conclusion relative à l'objet prédominant d'un examen est une question mixte de fait et de droit. En l'absence d'une décision claire de procéder à une enquête criminelle, la Cour doit soupeser les circonstances dans leur ensemble afin de décider si la relation entre l'État et le particulier est devenue une relation de nature contradictoire. Un certain nombre de critères énoncés dans l'arrêt *Jarvis* ne s'appliquaient pas en l'espèce étant donné que, comme le ministre l'a reconnu, la section de vérification de l'ADRC n'a jamais été en cause dans cette affaire. Toutefois, le juge des requêtes n'a pas procédé à une analyse des trois facteurs énoncés dans l'arrêt *Jarvis* qui, selon lui, exigeaient une analyse. Il ne faut pas considérer la question de savoir si une décision claire de procéder à une enquête criminelle a été prise en ayant simplement à l'esprit le droit criminel. Au contraire, cela ressort de la nature et de l'objet de la Loi, qui est essentiellement de nature administrative. La preuve ne satisfait pas au critère préconisé dans l'arrêt *Jarvis* à l'égard d'une décision claire. L'ADRC avait demandé à l'enquêteur Faribault de chercher principalement une preuve de nature pénale, mais on ne saurait conclure à partir de cette directive que l'Agence avait décidé de procéder à une enquête criminelle. Elle ne disposait d'aucun élément de preuve justifiant pareille décision. Aucune relation contradictoire ne s'était cristallisée et la procédure administrative pouvait légalement se poursuivre. La demande de production était en règle. Il faut faire une distinction entre une décision claire et une décision apparente.

Il fallait donc procéder à une analyse détaillée de trois facteurs énoncés dans l'arrêt *Jarvis*. 1) Le témoignage présenté par M. Faribault révélait que lorsque les demandes péremptoires avaient été délivrées, l'ADRC n'avait pas de motifs raisonnables de porter des accusations. On n'aurait pas alors pu prendre une décision de procéder à une enquête criminelle. 2) L'ensemble de la conduite des autorités en l'espèce ne permettait pas de conclure qu'une enquête criminelle était en cours selon le sens attribué à ces mots dans un contexte fiscal. Même lorsqu'il existe des motifs raisonnables de soupçonner qu'une infraction a été commise, il n'est pas toujours vrai que l'examen est devenu une enquête. 3) Le dernier facteur pertinent énoncé dans l'arrêt *Jarvis* se rapportait à la question de savoir si la preuve recherchée était pertinente quant à la responsabilité générale du contribuable ou uniquement quant à sa responsabilité pénale. Le dossier ne permettait pas de décider si le délai pour établir une nouvelle

Yet another error was committed by the Judge below. While (wrongly) concluding that the predominant purpose of the investigation had become criminal in nature he nevertheless concluded that the requirements, as against the corporations, were valid under the Charter. This was wrong since, if a criminal investigation had begun, search warrants would have been required.

STATUTES AND REGULATIONS JUDICIALLY CONSIDERED

Canadian Charter of Rights and Freedoms, being Part I of the *Constitution Act, 1982*, Schedule B, *Canada Act 1982*, 1982, c. 11 (U.K.) [R.S.C., 1985, Appendix II, No. 44], ss. 7, 8, 24,(1),(2).

Criminal Code, R.S.C., 1985, c. C-46, s. 487.

Federal Courts Act, R.S.C., 1985, c. F-7, ss. 1 (as am. by S.C. 2002, c. 8, s. 14), 2(1) "final judgment" (as am. by S.C. 1990, c. 8, s. 1), 27 (as am. by S.C. 2002, c. 8, s. 34), 57 (as am. by S.C. 1990, c. 8, s. 19; 2002, c. 8, s. 54).

Federal Court Rules, 1998, SOR/98-106, r. 341.

Income Tax Act, R.S.C., 1985 (5th Supp.), c. 1, ss. 163 (as am. by S.C. 1994, c. 7, Sch. II, s. 135; Sch. VII, s. 17; c. 8, s. 26; 1995, c. 3, s. 48; 1996, c. 21, s. 43; 1997, c. 25, s. 52; 1998, c. 19, ss. 45, 189; 2000, c. 12, s. 142; c. 19, s. 49), 230 (as am. by S.C. 1994, c. 21, s. 105; 1998, c. 19, s. 227), 231.1(1),(2),(3) (as am. by S.C. 1994, c. 21, s. 107), 231.2(1) (as am. by S.C. 2000, c. 30, s. 176), 231.3 (as am. by S.C. 1994, c. 21, s. 108), 238, 239 (as am. by S.C. 1998, c. 19, s. 235).

CASES JUDICIALLY CONSIDERED

FOLLOWED:

Hunter et al. v. Southam Inc., [1984] 2 S.C.R. 145; (1984), 55 A.R. 291; 11 D.L.R. (4th) 641; [1984] 6 W.W.R. 577; 33 Alta. L.R. (2d) 193; 27 B.L.R. 297; 14 C.C.C. (3d) 97; 2 C.P.R. (3d) 1; 41 C.R. (3d) 97; 9 C.R.R. 355; 84 DTC 6467; 55 N.R. 241; *Thomson Newspapers Ltd. v. Canada (Director of Investigation and Research, Restrictive Trade Practices Commission)*, [1990] 1 S.C.R. 425; (1990), 67 D.L.R. (4th) 161; 54 C.C.C. (3d) 417; 29 C.P.R. (3d) 97; 76 C.R. (3d) 129; 47 C.R.R. 1; 106 N.R. 161; 39 O.A.C. 161; *Toronto (City) v. C.U.P.E., Local 79*, [2003] 3 S.C.R. 77; (2003), 232 D.L.R. (4th) 385; 17 C.R. (6th) 276; 311 N.R. 201; 179 O.A.C. 291; *Starr v.*

cotisation était expiré, mais l'intérêt supérieur du système fiscal devait l'emporter. Le juge a appliqué d'une façon erronée les critères élaborés dans l'arrêt *Jarvis*.

Toutefois, le juge de première instance a commis une autre erreur. Bien qu'il ait statué (erronément) que l'objet prédominant de l'enquête était désormais de nature criminelle, il a néanmoins conclu que les demandes péremptoires adressées aux sociétés étaient valides selon la Charte. Cette conclusion était erronée puisque, si une enquête criminelle avait été engagée, des mandats de perquisition auraient été nécessaires.

LOIS ET RÈGLEMENTS

Charte canadienne des droits et libertés, qui constitue la partie I de la *Loi constitutionnelle de 1982*, annexe B, *Loi de 1982 sur le Canada*, 1982, ch. 11 (R.-U.) [L.R.C. (1985), appendice II, nº 44], art. 7, 8, 24(1),(2).

Code criminel, L.R.C. (1985), ch. C-46, art. 487.

Loi de l'impôt sur le revenu, L.R.C. (1985) (5e suppl.), ch. 1, art. 163 (mod. par L.C. 1994, ch. 7, ann. II, art. 135; ann. VII, art. 17; ch. 8, art. 26; 1995, ch. 3, art. 48; 1996, ch. 21, art. 43; 1997, ch. 25, art. 52; 1998, ch. 19, art. 45, 189; 2000, ch. 12, art. 142; ch. 19, art. 49), 230 (mod. par L.C. 1994, ch. 21, art. 105; 1998, ch. 19, art. 227), 231.1(1),(2),(3) (mod. par L.C. 1994, ch. 21, art. 107), 231.2(1) (mod. par L.C. 2000, ch. 30, art. 176), 231.3 (mod. par L.C. 1994, ch. 21, art. 108), 238, 239 (mod. par L.C. 1998, ch. 19, art. 235).

Loi sur les Cours fédérales, L.R.C. (1985), ch. F-7, art. 1 (mod. par L.C. 2002, ch. 8, art. 14), 2(1) «jugement définitif» (mod. par L.C. 1990, ch. 8, art. 1), 27 (mod. par L.C. 2002, ch. 8, art. 34), 57 (mod. par L.C. 1990, ch. 8, art. 19; 2002, ch. 8, art. 54).

Règles de la Cour fédérale (1998), DORS/98-106, règle 341.

JURISPRUDENCE

DÉCISIONS SUIVIES:

Hunter et autres c. Southam Inc., [1984] 2 R.C.S. 145; (1984), 55 A.R. 291; 11 D.L.R. (4th) 641; [1984] 6 W.W.R. 577; 33 Alta. L.R. (2d) 193; 27 B.L.R. 297; 14 C.C.C. (3d) 97; 2 C.P.R. (3d) 1; 41 C.R. (3d) 97; 9 C.R.R. 355; 84 DTC 6467; 55 N.R. 241; *Thomson Newspapers Ltd. c. Canada (Directeur des enquêtes et recherches, Commission sur les pratiques restrictives du commerce)*, [1990] 1 R.C.S. 425; (1990), 67 D.L.R. (4th) 161; 54 C.C.C. (3d) 417; 29 C.P.R. (3d) 97; 76 C.R. (3d) 129; 47 C.R.R. 1; 106 N.R. 161; 39 O.A.C. 161; *Toronto (Ville) c. S.C.E.P., section locale 79*, [2003] 3 R.C.S. 77; (2003), 232 D.L.R. (4th) 385; 17 C.R. (6th) 276; 311 N.R. 201;

Houlden, [1990] 1 S.C.R. 1366; (1990), 68 D.L.R. (4th) 641; 55 C.C.C. (3d) 472; 110 N.R. 81; 41 O.A.C. 161.

APPLIED:

Blueberry River Indian Band v. Canada (Department of Indian Affairs and Northern Development), [2001] 4 F.C. 451; (2001), 201 D.L.R. (4th) 35; [2001] 3 C.N.L.R. 72; 6 C.P.C. (5th) 1; 274 N.R. 304 (C.A.).

DISTINGUISHED:

United States v. La Salle Nat'l Bank, 98 S.Ct. 2357 (1978).

CONSIDERED:

R. v. Jarvis, [2002] 3 S.C.R. 757; (2002), 317 A.R. 1; 219 D.L.R. (4th) 233; [2003] 3 W.W.R. 197; 8 Alta. L.R. (4th) 1; 169 C.C.C. (3d) 1; 6 C.R. (6th) 23; 101 C.R.R. (2d) 35; [2003] 1 C.T.C. 135; 2002 DTC 7547; 295 N.R. 201; *Knox Contracting Ltd. v. Canada*, [1990] 2 S.C.R. 338; (1990), 106 N.B.R. (2d) 408; 73 D.L.R. (4th) 110; 58 C.C.C. (3d) 65; [1990] 2 C.T.C. 262; 90 DTC 6447; 110 N.R. 171; *R. v. Ling*, [2002] 3 S.C.R. 814; (2002), 219 D.L.R. (4th) 279; [2003] 2 W.W.R. 403; 8 B.C.L.R. (4th) 1; 173 B.C.A.C. 161; 169 C.C.C. (3d) 46; 6 C.R. (6th) 64; 99 C.R.R. (2d) 313; 295 N.R. 273; *Devinat v. Canada (Immigration and Refugee Board)*, [2000] 2 F.C. 212; (1999), 181 D.L.R. (4th) 441; 18 Admin. L.R. (3d) 243; 31 Admin. L.R. (3d) 174; 3 Imm. L.R. (3d) 1; 250 N.R. 326 (C.A.); leave to appeal to S.C.C. refused [2000] 2 S.C.R. vii; *Wilson v. R.*, [1983] 2 S.C.R. 594; (1983), 4 D.L.R. (4th) 577; [1984] 1 W.W.R. 481; 26 Man. R. (2d) 194; 9 C.C.C. (3d) 97; 37 C.R. (3d) 97; 51 N.R. 321; *R. v. McKinlay Transport Ltd.*, [1990] 1 S.C.R. 627; (1990), 68 D.L.R. (4th) 568; 55 C.C.C. (3d) 530; 76 C.R. (3d) 283; 47 C.R.R. 151; [1990] 2 C.T.C. 103; 90 DTC 6243; 106 N.R. 385; 106 N.R. 385; 39 O.A.C. 385; *Del Zotto v. Canada*, [1997] 3 F.C. 40; (1997), 147 D.L.R. (4th) 457; 116 C.C.C. (3d) 123; 46 C.R.R. (2d) 324; [1997] 3 C.T.C. 199; 97 DTC 5328; 215 N.R. 184 (C.A.); revd [1999] 1 S.C.R. 3; (1999), 169 D.L.R. (4th) 130; 131 C.C.C. (3d) 353; 61 C.R.R. (2d) 1; [1998] 1 C.T.C. 113; 99 DTC 5029; 252 N.R. 201; *Housen v. Nikolaisen*, [2002] 2 S.C.R. 235; (2002), 211 D.L.R. (4th) 577; [2002] 7 W.W.R. 1; 10 C.C.L.T. (3d) 157; 30 M.P.L.R. (3d) 1; 286 N.R. 1; 219 Sask. R. 1.

REFERRED TO:

Roberts v. Canada, [2000] 3 C.N.L.R. 303; (1999), 247 N.R. 350; 27 R.P.R. (3d) 157 (F.C.A.); *Air Canada v. Canada (Commissioner of Competition)*, [2002] 4 F.C.

179 O.A.C. 291; *Starr c. Houlden*, [1990] 1 R.C.S. 1366; (1990), 68 D.L.R. (4th) 641; 55 C.C.C. (3d) 472; 110 N.R. 81; 41 O.A.C. 161.

DÉCISION APPLIQUÉE:

Bande indienne de Blueberry River c. Canada (Ministère des Affaires indiennes et du Nord canadien), [2001] 4 C.F. 451; (2001), 201 D.L.R. (4th) 35; [2001] 3 C.N.L.R. 72; 6 C.P.C. (5th) 1; 274 N.R. 304 (C.A.).

DISTINCTION FAITE D'AVEC:

United States v. La Salle Nat'l Bank, 98 S.Ct. 2357 (1978).

DÉCISIONS EXAMINÉES:

R. c. Jarvis, [2002] 3 R.C.S. 757; (2002), 317 A.R. 1; 219 D.L.R. (4th) 233; [2003] 3 W.W.R. 197; 8 Alta. L.R. (4th) 1; 169 C.C.C. (3d) 1; 6 C.R. (6th) 23; 101 C.R.R. (2d) 35; [2003] 1 C.T.C. 135; 2002 DTC 7547; 295 N.R. 201; *Knox Contracting Ltd. c. Canada*, [1990] 2 R.C.S. 338; (1990), 106 N.B.R. (2d) 408; 73 D.L.R. (4th) 110; 58 C.C.C. (3d) 65; [1990] 2 C.T.C. 262; 90 DTC 6447; 110 N.R. 171; *R. c. Ling*, [2002] 3 R.C.S. 814; (2002), 219 D.L.R. (4th) 279; [2003] 2 W.W.R. 403; 8 B.C.L.R. (4th) 1; 173 B.C.A.C. 161; 169 C.C.C. (3d) 46; 6 C.R. (6th) 64; 99 C.R.R. (2d) 313; 295 N.R. 273; *Devinat c. Canada (Commission de l'immigration et du statut de réfugié)*, [2000] 2 C.F. 212; (1999), 181 D.L.R. (4th) 441; 18 Admin. L.R. (3d) 243; 31 Admin. L.R. (3d) 174; 3 Imm. L.R. (3d) 1; 250 N.R. 326 (C.A.); autorisation de pourvoi à la C.S.C. refusée [2000] 2 R.C.S. vii; *Wilson c. R.*, [1983] 2 R.C.S. 594; (1983), 4 D.L.R. (4th) 577; [1984] 1 W.W.R. 481; 26 Man. R. (2d) 194; 9 C.C.C. (3d) 97; 37 C.R. (3d) 97; 51 N.R. 321; *R. c. McKinlay Transport Ltd.*, [1990] 1 R.C.S. 627; (1990), 68 D.L.R. (4th) 568; 55 C.C.C. (3d) 530; 76 C.R. (3d) 283; 47 C.R.R. 151; [1990] 2 C.T.C. 103; 90 DTC 6243; 106 N.R. 385; 106 N.R. 385; 39 O.A.C. 385; *Del Zotto c. Canada*, [1997] 3 C.F. 40; (1997), 147 D.L.R. (4th) 457; 116 C.C.C. (3d) 123; 46 C.R.R. (2d) 324; [1997] 3 C.T.C. 199; 97 DTC 5328; 215 N.R. 184 (C.A.); infirmée [1999] 1 R.C.S. 3; (1999), 169 D.L.R. (4th) 130; 131 C.C.C. (3d) 353; 61 C.R.R. (2d) 1; [1998] 1 C.T.C. 113; 99 DTC 5029; 252 N.R. 201; *Housen c. Nikolaisen*, [2002] 2 R.C.S. 235; (2002), 211 D.L.R. (4th) 577; [2002] 7 W.W.R. 1; 10 C.C.L.T. (3d) 157; 30 M.P.L.R. (3d) 1; 286 N.R. 1; 219 Sask. R. 1.

DÉCISIONS CITÉES:

Roberts c. Canada, [2000] 3 C.N.L.R. 303; (1999), 247 N.R. 350; 27 R.P.R. (3d) 157 (C.A.F.); *Air Canada c. Canada (Commissaire de la concurrence)*, [2002] 4 C.F.

598; (2002), 18 C.P.R. (4th) 31; 288 N.R. 113 (C.A.); *Redpath Industries Ltd. v. Fednav Ltd.* (1994), 113 D.L.R. (4th) 764; 166 N.R. 72 (F.C.A.).

AUTHORS CITED

Canada. Department of National Revenue. Taxation. Information Circular No. 73-10R3. "Tax Evasion" (February 13, 1987).

Sopinka, John and Mark A. Gelowitz. *The Conduct of an Appeal*, 2nd ed. Toronto: Butterworths, 2000.

APPEAL by three corporate taxpayers from the decision of a Motions Judge ([2003] 3 F.C. 569; (2003), 103 C.R.R. (2d) 261; 2003 DTC 5100; 227 F.T.R. 126 (T.D.)), that their rights under Charter sections 7 and 8 had not been violated by service with requirements to provide documents under *Income Tax Act*, paragraph 231.2(1)(*b*). Appeal allowed.

APPEARANCES:

Sébastien Rheault for appellants.
Gilles D. Villeneuve for respondent.

SOLICITORS OF RECORD:

Barsalou Lawson, Montréal, for appellants.
Deputy Attorney General of Canada for respondent.

The following are the reasons for judgment rendered in English by

[1] LÉTOURNEAU J.A.: I have had the benefit of reading the reasons for judgment of my colleague, Desjardins J.A.

Availability of judicial review proceedings

[2] I agree with her that the Motions Judge [[2003] 3 F.C. 569 (T.D.)] made no error when he ruled that the appellants could challenge by way of judicial review the respondent's requirements to provide information issued on behalf of the Minister of National Revenue (Minister) pursuant to subsection 231.2(1) [as am. by S.C. 2000, c. 30, s. 176] of the *Income Tax Act*, R.S.C., 1985 (5th

598; (2002), 18 C.P.R. (4th) 31; 288 N.R. 113 (C.A.); *Redpath Industries Ltd. c. Fednav Ltd.* (1994), 113 D.L.R. (4th) 764; 166 N.R. 72 (C.A.F.).

DOCTRINE

Canada. Ministère du Revenu national. Impôt. Circulaire d'information no 73-10R3. «Évasion fiscale» (13 février 1987).

Sopinka, John and Mark A. Gelowitz. *The Conduct of an Appeal*, 2nd ed. Toronto: Butterworths, 2000.

APPEL interjeté par trois sociétés contre la décision d'un juge des requêtes ([2003] 3 C.F. 569; (2003), 103 C.R.R. (2d) 261; 2003 DTC 5100; 227 F.T.R. 126 (1re inst.)), selon laquelle la signification de demandes péremptoires de production de documents délivrées en vertu de l'alinéa 231.2(1)*b*) de la *Loi de l'impôt sur le revenu* ne portait pas atteinte aux droits qui leur étaient reconnus par les articles 7 et 8 de la Charte. Appel accueilli.

ONT COMPARU:

Sébastien Rheault pour les appelantes.
Gilles D. Villeneuve pour l'intimé.

AVOCATS INSCRITS AU DOSSIER:

Barsalou Lawson, Montréal, pour les appelantes.
Le sous-procureur général du Canada pour l'intimé.

Ce qui suit est la version française des motifs du jugement rendus par

[1] LE JUGE LÉTOURNEAU, J.C.A.: J'ai eu l'avantage de lire les motifs du jugement de ma collègue, la juge Desjardins.

Possibilité d'un contrôle judiciaire

[2] Je suis d'accord avec ma collègue pour dire que le juge des requêtes [[2003] 3 C.F. 569 (1re inst.)] n'a pas commis d'erreur en décidant que les appelantes pouvaient contester, par voie de contrôle judiciaire, les demandes péremptoires, émises pour le compte du ministre du Revenu national (le ministre), de fournir des renseignements conformément au paragraphe 231.2(1)

Supp.), c. 1 (Act).

[3] I do not accept the respondent's contention that the appellants should comply with the requirements and, as it was done in *R. v. Jarvis*, [2002] 3 S.C.R. 757, later oppose the admissibility into evidence of the information thus provided. In *Jarvis*, the documents had already been obtained and the only option left to the accused in his criminal trial for tax evasion was to object to their admissibility. The respondent's contention means that a taxpayer would be prohibited from asserting preventively his Charter [*Canadian Charter of Rights and Freedoms*, being Part I of the *Constitution Act, 1982*, Schedule B, *Canada Act 1982*, 1982, c. 11 (U.K.) [R.S.C., 1985, Appendix II, No. 44]] right to protection against unreasonable searches and seizures and from impeding its imminent violation. He would only be entitled to apply for a discretionary remedy under subsection 24(2) of the Charter. This would seriously undermine the beneficial and protective effect of the Charter.

[4] In *Hunter et al. v. Southam Inc.*, [1984] 2 S.C.R. 145, at page 160, Dickson J. [as he then was] stressed the importance of prior authorization before a search is conducted:

> If the issue to be resolved in assessing the constitutionality of searches under s. 10 were in fact the governmental interest in carrying out a given search outweighed that of the individual in resisting the governmental intrusion upon his privacy, then it would be appropriate to determine the balance of the competing interests after the search had been conducted. Such a *post facto* analysis would, however, be seriously at odds with the purpose of s. 8. That purpose is, as I have said, to protect individuals from unjustified state intrusions upon their privacy. That purpose requires a means of preventing unjustified searches before they happen, not simply of determining, after the fact, whether they ought to have occurred in the first place. This, in my view, can only be accomplished by a system of prior authorization, not one of subsequent validation. [Emphasis in original.]

[mod. par L.C. 2000, ch. 30, art. 176] de la *Loi de l'impôt sur le revenu*, L.R.C. (1985) (5e suppl.), ch. 1 (la Loi).

[3] Je n'accepte pas la prétention de l'intimé selon laquelle les appelantes devraient se conformer aux demandes péremptoires et, comme on l'a fait dans l'affaire *R. c. Jarvis*, [2002] 3 R.C.S. 757, s'opposer par la suite à l'admissibilité en preuve des renseignements ainsi fournis. Dans l'affaire *Jarvis*, les documents avaient déjà été obtenus et la seule possibilité qui s'offrait à l'accusé dans son procès criminel pour fraude fiscale était de s'opposer à l'admissibilité de ces documents. Selon la prétention de l'intimé, il serait interdit au contribuable de faire valoir à titre préventif le droit à la protection contre les fouilles, les perquisitions et les saisies abusives qui lui est reconnu par la Charte [*Charte canadienne des droits et libertés*, qui constitue la partie I de la *Loi constitutionnelle de 1982*, annexe B, *Loi de 1982 sur le Canada*, 1982, ch. 11 (R.-U.) [L.R.C. (1985), appendice II, nº 44]] et d'empêcher la violation imminente de ce droit. Le contribuable pourrait uniquement demander une réparation discrétionnaire en vertu du paragraphe 24(2) de la Charte, ce qui minerait sérieusement l'effet bénéfique protecteur de la Charte.

[4] Dans l'arrêt *Hunter et autres c. Southam Inc.*, [1984] 2 R.C.S. 145, à la page 160, le juge Dickson [alors juge puîné] a insisté sur le fait qu'il est important d'obtenir au préalable l'autorisation nécessaire pour procéder à une fouille ou à une perquisition:

> Si la question à résoudre en appréciant la constitutionnalité des fouilles et des perquisitions effectuées en vertu de l'art. 10 était de savoir si en fait le droit du gouvernement d'effectuer une fouille ou une perquisition donnée l'emporte sur celui d'un particulier de résister à l'intrusion du gouvernement dans sa vie privée, il y aurait alors lieu de déterminer la prépondérance des droits en concurrence après que la perquisition a été effectuée. Cependant, une telle analyse après le fait entrerait sérieusement en conflit avec le but de l'art. 8. Comme je l'ai déjà dit, cet article a pour but de protéger les particuliers contre les intrusions injustifiées de l'État dans leur vie privée. Ce but requiert un moyen de prévenir les fouilles et les perquisitions injustifiées avant qu'elles ne se produisent et non simplement un moyen de déterminer, après le fait, si au départ elles devaient être effectuées. Cela ne peut se faire, à mon avis, que par un système d'autorisation préalable et non de validation subséquente. [Souligné dans l'original.]

Wilson J. extended this rationale to seizures in *Thomson Newspapers Ltd. v. Canada (Director of Investigation and Research, Restrictive Trade Practices Commission)*, [1990] 1 S.C.R. 425. At page 495, she wrote:

> In my opinion, Dickson J.'s remarks with regard to searches are equally applicable to seizures. It makes no sense to say that s. 8 is only engaged once the private information becomes public. If that were the case, the protections afforded by s. 8 would be completely illusory. The fact that an individual can challenge the validity of the order before producing the documents goes, in my opinion, not to the question whether a seizure has occurred but to the question whether the seizure is a reasonable one. [Emphasis added.]

[5] Furthermore, I believe that the Supreme Court made it clear, in the *Jarvis* case, that subsection 231.2(1) of the Act is not available for the purpose of criminal investigations, i.e. investigations whose predominant purpose is to establish the penal liability of the taxpayer. At paragraphs 88, 97-98, Iacobucci and Major JJ. wrote in this respect:

> In our view, where the predominant purpose of a particular inquiry is the determination of penal liability, CCRA officials must relinquish the authority to use the inspection and requirement powers under ss. 231.1(1) and 231.2(1).
>
> . . .
>
> Put another way, the requirement powers of ss. 231.1(1) and 231.2(1) cannot be used to compel oral statements or written production for the purpose of advancing the criminal investigation.
>
> In summary, wherever the predominant purpose of an inquiry or question is the determination of penal liability, criminal investigatory techniques must be used. As a corollary, all *Charter* protections that are relevant in the criminal context must apply. [My emphasis.]

These conclusions of the Supreme Court mean that, in the context of a criminal investigation, barring exigent circumstances, searches and seizures are subject for their validity to prior judicial authorization. Their legality cannot be secured by an after-the-fact validation as it turned out to be the case in the present instance.

La juge Wilson a appliqué ce raisonnement aux saisies dans l'arrêt *Thomson Newspapers Ltd. c. Canada (Directeur des enquêtes et recherches, Commission sur les pratiques restrictives du commerce)*, [1990] 1 R.C.S. 425. À la page 495, la juge a dit ce qui suit:

> À mon avis, ce que dit le juge Dickson concernant les fouilles et les perquisitions s'applique également aux saisies. Il est illogique de prétendre que l'art. 8 ne joue que dès que les renseignements confidentiels deviennent publics. S'il en était ainsi, l'art. 8 n'accorderait qu'une protection tout à fait illusoire. Le fait qu'un individu puisse contester la validité de l'ordonnance avant de produire les documents est, à mon avis, pertinent non pas relativement à la question de savoir s'il y a eu une saisie, mais relativement à celle de savoir si la saisie effectuée est raisonnable. [Non souligné dans l'original.]

[5] En outre, je crois que la Cour suprême a clairement dit, dans l'arrêt *Jarvis*, que le paragraphe 231.2(1) de la Loi ne peut pas être invoqué pour les besoins d'une enquête criminelle, c'est-à-dire une enquête dont l'objet prédominant est d'établir la responsabilité pénale du contribuable. Aux paragraphes 88, 97 et 98, les juges Iacobucci et Major ont écrit ce qui suit sur ce point:

> À notre avis, lorsqu'un examen dans un cas particulier a pour objet prédominant d'établir la responsabilité pénale du contribuable, les fonctionnaires de l'ADRC doivent renoncer à leur faculté d'utiliser les pouvoirs d'inspection et de demande péremptoire que leur confèrent les par. 231.1(1) et 231.2(1).
>
> [. . .]
>
> En d'autres termes, les pouvoirs de contrainte conférés par les par. 231.1(1) et 231.2(1) ne peuvent être exercés pour obtenir des déclarations verbales ou la production de documents écrits dans le but de faire progresser une enquête criminelle.
>
> En bref, dès qu'un examen ou une question a pour objet prédominant d'établir la responsabilité pénale du contribuable, il faut utiliser les techniques d'enquête criminelle. À titre corollaire, toutes les garanties prévues par la *Charte*, pertinentes dans le contexte criminel, s'appliquent obligatoirement. [Non souligné dans l'original.]

Ces conclusions de la Cour suprême signifient que, dans le contexte d'une enquête criminelle, en l'absence de circonstances urgentes, les fouilles, les perquisitions et les saisies doivent, pour être valides, faire l'objet d'une autorisation judiciaire préalable. Leur légalité ne peut pas être assurée par une validation subséquente comme c'est ici le cas.

[6] I should add that the Supreme Court's conclusions relating to the availability of the requirement powers in subsection 231.2(1) of the Act do not distinguish between an individual and a corporate taxpayer: such powers are not available for the purpose of advancing a criminal investigation. I agree with my colleague that the Motions Judge, after having found that the investigation was a criminal investigation, could not use Charter considerations to authorize the use of the requirement powers. The Charter protections are a corollary to a finding that the investigation is a criminal investigation. They cannot be resorted to in order to undermine, or circumvent, the legal consequences of that finding.

[6] J'aimerais ajouter que, dans les conclusions qu'elle a tirées au sujet de la possibilité d'utiliser les pouvoirs de contrainte conférés au paragraphe 231.2(1) de la Loi, la Cour suprême ne fait pas de distinction entre un particulier et une société: ces pouvoirs ne peuvent pas être utilisés pour faire progresser une enquête criminelle. Je suis d'accord avec ma collègue lorsqu'elle dit que le juge des requêtes, après avoir conclu que l'enquête était une enquête criminelle, ne pouvait pas se fonder sur des considérations liées à la Charte pour autoriser le recours aux pouvoirs de contrainte. Les protections accordées par la Charte sont le corollaire d'une conclusion selon laquelle l'enquête est une enquête criminelle. On ne saurait y avoir recours afin de miner ou de contourner les effets juridiques de cette conclusion.

The determination of a preliminary issue

[7] Whether the inquiry's predominant purpose was to establish the penal liability of the taxpayers was a key issue common to all five applicants before the Motions Judge. Two of the applicants were individuals who were the directors of the three other corporate applicants. The conclusion of the Judge was adverse to the Minister who did not appeal it with respect to the two individuals. However, the Minister attacked that conclusion in the context of this appeal by the corporate appellants.

La détermination d'une question préliminaire

[7] La question de savoir si l'objet prédominant de l'enquête était d'établir la responsabilité pénale des contribuables était une question cruciale commune aux cinq demandeurs devant le juge des requêtes. Deux demandeurs étaient des particuliers; ils étaient administrateurs des trois sociétés demanderesses. La conclusion du juge était défavorable au ministre, qui n'a pas interjeté appel à l'égard des deux particuliers. Toutefois, le ministre a contesté cette conclusion dans le contexte du présent appel interjeté par les sociétés.

[8] At the hearing, an issue arose as to whether the Minister could relitigate this adverse conclusion without either appealing it or filing a cross-appeal in the present appeal. The Minister, having failed to appeal against the decision favourable to the two individuals on this issue, the argument goes, would be prohibited from seeking a reversal of that conclusion. Concerns were expressed about the possibility of conflicting decisions whereby the very same inquiry would receive two different and incompatible qualifiers: criminal in nature for two of the applicants and civil or administrative for the other three.

[8] À l'audience, la question s'est posée de savoir si le ministre pouvait débattre de nouveau cette conclusion défavorable sans interjeter appel sur ce point ou sans interjeter un appel incident. Selon l'argument soumis, le ministre, qui n'en avait pas appelé de la décision qui avait été rendue en faveur des deux particuliers sur ce point, ne pouvait pas demander l'annulation de cette conclusion. Certaines préoccupations ont été exprimées au sujet de la possibilité que des décisions contradictoires soient rendues, par lesquelles une même enquête serait qualifiée de deux façons non seulement différentes, mais incompatibles: elle serait de nature criminelle pour deux demandeurs et de nature civile ou administrative pour les trois autres.

[9] Upon careful consideration of the matter, I have come to the conclusion that the doctrine of issue estoppel, which can arise when a party wants to relitigate an issue that has been decided in an earlier case, does not

[9] J'ai minutieusement examiné la question et je suis arrivé à la conclusion selon laquelle la doctrine de l'irrecevabilité découlant d'une question déjà tranchée (*issue estoppel*), qui peut être invoquée lorsqu'une partie

apply in the present case because there is no identity of parties acting in the same qualities: *Toronto (City) v. C.U.P.E., Local 79*, [2003] 3 S.C.R. 77, at paragraph 23; *Blueberry River Indian Band v. Canada (Department of Indian Affairs and Northern Development)*, [2001] 4 F.C. 451 (C.A.), at paragraph 45. The doctrine requires for its application that the parties to the earlier judicial decision on the issue be the same as the parties to the proceedings in which the estoppel is raised. The corporate applicants are legal entities and parties different from the individuals.

[10] I am also satisfied that the Minister did not have to file a cross-appeal under rule 341 of the *Federal Court Rules, 1998* [SOR/98-106] because he is not seeking a different disposition of the order appealed from. He is, in fact, simply submitting an additional reason for which the order should be maintained and, therefore, the appeal dismissed.

Whether the Motions Judge erred in finding that the investigation was a criminal investigation

[11] Unlike my colleague, I believe that the Motions Judge committed no error when he came to the conclusion that the appellants were the subject of a criminal investigation. The Motions Judge found that there was overwhelming evidence to that effect on the record. Unfortunately, he mentioned only one reason in support of his finding, namely, that investigator Faribault, whose function at the Special Investigation (SI) branch of the Canadian Customs and Revenue Agency (CCRA) was to investigate and gather evidence of a tax evasion offence (see his testimony at pages 113, 119-120 and 124 of the Appeal Book), admitted that such was the purpose of the investigation. At paragraph 90 of his reasons for order, he wrote:

> The evidence on the record as a whole leads to the conclusion that the predominant purpose of the investigation of CCRA, from its outset, was prosecution of the applicants for tax evasion and eventual imposition of penal sanctions against them. The statements on discovery by Faribault are not the only indicia of this predominant purpose; they are simply among the most succinct elements of evidence which support

veut débattre de nouveau une question qui a fait l'objet d'une décision antérieure, ne s'applique pas en l'espèce parce que les parties en cause ne sont pas les mêmes et n'agissent pas au même titre: *Toronto (Ville) c. S.C.E.P., section locale 79*, [2003] 3 R.C.S. 77, au paragraphe 23; *Bande indienne de Blueberry River c. Canada (Ministère des Affaires indiennes et du Nord canadien)*, [2001] 4 C.F. 451 (C.A.), au paragraphe 45. Pour que la doctrine s'applique, il est nécessaire que les parties à la décision judiciaire antérieure qui a été rendue sur la question soient les mêmes que les parties à l'instance dans laquelle l'irrecevabilité est invoquée. Les sociétés demanderesses sont des personnes morales et des parties différentes des particuliers.

[10] Je suis également convaincu que le ministre n'avait pas à déposer un appel incident en vertu de la règle 341 des *Règles de la Cour fédérale (1998)* [DORS/98-106] parce qu'il ne demande pas la réformation de l'ordonnance portée en appel. De fait, il invoque simplement un motif additionnel à l'appui du maintien de l'ordonnance et donc du rejet de l'appel.

Le juge des requêtes a-t-il commis une erreur en concluant que l'enquête était une enquête criminelle?

[11] Contrairement à ma collègue, je crois que le juge des requêtes n'a pas commis d'erreur en concluant que les appelantes faisaient l'objet d'une enquête criminelle. Le juge des requêtes a conclu qu'il y avait dans le dossier une preuve abondante en ce sens. Malheureusement, il n'a mentionné qu'un seul motif à l'appui de sa conclusion, à savoir que l'enquêteur Faribault, dont la fonction au sein de la Direction générale des enquêtes spéciales (ES) de l'Agence des douanes et du revenu du Canada (ADRC) était d'enquêter et de recueillir la preuve d'une fraude fiscale (voir son témoignage aux pages 113, 119, 120 et 124 du dossier d'appel), avait admis que tel était l'objet de l'enquête. Au paragraphe 90 des motifs de l'ordonnance, le juge des requêtes a écrit ce qui suit:

> L'ensemble de la preuve versée dans le dossier permet de conclure que l'objet prédominant de l'enquête de l'ADRC était, dès le départ, la poursuite des demandeurs pour fraude fiscale, et l'imposition éventuelle de sanctions pénales à leur encontre. Les affirmations faites durant l'interrogatoire préalable de Faribault ne sont pas les seuls indices de cet objet prédominant; elles comptent simplement parmi les éléments de

this conclusion. Accordingly, I find that the predominant purpose of the investigation was prosecution of the applicants for tax evasion. [My emphasis.]

I will come back later to the impact of that witness' statement.

[12] In *Jarvis*, at paragraph 94, the Supreme Court gave a non-exhaustive list of factors to be considered in determining whether the relationship between the state and a taxpayer has reached a point where it has become adversarial:

In this connection, the trial judge will look at all factors, including but not limited to such questions as:

(a) Did the authorities have reasonable grounds to lay charges? Does it appear from the record that a decision to proceed with a criminal investigation could have been made?

(b) Was the general conduct of the authorities such that it was consistent with the pursuit of a criminal investigation?

(c) Had the auditor transferred his or her files and materials to the investigators?

(d) Was the conduct of the auditor such that he or she was effectively acting as an agent for the investigators?

(e) Does it appear that the investigators intended to use the auditor as their agent in the collection of evidence?

(f) Is the evidence sought relevant to taxpayer liability generally? Or, as is the case with evidence as to the taxpayer's *mens rea*, is the evidence relevant only to the taxpayer's penal liability?

(g) Are there any other circumstances or factors that can lead the trial judge to the conclusion that the compliance audit had in reality become a criminal investigation? [Underlining in original.]

[13] These factors are designed to assist in the determination of the predominant purpose of an inquiry. They apply unless there is a clear decision to pursue a criminal investigation. At paragraph 93, before listing the factors, the Supreme Court wrote:

preuve les plus succincts au soutien de cette conclusion. Par conséquent, je suis d'avis que l'objet prédominant de l'enquête était la poursuite des demandeurs pour fraude fiscale. [Non souligné dans l'original.]

Je reviendrai plus loin sur l'effet de cette déclaration du témoin.

[12] Dans l'arrêt *Jarvis*, au paragraphe 94, la Cour suprême a dressé une liste non exhaustive des facteurs dont il faut tenir compte pour décider si la elation entre l'État et un contribuable est de nature contradictoire:

À cet égard, le juge de première instance examinera tous les facteurs, y compris les suivants:

a) Les autorités avaient-elles des motifs raisonnables de porter des accusations? Semble-t-il, au vu du dossier, que l'on aurait pu prendre la décision de procéder à une enquête criminelle?

b) L'ensemble de la conduite des autorités donnait-elle à croire que celles-ci procédaient à une enquête criminelle?

c) Le vérificateur avait-il transféré son dossier et ses documents aux enquêteurs?

d) La conduite du vérificateur donnait-elle à croire qu'il agissait en fait comme un mandataire des enquêteurs?

e) Semble-t-il que les enquêteurs aient eu l'intention d'utiliser le vérificateur comme leur mandataire pour recueillir des éléments de preuve?

f) La preuve recherchée est-elle pertinente quant à la responsabilité générale du contribuable ou, au contraire, uniquement quant à sa responsabilité pénale, comme dans le cas de la preuve de la *mens rea*?

g) Existe-t-il d'autres circonstances ou facteurs susceptibles d'amener le juge de première instance à conclure que la vérification de la conformité à la loi était en réalité devenue une enquête criminelle? [Soulignement dans l'original.]

[13] Ces facteurs visent à permettre de déterminer plus facilement l'objet prédominant d'une enquête. Ils s'appliquent, à moins qu'il n'existe une décision claire de procéder à une enquête criminelle. Avant d'énumérer les facteurs, la Cour suprême a écrit ce qui suit au paragraphe 93:

To reiterate, the determination of when the relationship between the state and the individual has reached the point where it is effectively adversarial is a contextual one, which takes account of all relevant factors. In our opinion, the following list of factors will assist in ascertaining whether the predominant purpose of an inquiry is the determination of penal liability. Apart from a clear decision to pursue a criminal investigation, no one factor is necessarily determinative in and of itself, but courts must assess the totality of the circumstances, and make a determination as to whether the inquiry or question in issue engages the adversarial relationship between the state and the individual. [My emphasis.]

The evidence reveals that such a decision was made.

[14] In the present instance, the SI branch of the CCRA began, on November 12, 1998, a criminal investigation of a number of charitable organizations with respect to charitable donations. Targeted were the "Rabbinical College of Montréal", "Construit toujours avec Bonté", "Yeshiva Oir Hochaim", "L'Association Gimilis Chasodim Keren Chava B'Nei Levi" and others. It investigated tax evasion offences under section 239 [as am. by S.C. 1998, c. 19, s. 235] of the Act which are criminal in nature: *Knox Contracting Ltd. v. Canada*, [1990] 2 S.C.R. 338, at pages 350 and 356. The appellants had made very substantial donations to the Rabbinical College of Montréal and, in one case, to Yeshiva Oir Hochaim. I reproduce the three lists of donations as they appear in the Appeal Book:

MODERN WOOD FABRICATORS (M.W.F.) INC.

LIST OF DONATIONS

Year ended February 28, 1993	
College Rabbinique de Montreal	54 000 $
Year ended February 28, 1994	
College Rabbinique de Montréal	212 000
Year ended February 28, 1995	
College Rabbinique de Montréal	128 000
Year ended February 28, 1996	
College Rabbinique de Montréal	200 000
Yeshiva Oir Hochaim	100 000
Year ended February 28, 1998	
College Rabbinique	50 000

* * * * * * * * * * * * * * * * * * *

Rappelons que, pour déterminer à quel moment la relation entre l'État et le particulier est effectivement devenue une relation de nature contradictoire, il faut tenir compte du contexte, en examinant tous les facteurs pertinents. À notre avis, la liste suivante de facteurs sera utile pour déterminer si un examen a pour objet prédominant d'établir la responsabilité pénale du contribuable. À l'exception de la décision claire de procéder à une enquête criminelle, aucun facteur n'est nécessairement déterminant en soi. Les tribunaux doivent plutôt apprécier l'ensemble des circonstances et déterminer si l'examen ou la question en cause crée une relation de nature contradictoire entre l'État et le particulier. [Non souligné dans l'original.]

La preuve révèle qu'une telle décision a été prise.

[14] En l'espèce, la Direction générale des ES de l'ADRC a entrepris, le 12 novembre 1998, une enquête criminelle sur un certain nombre d'organismes de charité à l'égard de dons de charité. Les organismes visés étaient le «Collège rabbinique de Montréal», «Construit toujours avec Bonté», «Yeshiva Oir Hochaim», «L'Association Gimilis Chasodim Keren Chava B'Nei Levi» et d'autres organismes. L'enquête portait sur des infractions à l'article 239 [mod. par L.C. 1998, ch. 19, art. 235] de la Loi, à savoir des fraudes fiscales, qui sont de nature criminelle: *Knox Contracting Ltd. c. Canada*, [1990] 2 R.C.S. 338, aux pages 350 et 356. Les appelantes avaient consenti des dons d'un montant fort élevé au Collège rabbinique de Montréal et, dans un cas, à l'organisme Yeshiva Oir Hochaim. Je reproduis les trois listes de dons, telles qu'elles figurent dans le dossier d'appel:

MODERN WOOD FABRICATORS (M.W.F.) INC.

LISTE DES DONS

Exercice ayant pris fin le 28 février 1993	
Collège rabbinique de Montréal	54 000 $
Exercice ayant pris fin le 28 février 1994	
Collège rabbinique de Montréal	212 000
Exercice ayant pris fin le 28 février 1995	
Collège rabbinique de Montréal	128 000
Exercice ayant pris fin le 28 février 1996	
Collège rabbinique de Montréal	200 000
Yeshiva Oir Hochaim	100 000
Exercice ayant pris fin le 28 février 1998	
Collège rabbinique	50 000

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LES PLASTIQUES ALGAR (Canada) Ltée

LIST OF DONATIONS

Year ended May 31, 1994	
College Rabbinical de Montréal	86 000 $
Year ended May 31, 1995	
College Rabbinique de Montréal	72 000
College Rabbinique de Montréal	18 000
Year ended May 31, 1996	
College Rabbinique de Montréal	36 000
Year ended May 31, 1997	
College Rabbinique de Montréal	100 000
Year ended May 31, 1998	
College Rabbinique de Montréal	50 000

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SNAPSHOT THEATRICAL PRODUCTIONS

LIST OF DONATIONS

Year ended December 31, 1994	
College Rabbinique de Montréal	36 000 $

[15] Therefore, in October 1999, in the context of that criminal investigation, the CCRA began an investigation of the appellants. It sent an informal requirement to one of them, Les Plastiques Algar (Algar), requesting various documents and informations, relative to donations made to the Rabbinical College of Montréal, including charitable donations receipts, with respect to taxation years 1994 to 1998. The following month, the CCRA informed Algar that the investigation against it was suspended. However, in the meantime, the criminal investigations continued against the targeted beneficiaries of the charitable donations.

[16] A charge of tax evasion under section 239 of the Act was laid against the charitable organization "Construit toujours avec Bonté" and the organization pleaded guilty on September 20, 2000 to that charge which consisted in the delivery of false charitable gift receipts. On September 21, 2000, the SI branch of the CCRA completed the investigation of the Rabbinical College of Montréal and, for reasons that were not provided to us, no criminal charges were laid against that institution.

LES PLASTIQUES ALGAR (Canada) Ltée

LISTE DES DONS

Exercice ayant pris fin le 31 mai 1994	
Collège rabbinique de Montréal	86 000 $
Exercice ayant pris fin le 31 mai 1995	
Collège rabbinique de Montréal	72 000
Collège rabbinique de Montréal	18 000
Exercice ayant pris fin le 31 mai 1996	
Collège rabbinique de Montréal	36 000
Exercice ayant pris fin le 31 mai 1997	
Collège rabbinique de Montréal	100 000
Exercice ayant pris fin le 31 mai 1998	
Collège rabbinique de Montréal	50 000

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SNAPSHOT THEATRICAL PRODUCTIONS

LISTE DES DONS

Exercice ayant pris fin le 31 décembre 1994	
Collège rabbinique de Montréal	36 000 $

[15] Par conséquent, au mois d'octobre 1999, dans le contexte de cette enquête criminelle, l'ADRC a entrepris une enquête sur les appelantes. Elle a envoyé une demande péremptoire informelle à l'une d'elle, Les Plastiques Algar (Algar), pour demander divers documents et renseignements au sujet des dons consentis au Collège rabbinique de Montréal, et notamment des reçus de dons de charité, pour les années d'imposition 1994 à 1998. Le mois suivant, l'ADRC a informé Algar que l'enquête dont elle faisait l'objet était suspendue. Toutefois, dans l'intervalle, les enquêtes criminelles se sont poursuivies à l'encontre des bénéficiaires visés par l'opération des dons de charité.

[16] Une accusation de fraude fiscale a été portée en vertu de l'article 239 de la Loi contre l'organisme de charité connu sous le nom de «Construit toujours avec Bonté», qui a présenté, le 20 septembre 2000, un plaidoyer de culpabilité à l'égard de cette accusation, qui portait sur la remise de faux reçus de dons de charité. Le 21 septembre 2000, la Direction générale des ES de l'ADRC a achevé l'enquête concernant le Collège rabbinique de Montréal et, pour des raisons qui ne nous ont pas été données, aucune accusation criminelle n'a été portée contre cet établissement.

[17] On October 18, 2000, the SI branch of the CCRA informed Algar that its file had been internally reassigned to another investigator by the name of Faribault. On January 12, 2002, investigator Faribault, on behalf of the Minister, sent letters to the three appellants requesting various documents and informations, such as cancelled cheques, bank statements, donation receipts and accounting books and records, all related to the donations to the Rabbinical College of Montréal.

[18] I have related these facts in chronological order because they shed a needed light on the context in which the appellants were summoned to provide information pursuant to subsection 231.2(1) of the Act. An investigation was actually undertaken with respect to false charitable donations and receipts. The investigation first looked at the recipients of the donations. Evidently, a fraudulent scheme of that nature requires, for success, the participation of accomplices, i.e. donors. I believe that the SI branch of the CCRA then turned its attention to the search and identification of the accomplices as well as to the search of evidence which could incriminate them and, by the same token, the charitable organizations which received the fraudulent donations. In fact, the investigation by Mr. Faribault was purely an extension of the so-far unsuccessful criminal investigation directed initially towards the Rabbinical College of Montréal. Mr. Faribault was now trying to obtain evidence of fraud by looking at the same matter, but from a different perspective, i.e. that of the donors.

[19] Indeed, Mr. Faribault, at page 132 of the Appeal Book, admitted that much in his cross-examination under oath:

Q - [Me Rheault]	So your objective then . . . if I understand correctly, your main objective with respect to the applicants was to establish that they had committed tax evasion, is that right?
A - [M. Faribault]	To investigate tax evasion, yes . . .
Q - [Me Rheault]	Yes.
A - [M. Faribault]	. . . it's . . .
Q - [Me Rheault]	But obviously if that was not successful, you still had an opportunity to issue a civil assessment?

[17] Le 18 octobre 2000, la Direction générale des ES de l'ADRC a informé Algar que son dossier avait été transmis, à l'interne, à un autre enquêteur, un certain M. Faribault. Le 12 janvier 2002, l'enquêteur Faribault a envoyé, pour le compte du ministre, des lettres aux trois appelantes pour leur demander divers documents et renseignements, comme des chèques oblitérés, des relevés bancaires, des reçus de dons et des registres et livres de comptes se rapportant tous aux dons consentis au Collège rabbinique de Montréal.

[18] J'ai relaté ces faits en ordre chronologique parce qu'ils jettent la lumière nécessaire sur le contexte dans lequel les appelantes ont été sommées de fournir des renseignements conformément au paragraphe 231.2(1) de la Loi. Une enquête a de fait été engagée au sujet des faux dons de charité et des faux reçus. L'enquête a d'abord porté sur les bénéficiaires des dons. De toute évidence, un stratagème frauduleux de cette nature exige, pour réussir, la participation de complices, à savoir les donateurs. Je crois que la Direction générale des ES de l'ADRC a ensuite porté son attention sur la recherche et l'identification des complices ainsi que sur la recherche d'éléments de preuve susceptibles de les incriminer et, du même coup, les organismes de charité qui recevaient les dons frauduleux. De fait, l'enquête menée par M. Faribault était purement une extension de l'enquête criminelle jusque là infructueuse qui visait initialement le Collège rabbinique de Montréal. M. Faribault essayait maintenant d'obtenir une preuve de fraude en examinant la même affaire, mais sous une perspective différente, c'est-à-dire en s'attachant aux donateurs.

[19] De fait, à la page 132 du dossier d'appel, M. Faribault a admis cela lorsqu'il a été contre-interrogé sous serment:

Q - [Me Rhéault]	Alors, votre objectif, donc [. . .] si je comprends bien, votre objectif principal à l'égard des requérants était d'établir qu'ils avaient commis une évasion fiscale, c'est ça?
R - [M. Faribault]	Enquêter l'évasion fiscale, oui [. . .]
Q - [Me Rhéault]	Oui.
R - [M. Faribault]	[. . .] c'est [. . .]
Q - [Me Rhéault]	Mais si évidemment, ça arrivait pas en bout de ligne, vous avez toujours l'opportunité de cotiser au civil?

A - [M. Faribault]	That's right..
Q - [Me Rheault]	O.K. O.K. But you're not telling me that your main objective in the case here was simply to issue tax assessments?
A - [M. Faribault]	No . . . [My emphasis.]

[20] Counsel for the respondent, in an effort to attenuate the adverse impact of that admission, contends that that statement of Mr. Faribault merely represents his personal views or motivation. He relies upon a decision of the Supreme Court of the United States in *United States v. La Salle Nat'l Bank*, 98 S.Ct. 2357 (1978), at page 2367, which held that while a special agent is an important actor in the process, his motivation is hardly dispositive of the issue. With respect, I think that, in the present factual context, it is an unfair and inaccurate characterization of Mr. Faribault's clear stated objective to view his testimony as a mere expression of his personal motivation.

[21] As I have already mentioned, Mr. Faribault resumed the suspended investigation against the appellants undertaken in the context of a broader criminal investigation of a fraudulent scheme involving charitable organizations and their donors. He was in charge of the file, autonomous and making the appropriate decisions to lead it to its ultimate admitted objective, i.e. the gathering of evidence of a tax evasion offence under section 239 of the Act. At page 120 of the Appeal Book, he admitted that such was his main responsibility and function:

Q - [Me Rheault]	In this case [. . .] here, it's indicated "*Where it is suspected that tax evasion has occurred*", in this case, you had suspicions that there . . . that there had been tax evasion when you issued the requirements. Is that right?
A - [M. Faribault]	Suspicions? Yes.
Q - [Me Rheault]	So . . . and your main responsibility as an investigator in special investigations was to . . . investigate this case involving the applicants here . . .
A - [M. Faribault]	Yes.
Q - [Me Rheault]	. . . In order to gather evidence of any criminal offence, in accordance with paragraph 7, that

R - [M. Faribault]	Voilà.
Q - [Me Rhéault]	O.K. O.K. Mais vous êtes pas en train de me dire que votre objectif principal dans le dossier ici, c'était simplement d'établir des cotisations d'impôt?
R - [M. Faribault]	Non [. . .] [Non souligné dans l'original.]

[20] L'avocat de l'intimé, en tentant d'atténuer l'effet défavorable de cet aveu, soutient que la déclaration de M. Faribault représente simplement ses opinions ou motifs personnels. Il se fonde sur la décision que la Cour suprême américaine a rendue dans l'affaire *United States v. La Salle Nat'l Bank*, 98 S.Ct. 2357 (1978), à la page 2367, où il a été statué qu'un agent spécial est un acteur important dans le processus, mais que les motifs qui l'animent sont loin d'être déterminants. Je crois que, dans le présent contexte factuel, il est injuste et inexact de considérer le témoignage de M. Faribault comme une simple expression de ses motifs personnels étant donné l'objectif clair que celui-ci a énoncé.

[21] Comme il en a déjà été fait mention, M. Faribault a repris l'enquête suspendue dont les appelantes avaient fait l'objet dans le cadre d'une enquête criminelle plus générale portant sur un stratagème frauduleux dans lequel des organismes de charité et leurs donateurs étaient impliqués. M. Faribault était responsable du dossier; il était autonome et il prenait les décisions appropriées pour atteindre son objectif admis final, à savoir la collecte d'éléments de preuve concernant l'infraction de fraude fiscale prévue à l'article 239 de la Loi. À la page 120 du dossier d'appel, M. Faribault a admis que telle était sa principale responsabilité et sa principale tâche:

Q - [Me Rheault]	Dans le présent dossier [. . .] ici, on mentionne "*Où l'on soupçonne qu'il y ait eu évasion fiscale*", dans le présent dossier, vous aviez des soupçons qu'il y [. . .] qu'il y avait eu évasion fiscale au moment où vous avez émis les demandes péremptoires. C'est exact?
R - [M. Faribault]	Des soupçons? Oui.
Q - [Me Rheault]	Donc [. . .] et votre principale responsabilité comme enquêteur des enquêtes spéciales était de [. . .] d'enquêter dans ce cas qui occupe les requérants ici [. . .]
R - [M. Faribault]	Oui.
Q - [Me Rheault]	[. . .] dans le but de recueillir des preuves de toute infraction criminelle, conformément au

may have been committed and if such evidence was obtained, to take steps . . . to bring the matter before the courts under section 239 of the Act?

A - [M. Faribault] Yes. [My emphasis.]

This is consistent with paragraph 7 of Information Circular No. 73-10R3, dated February 13, 1987, entitled "Tax Evasion" which reads:

7. The main responsibility of Special Investigations is to investigate significant cases of suspected tax evasion for the purpose of obtaining evidence of any criminal offence that may have been committed and, where such evidence is found, to prepare the case for prosecution in the courts under section 239 of the Act. A further responsibility is to publicize prosecution convictions as a means of deterring other taxfilers from tax evasion and to encourage voluntary disclosures.

If unsuccessful in that endeavour, it could still lead to a tax reassessment: see the excerpt from Mr. Faribault's testimony, at page 132 of the Appeal Book, previously cited.

[22] Moreover, the facts of our case are quite distinguishable from the facts in the *La Salle Nat'l Bank* case, *supra*. In making its statement that the motivation of a special agent is hardly dispositive, the U.S. Supreme Court referred to the multilayered system of reviews of decisions in place and found that the motivation of a single agent attempting to build a criminal case, without regard to the enforcement policy of the Service as an institution, does not necessarily overturn the institutional responsibility of the Service to calculate and to collect civil fraud penalties. Obviously, the U.S. system is different from ours. In addition, in our case, the file was with the SI branch and assigned by that authority to a specific investigator to conduct a criminal investigation of a tax evasion offence. I would also point out that the *La Salle Nat'l Bank* case goes back some 26 years and contained strong dissenting views. No attempt has been made by counsel for the respondent to show that the ruling of the majority still represents the state of the law in this respect.

[23] Counsel for the respondent also argued that Mr. Faribault had no reasonable grounds to believe that an

paragraphe 7, qui ont pu être commises, et si de telles preuves sont recueillies, de prendre les [. . .] des dispositions en vue de porter l'affaire devant les tribunaux en vertu de l'article 239 de la loi?

R - [M. Faribault] Oui. [Non souligné dans l'original.]

Cela est compatible avec le paragraphe 7 de la Circulaire d'information n° 73-10R3, en date du 13 février 1987, intitulée «Évasion fiscale», laquelle est ainsi libellée:

7. La principale responsabilité des Enquêtes spéciales est d'enquêter sur les cas importants, où l'on soupçonne qu'il y a eu évasion fiscale, dans le but de recueillir des preuves de toute infraction criminelle qui a pu être commise et, si de telles preuves sont recueillies, de prendre des dispositions en vue de porter l'affaire devant les tribunaux en vertu de l'article 239 de la loi. Les Enquêtes spéciales ont aussi la responsabilité de faire connaître au public les condamnations judiciaires dans le but de décourager l'évasion fiscale chez les autres contribuables et de favoriser les divulgations volontaires.

Si cette tentative s'avère infructueuse, une nouvelle cotisation d'impôt pourrait néanmoins être établie: voir l'extrait précité du témoignage de M. Faribault, à la page 132 du dossier d'appel.

[22] En outre, les faits de la présente espèce sont fort distincts des faits de l'affaire *La Salle Nat'l Bank*, précitée. En disant que les motifs d'un agent spécial sont loin d'être déterminants, la Cour suprême américaine se référait à un système d'examen à multiples paliers de décisions déjà rendues et elle a conclu que les motifs d'un seul agent qui tentait d'établir une preuve criminelle, sans tenir compte de la politique de mise en œuvre du Service en tant qu'institution, n'écartent pas nécessairement la responsabilité institutionnelle du Service de fixer et de percevoir les pénalités applicables à une fraude civile. De toute évidence, le système américain est différent du nôtre. De plus, dans ce cas-ci, le dossier relevait de la Direction générale des ES, qui l'avait attribué à un enquêteur précis pour qu'il mène une enquête criminelle sur une fraude fiscale. J'aimerais également signaler que la décision *La Salle Nat'l Bank* a été rendue il y a près de 26 ans et qu'elle contenait de vigoureuses opinions dissidentes. L'avocat de l'intimé n'a pas tenté de démontrer que la décision de la majorité représente encore l'état du droit sur ce point.

[23] L'avocat de l'intimé a également soutenu que M. Faribault n'avait pas de motifs raisonnables de croire

offence had been committed. The fact is that Mr. Faribault knew that between November 11, 1998 and September 22, 2000 a colleague of the SI branch had investigated the legitimacy and legality of donations made to the Rabbinical College of Montréal and to Construit toujours avec Bonté. He knew that tax evasion charges had been laid successfully against Construit toujours avec Bonté. He knew that the investigation against the Rabbinical College of MontrÉal had been so far inconclusive. Bearing in mind the context, I think that Mr. Faribault's testimony under cross-examination at the examination discovery dispels all my doubts as to what his real beliefs and objectives were when he resumed the investigation against the appellants.

[24] Counsel for the respondent finally argued that the investigator Faribault had no reasonable grounds to apply for a search warrant since he had no reasons to believe that a crime had been committed. I believe it is more accurate to say that he had suspicions that a crime had been committed, but not enough evidence at this stage to seek a warrant. That is why Mr. Faribault who, by his own admission, was conducting a criminal investigation, resorted to the requirement powers of subsection 231.2(1) which eliminate the hurdle of prior judicial scrutiny. A short review of his testimony is instructive in this respect.

[25] At pages 137 and 140 of the Appeal Book, Mr. Faribault testified as to what the policy was regarding his gathering of evidence of a tax evasion offence:

Q - [Me Rheault] So . . . but there is a . . . there is a policy there, which is reflected in paragraph 13, applying to special investigations, which is to the effect that . . . I . . . and I quote:

> "*Therefore, an investigator must obtain all documents in a taxfiler's possession or under a taxfiler's control that may afford evidence, and maintain custody and control of them until they are presented in court.*"

Is that right?

A - [M. Faribault] Yes, yes, yes.

qu'une infraction avait été commise. En fait, M. Faribault savait qu'entre le 11 novembre 1998 et le 22 septembre 2000, un collègue de la Direction générale des ES avait enquêté sur la légitimité et la légalité des dons qui avaient été faits au Collège rabbinique de Montréal et à l'organisme Construit toujours avec Bonté. Il savait que des accusations de fraude fiscale avaient été portées avec succès contre l'organisme Construit toujours avec Bonté. Il savait que l'enquête concernant le Collège rabbinique de Montréal avait jusqu'alors été non concluante. Compte tenu de ce contexte, je crois que le témoignage que M. Faribault a présenté lorsqu'il a été contre-interrogé pendant l'interrogatoire préalable dissipe tous les doutes que j'avais au sujet de ses croyances et objectifs réels lorsqu'il a repris l'enquête dont les appelantes faisaient l'objet.

[24] Enfin, l'avocat de l'intimé a soutenu que l'enquêteur Faribault n'avait pas de motifs raisonnables de demander un mandat de perquisition puisqu'il n'y avait pas lieu de croire qu'un crime avait été commis. Je crois qu'il est plus exact de dire qu'il soupçonnait qu'un crime avait été commis, mais qu'il ne disposait pas à ce stade de suffisamment d'éléments de preuve pour demander un mandat. C'est pourquoi M. Faribault qui, de son propre aveu, menait une enquête criminelle, a eu recours aux pouvoirs de contrainte prévus au paragraphe 231.2(1), lesquels éliminent l'entrave représentée par un examen judiciaire préalable. Un bref examen du témoignage de M. Faribault est instructif sur ce point.

[25] Aux pages 137 et 140 du dossier d'appel, M. Faribault a témoigné au sujet de la politique qui s'appliquait à la collecte de la preuve relative à une fraude fiscale:

Q - [Me Rheault] Donc [. . .] mais il y a une [. . .] il y a une politique, là, qui est reflétée au paragraphe 13, applicable aux enquêtes spéciales, qui est celle à l'effet que [. . .] je [. . .] et je lis:

> «*L'enquêteur doit donc obtenir tous les documents et registres en la possession ou sous le contrôle du contribuable qui peuvent servir d'éléments de preuve, et les conserver sous sa garde et son contrôle jusqu'à ce qu'ils soient présentés au Tribunal.*»

C'est exact?

R - [M. Faribault] Oui, oui. Oui.

Q - [Me Rheault]	Then for evidentiary purposes, as an investigator, your role is to obtain the originals?
A - [M. Faribault]	At some point, yes. At a stage of the investigation, yes.
	. . .
Q - [Me Rheault]	Then the policy of the Department at the time the requirements are issued was set out in that *circular, here, among other things, and as part of* that policy, an investigator was asked to obtain the documents and records in the possession or under the control of the taxpayer that may . . . that could be used . . . as evidence, and to keep them until they were filed in court, is that right?
A - [M. Faribault]	In the Circular, yes, that is stated, yes.
Q - [Me Rheault]	Now, was that the policy of the Department at the time?
A - [M. Faribault]	Well, yes. [My emphasis.]

[26] Mr. Faribault explains at page 145 what he was trying to do to fulfill, as an investigator, his necessary obligation to gather the evidence of the tax evasion offence that he was investigating:

Q - [Me Rheault]	You, as an investigator, you had to be satisfied that you had reasonable and probable grounds to believe that an offence had been committed, before requesting that a search warrant be issued?
A - [M. Faribault]	Yes.
Q - [Me Rheault]	And in this case as you mentioned earlier, you had suspicions that . . . that resulted, then, in the investigation you began, but you tell us that you did . . . not yet have grounds, reasonable and probable grounds to believe than an offence of tax evasion had been committed?
A - [M. Faribault]	Yes.
Q - [Me Rheault]	So you proceeded then to . . . to apply for a search warrant?
A - [M. Faribault]	No.
Q - [Me Rheault]	Instead, you proceeded by issuing requirements?
A - [M. Faribault]	Yes.

Q - [M[e] Rheault]	Puis pour les fins de preuve, comme enquêteur, votre rôle c'est d'obtenir les originaux?
R - [M. Faribault]	À un moment donné, oui. À un stade de l'enquête, oui.
	[. . .]
Q - [M[e] Rheault]	Puis la politique du ministère au moment des demandes péremptoires était exposée dans cette *circulaire-là, ici, entre autres, et dans le cadre de* cette politique-là, on demandait à l'enquêteur d'obtenir les documents et les registres en la possession ou sous le contrôle du contribuable qui peuvent [. . .] qui pourraient servir de [. . .] d'éléments de preuve, et de les conserver jusqu'à *ce qu'ils soient présentés au Tribunal, c'est* exact?
R - [M. Faribault]	Dans la circulaire, oui, c'est indiqué, oui.
Q - [M[e] Rheault]	Puis est-ce que c'était ça la politique du ministère à l'époque?
R - [M. Faribault]	Bien, oui. [Non souligné dans l'original.]

[26] À la page 145, M. Faribault explique qu'il essayait de s'acquitter, en sa qualité d'enquêteur, de l'obligation qui lui incombait de recueillir la preuve relative à la fraude fiscale sur laquelle il enquêtait:

Q - [M[e] Rheault]	Vous, comme enquêteur, vous deviez vous satisfaire que vous aviez des motifs raisonnables et probables de croire qu'une infraction avait été commise, avant d'aller demander l'émission d'un mandat de perquisition?
R - [M. Faribault]	Oui.
Q - [M[e] Rheault]	Puis dans le présent dossier comme vous l'avez mentionné tantôt, vous entreteniez des soupçons qui ont [. . .] qui ont résulté, là, à l'enquête que vous avez amorcée, mais vous nous dites que *vous ne [. . .] n'aviez pas des motifs encore*, là, raisonnables et probables de croire qu'une infraction d'évasion fiscale avait été commise?
R - [M. Faribault]	Oui.
Q - [M[e] Rheault]	Donc vous avez pas procédé, là, à [. . .] à demander un mandat de perquisition?
R - [M. Faribault]	Non.
Q - [M[e] Rheault]	Vous avez plutôt procédé par le biais de demandes péremptoires?
R - [M. Faribault]	Oui.

Q - [Me Rheault] Under section 231.2 of the Act?

A - [M. Faribault] Yes. [My emphasis.]

[27] In my respectful view, Mr. Faribault who was embarked upon a criminal investigation of the appellants attempted to do, indirectly, what he could not do directly, i.e. obtain the incriminating evidence without a warrant. The events go back to a time when the line between the use of the requirement powers and the search powers pursuant to a warrant was blurred and the decision in *Jarvis* had not yet been rendered: see the facts in *Jarvis* and in *R. v. Ling*, [2002] 3 S.C.R. 814 which attest to the blurring. In any event, both the admission and conduct of Mr. Faribault reveal that he was clearly engaged into the criminal investigation of the appellants and that a clear decision to that effect had been made.

[28] There would be no need for me to consider the factors identified by the Supreme Court. I will, nonetheless, do it and review the evidence on the record to ascertain whether the factors also establish that the respondent's investigation had crossed the Rubicon to become a criminal investigation. The record before us is somewhat succinct, probably more so than it was before the Motions Judge. In any event, the transcript of the cross-examination of investigator Faribault of the SI branch has been included in the Appeal Book. I will analyze the first two factors together since the relevant facts already enumerated are intertwined.

Factor

(a) Did the authorities have reasonable grounds to lay charges? Does it appear from the record that a decision to proceed with a criminal investigation could have been made?

(b) Was the general conduct of the authorities such that it was consistent with the pursuit of a criminal investigation?

[29] Factor (a) addresses two different issues that may arise at different times in the process. A decision to proceed with a criminal investigation may be made early in the process and such investigation may eventually, at a later stage, provide the authorities with the required

Q - [Me Rheault] Selon l'article 231.2 de la loi?

R - [M. Faribault] Oui. [Non souligné dans l'original.]

[27] À mon avis, M. Faribault, qui était engagé dans une enquête criminelle mettant en cause les appelantes, tentait indirectement de faire ce qu'il ne pouvait pas faire directement, à savoir obtenir des preuves incriminantes sans mandat. Les événements remontent à une époque où la ligne de démarcation entre le recours aux pouvoirs de contrainte et aux pouvoirs de perquisition conformément à un mandat était floue et où la décision n'avait pas encore été rendue dans l'affaire *Jarvis*: voir les faits, dans les affaires *Jarvis* et *R. c. Ling*, [2002] 3 R.C.S. 814, qui montrent que la ligne était floue. Quoi qu'il en soit, l'aveu et la conduite de M. Faribault révèlent qu'il était clairement engagé dans une enquête criminelle mettant en cause les appelantes et qu'une décision claire en ce sens avait été prise.

[28] Je n'aurais pas à tenir compte des facteurs identifiés par la Cour suprême, mais je le ferai néanmoins et j'examinerai la preuve versée au dossier pour décider si les facteurs établissent également que l'enquête de l'intimé avait franchi le Rubicon pour devenir une enquête criminelle. Le dossier mis à notre disposition est plutôt succinct, probablement plus que celui dont disposait le juge des requêtes. Quoi qu'il en soit, la transcription du contre-interrogatoire de l'enquêteur Faribault de la Direction générale des ES a été incluse dans le dossier d'appel. J'analyserai les deux premiers facteurs ensemble étant donné que les faits pertinents qui ont déjà été exposés sont liés les uns aux autres.

Facteur

a) Les autorités avaient-elles des motifs raisonnables de porter des accusations? Semble-t-il, au vu du dossier, que l'on aurait pu prendre la décision de procéder à une enquête criminelle?

b) L'ensemble de la conduite des autorités donnait-elle à croire que celles-ci procédaient à une enquête criminelle?

[29] Le facteur a) se rapporte à deux questions différentes qui peuvent se poser à différents moments du processus. La décision de procéder à une enquête criminelle peut être prise au début du processus et cette enquête peut éventuellement, à un stade ultérieur, fournir

reasonable grounds to lay a charge. However, a criminal investigation does not cease to be a criminal investigation because, in the end, the authorities do not have reasonable grounds to lay charges or no charges are laid. It may be that the criminal investigation is inconclusive with respect to the commission of an offence or that, although conclusive in that respect, the offenders have yet to be identified. It is the very purpose of a criminal investigation to determine whether a crime has been committed and by whom so that charges can be laid. L'Heureux-Dubé J. said in *Starr v. Houlden*, [1990] 1 S.C.R. 1366, at page 1425, from a criminal law perspective, "[s]pecific individuals are targeted for the express and exclusive purpose of indicting them".

aux autorités les motifs exigés pour pouvoir porter des accusations. Toutefois, une enquête criminelle ne change pas de nature pour la seule raison que, en fin de compte, les autorités n'ont pas de motifs raisonnables de porter des accusations ou parce qu'aucune accusation n'est portée. Il se peut que l'enquête criminelle ne soit pas concluante en ce qui concerne la perpétration d'une infraction ou que, même si elle est concluante sur ce point, les contrevenants n'aient pas encore été identifiés. Or, l'enquête criminelle vise justement à permettre de décider si un crime a été commis et par qui il l'a été, de façon que des accusations puissent être portées. Dans l'arrêt *Starr c. Houlden*, [1990] 1 R.C.S. 1366, à la page 1425, la juge L'Heureux-Dubé a dit que, du point de vue du droit criminel, «[d]es personnes précises sont visées dans le but exprès et exclusif d'une mise en accusation».

[30] The fact that the authorities have reached a stage in their inquiry where they have reasonable grounds to lay charges is not, in and of itself, sufficient to conclude that the threshold has been crossed and that the inquiry has become a criminal investigation: see *Jarvis*, at paragraph 93. It is, however, an important factor to be considered in the determination of the subsequent relationship between the parties. "In most cases", the Supreme Court writes, "if all ingredients of an offence are reasonably thought to have occurred, it is likely that the investigation function is triggered", at paragraph 89. This is no doubt the case when the situation has reached a stage where charges can be laid. Usually, the criminal investigation is over since the laying of charges is the outcome of the investigation.

[30] Le fait que les autorités en sont venues à un stade de leur enquête où elles ont des motifs raisonnables leur permettant de porter des accusations n'est pas en soi suffisant pour conclure que le seuil a été franchi et que l'enquête est devenue une enquête criminelle: voir *Jarvis*, au paragraphe 93. Toutefois, il s'agit d'un facteur important dont il faut tenir compte pour qualifier la relation subséquente entre les parties. La Cour suprême a écrit ce qui suit: «Dans la plupart des cas, si l'on croit raisonnablement à la présence de tous les éléments d'une infraction, il est probable que le processus d'enquête sera enclenché», au paragraphe 89. C'est sans doute ce qui arrive lorsque la situation est parvenue à un stade où des accusations peuvent être portées. Habituellement, l'enquête criminelle est terminée puisque le dépôt d'accusations est le résultat de l'enquête.

[31] Conversely, the fact that there are yet no reasonable grounds to lay charges does not mean that the ongoing inquiry is not a criminal investigation because, as I have already pointed out, the purpose of such investigation is to lead to a point where the prosecuting authorities acquire reasonable grounds to lay charges. As the second question in factor (a) indicates, it is important to look at the record to see if it appears "that a decision to proceed with a criminal investigation could have been made". I note that the test is cast in terms of a mere possibility as opposed to a probability and that the Supreme Court itself has underlined that fact.

[31] Par ailleurs, le fait qu'il n'y a pas encore de motifs raisonnables de porter des accusations ne veut pas pour autant dire que l'enquête en cours n'est pas une enquête criminelle parce que, comme je l'ai déjà signalé, l'enquête criminelle a pour objet de mener à un point où les autorités ont des motifs raisonnables leur permettant de porter des accusations. Comme le montre la deuxième question du facteur a), il importe de consulter le dossier pour voir s'il semble «que l'on aurait pu prendre la décision de procéder à une enquête criminelle». Je note que le critère est libellé en des termes indiquant une simple possibilité par opposition à une probabilité et que la Cour suprême elle-même a souligné ce fait.

[32] In the present instance, not only a decision to proceed with a criminal investigation could have been made as factor (a) indicates, but such investigation was actually undertaken as evidenced by the facts and the admission and conduct of investigator Faribault of the SI branch.

(c) Had the auditor transferred his or her files and materials to the investigators?

[33] This factor as defined does not apply because the appellants' files were at all times with the SI branch of the CCRA which was conducting a criminal investigation of a fraudulent ring of charitable donations and receipts. The appellants were generous donors to one of the charitable organization under criminal investigation and were part of that investigation.

(d) Was the conduct of the auditor such that he or she was effectively acting as an agent for the investigators?

[34] This factor does not apply in the case at bar.

(e) Does it appear that the investigators intended to use the auditor as their agent in the collection of evidence?

[35] This factor does not apply directly *per se*. However, if what was really intended was a mere compliance audit and if the criminal investigation was really closed, why wasn't the file sent to the audit section to achieve that result. This would have had the advantage of dissipating any ambiguity as to the real objective of the investigation although, in my view, the testimony of investigator Faribault left none when he clearly stated the objective of the investigation that he had undertaken.

(f) Is the evidence sought relevant to taxpayer liability generally? Or, as is the case with evidence as to the taxpayer's *mens rea*, is the evidence relevant only to the taxpayer's penal liability? [My emphasis.]

[36] Factor (f), as worded, which states its objective in terms of mere relevancy of the evidence and exclusive relevancy with respect to penal liability, is difficult to apply in the present instance. By definition, an investigation with a predominant purpose is an

[32] En l'espèce, non seulement la décision de procéder à une enquête criminelle aurait pu être prise comme le facteur a) l'indique, mais une telle enquête a de fait été engagée comme en font foi les faits ainsi que l'aveu et la conduite de l'enquêteur Faribault, de la Direction générale des ES.

c) Le vérificateur avait-il transféré son dossier et ses documents aux enquêteurs?

[33] Ce facteur tel qu'il est défini ne s'applique pas parce que les dossiers des appelantes relevaient au moment pertinent de la Direction générale des ES de l'ADRC, qui menait une enquête criminelle sur un stratagème frauduleux relatif à des dons et à des reçus de charité. Les appelantes avaient consenti des dons généreux à l'un des organismes de charité visés par l'enquête criminelle et faisaient partie de cette enquête:

d) La conduite du vérificateur donnait-elle à croire qu'il agissait en fait comme un mandataire des enquêteurs?

[34] Ce facteur ne s'applique pas en l'espèce.

e) Semble-t-il que les enquêteurs aient eu l'intention d'utiliser le vérificateur comme leur mandataire pour recueillir des éléments de preuve?

[35] Ce facteur ne s'applique pas directement en soi. Toutefois, si l'on voulait en fait procéder à une simple vérification de conformité et si l'enquête criminelle était réellement terminée, pourquoi le dossier n'a-t-il pas été transmis à la section de la vérification pour que ce résultat puisse être obtenu? Cela aurait eu l'avantage de dissiper toute ambiguïté au sujet de l'objet réel de l'enquête même si, à mon avis, le témoignage de l'enquêteur Faribault ne laissait planer aucun doute sur la question puisqu'il avait clairement énoncé l'objet de son enquête.

f) La preuve recherchée est-elle pertinente quant à la responsabilité générale du contribuable ou, au contraire, uniquement quant à sa responsabilité pénale, comme dans le cas de la preuve de la *mens rea*?

[36] Le facteur f), tel qu'il a été libellé, dont l'objet est énoncé en fonction d'une simple pertinence de la preuve et d'une pertinence exclusive à la responsabilité pénale, est difficile à appliquer en l'espèce. Par définition, une enquête ayant un objet prédominant est une enquête qui

investigation that has secondary or subsidiary purposes. Therefore, the evidence sought and obtained for the predominant or primary purpose may also be relevant and useful to the secondary purpose. Even if the evidence is sought to establish the penal liability of the taxpayer, such evidence will generally remain relevant to establish his tax liability and civil penalties. It may be, for example, that the evidence obtained in the context of a criminal investigation of a taxpayer falls short of proving a crime beyond a reasonable doubt, but still reveals irregularities in that taxpayer's compliance with the Act which affect his tax liability. As the U.S. Supreme Court said in the *La Salle Nat'l Bank* case *supra*, at page 2365, "[t]he Government does not sacrifice its interest in unpaid taxes just because a criminal prosecution begins". Thus, it is difficult, if not impossible to say, that the evidence will be, or is relevant, only to the taxpayer's penal liability even though this was the primary reason why that evidence was sought and obtained and even though the taxpayer's penal liability was the predominant purpose of the investigation.

a des objets secondaires ou accessoires. Par conséquent, la preuve recherchée et obtenue pour la fin prédominante ou primaire peut également être pertinente et utile quant aux fins secondaires. Même si la preuve recherchée vise à établir la responsabilité pénale du contribuable, cette preuve continuera en général à être pertinente lorsqu'il s'agira d'établir l'obligation fiscale du contribuable et les pénalités civiles y afférentes. Ainsi, il se peut que la preuve obtenue dans le contexte d'une enquête criminelle concernant un contribuable n'établisse pas la perpétration d'un crime hors de tout doute raisonnable, mais qu'elle révèle néanmoins des irrégularités en ce qui concerne la façon dont le contribuable observe la Loi, ce qui influe sur la responsabilité fiscale de celui-ci. Comme la Cour suprême américaine l'a dit dans la décision *La Salle Nat'l Bank*, précitée, à la page 2365, [TRADUCTION] «[l]e gouvernement ne sacrifie pas son intérêt à l'égard d'impôts impayés simplement parce qu'une poursuite criminelle est engagée». Il est donc difficile sinon impossible de dire que la preuve sera pertinente, ou qu'elle est pertinente, uniquement quant à la responsabilité pénale du contribuable, même si c'était la principale raison pour laquelle cette preuve était recherchée et obtenue et même si la responsabilité pénale du contribuable était l'objet prédominant de l'enquête.

[37] All the evidence sought from the appellants, i.e. cancelled cheques, bank statements, accounting books and records, was in connection with their donations to the Rabbinical College of Montréal whose investigation led to the sending, on March 3, 2000, of a notice of revocation of its charitable registration for alleged numerous and serious irregularities relating to transfers of money and books and records keeping. That evidence was relevant to establish their penal liability. It could be used also to complement the unsuccessful criminal investigation of the Rabbinical College of Montréal and establish its involvement in the alleged organized fraud. The appellants' penal liability could not be proven solely with the evidence obtained from the College in the course of the criminal investigation that it was subject to.

[37] Tous les éléments de preuve demandés aux appelantes, à savoir les chèques oblitérés, les relevés bancaires, les registres et livres de compte, se rapportaient aux dons qu'elles avaient consentis au Collège rabbinique de Montréal, l'enquête y afférente ayant mené à l'envoi, le 3 mars 2000, d'un avis de révocation de l'enregistrement du Collège à titre d'organisme de charité en raison des nombreuses irrégularités graves qui étaient alléguées en rapport avec des virements de fonds et la tenue de livres et de registres. Ces éléments de preuve étaient pertinents lorsqu'il s'agissait d'établir leur responsabilité pénale. Ils pouvaient également être utilisés pour compléter l'enquête criminelle infructueuse concernant le Collège rabbinique de Montréal et établir la participation de cet organisme au stratagème frauduleux allégué. La responsabilité pénale des appelantes ne pouvait être établie uniquement à l'aide des éléments de preuve obtenus de cet établissement dans le cadre de l'enquête criminelle dont celui-ci faisait l'objet.

(g) Are there any other circumstances or factors that can lead the trial judge to the conclusion that the compliance audit had in reality become a criminal investigation?

[38] This factor does not apply in this case.

Conclusion

[39] Like the Motions Judge, I have come to the conclusion that the investigation of the appellants was a criminal investigation. It was led at all times by the SI branch of the CCRA whose primary function is to fight tax evasion and establish the penal liability of taxpayers in this respect. The investigator in charge of the file clearly stated that the investigation was a criminal investigation and that its purpose was to gather evidence of a tax evasion offence committed by the appellants. His evidence has remained uncontradicted. It is significant that none of his superiors came to testify that this was not the case. He testified that he resorted to the requirement powers of subsection 231.2(1) of the Act because he did not yet have reasonable grounds to apply for a warrant to obtain the evidence that he wanted. The events occurred at a time when the line between the requirement powers of subsection 231.2(1) and the search powers of subsection 231.3(1) was blurred.

[40] Furthermore, the investigation of the appellants was a resumption of the earlier criminal investigation that had been suspended. In addition, it was interconnected with other criminal investigations of charitable organizations. All these interconnected investigations were conducted by the SI branch of the CCRA. The evidence sought was relevant to the penal liability of the appellants as donors as well as that of the beneficiaries of the donations. The relevant factors, when analyzed in their proper context, also point to an investigation whose predominant purpose is criminal in nature. If this investigation of the appellants is not a criminal investigation, one is then left to wonder what is, and what will ever be, a criminal investigation.

g) Existe-t-il d'autres circonstances ou facteurs susceptibles d'amener le juge de première instance à conclure que la vérification de la conformité à la loi était en réalité devenue une enquête criminelle?

[38] Ce facteur ne s'applique pas en l'espèce.

Conclusion

[39] Comme le juge des requêtes, je suis arrivé à la conclusion que l'enquête dont les appelantes faisaient l'objet était une enquête criminelle. L'enquête a en tout temps été menée par la Direction générale des ES de l'ADRC, dont la principale tâche consiste à lutter contre les fraudes fiscales et à établir la responsabilité pénale des contribuables à cet égard. L'enquêteur chargé du dossier a clairement déclaré que l'enquête était une enquête criminelle et qu'elle visait à permettre de recueillir des éléments de preuve tendant à montrer qu'une fraude fiscale avait été commise par les appelantes. La preuve présentée par l'enquêteur n'a pas été contredite. Il importe de noter qu'aucun des supérieurs de l'enquêteur n'est venu témoigner que ce n'était pas le cas. L'enquêteur a déclaré avoir eu recours aux pouvoirs de contrainte prévus au paragraphe 231.2(1) de la Loi parce qu'il n'avait pas encore de motifs raisonnables lui permettant de demander un mandat en vue d'obtenir les éléments de preuve qu'il cherchait. Les événements se sont produits à un moment où la ligne de démarcation entre les pouvoirs de contrainte prévus au paragraphe 231.2(1) et les pouvoirs de perquisition conférés au paragraphe 231.3(1) était floue.

[40] En outre, l'enquête concernant les appelantes reprenait l'enquête criminelle antérieure qui avait été suspendue. De plus, elle était liée à d'autres enquêtes criminelles concernant des organismes de charité. Toutes ces enquêtes liées les unes aux autres ont été menées par la Direction générale des ES de l'ADRC. La preuve recherchée était pertinente quant à la responsabilité pénale des appelantes en leur qualité de donateurs ainsi qu'à celle des bénéficiaires de dons. Les facteurs pertinents, lorsqu'ils sont analysés dans le contexte approprié, indiquent également que l'objet prédominant de l'enquête était de nature criminelle. Si l'enquête à laquelle les appelantes sont ici assujetties n'est pas une enquête criminelle, on peut se demander ce qu'est une

[41] For these reasons, I would allow the appeal with costs and set aside the decision of the Motions Judge. Rendering the judgment that he should have rendered, I would allow the application for judicial review with costs and quash the requirements for production of documents issued on behalf of the Minister on January 12, 2001 against the appellants, Les Plastiques Algar (Canada) Ltée, Modern Wood Fabricators (M.W.F.) Inc. and Snapshot Theatrical Productions Inc.

* * *

The following are the reasons for judgment rendered in English by

[42] NADON J.A.: For the reasons which my colleague Létourneau J.A. gives, I would also allow this appeal with costs. However, as I have reached this conclusion only after much hesitation, a few words are in order.

[43] I need not recite the facts, as they are clearly set out in the reasons of my colleagues Desjardins and Létourneau JJ.A., which I have had the benefit of reading in draft.

[44] For their respective conclusions, my colleagues rely on the Supreme Court of Canada's decisions in *R. v. Jarvis*, [2002] 3 S.C.R. 757 and *R. v. Ling*, [2002] 3 S.C.R. 814. In *Jarvis*, the Supreme Court elaborated a test so as to determine the boundary between the audit and investigation functions of Revenue Canada. At paragraphs 93 and 94 of its reasons in *Jarvis*, the Supreme Court directed trial judges to consider, absent a clear decision on the part of Revenue Canada to pursue a criminal investigation, a number of factors with a view to making the proper determination.

[45] In these reasons, I wish to address one of the issues dealt with by both of my colleagues, namely

enquête criminelle et ce qui pourrait bien constituer une enquête criminelle.

[41] Pour ces motifs, j'accueille l'appel avec dépens et j'annule la décision du juge des requêtes. Je rends le jugement que le juge aurait dû rendre, et j'accueille la demande de contrôle judiciaire avec dépens et j'annule les demandes péremptoires de production de documents émises pour le compte du ministre, le 12 janvier 2001, contre les appelantes, Les Plastiques Algar (Canada) Ltée, Modern Wood Fabricators (M.W.F.) Inc. et Snapshot Theatrical Productions Inc.

* * *

Ce qui suit est la version française des motifs du jugement rendus par

[42] LE JUGE NADON, J.C.A.: Pour les motifs énoncés par mon collègue le juge Létourneau, j'accueille également l'appel avec dépens. Toutefois, puisque j'ai énormément hésité avant d'arriver à cette conclusion, il convient de faire quelques remarques.

[43] Je n'ai pas à exposer les faits puisqu'ils sont clairement relatés dans les motifs de mes collègues, les juges Desjardins et Létourneau, et que j'ai eu l'avantage de lire le projet de motifs.

[44] Pour tirer les conclusions respectives auxquelles ils sont arrivés, mes collègues se fondent sur les décisions rendues par la Cour suprême du Canada dans les affaires *R. c. Jarvis*, [2002] 3 R.C.S. 757, et *R. c. Ling*, [2002] 3 R.C.S. 814. Dans l'arrêt *Jarvis*, la Cour suprême a élaboré un critère permettant de déterminer la ligne de démarcation entre les fonctions de vérification et d'enquête de Revenu Canada. Aux paragraphes 93 et 94 des motifs prononcés dans l'arrêt *Jarvis*, la Cour suprême a demandé aux juges de première instance de tenir compte d'un certain nombre de facteurs afin de rendre la décision qui convient, en l'absence d'une décision claire de la part de Revenu Canada de procéder à une enquête criminelle.

[45] Dans les présents motifs, j'aimerais traiter de l'une des questions examinées par mes deux collègues,

whether, at the time the requirements to provide information and documents were sent to the appellants, pursuant to paragraph 231.2(1)(*b*) of the *Income Tax Act*, R.S.C., 1985, 5th Supp.), c. 1 (the Act), Revenue Canada had made a clear decision to pursue a criminal investigation.

[46] At paragraph 27 of his reasons, Létourneau J.A. concludes that, at the relevant time, the investigator, Mr. Faribault, was clearly "embarked upon a criminal investigation of the appellants". Although that conclusion is sufficient to dispose of the issue, Létourneau J.A. then goes on to examine, in light of the evidence, the factors set out in *Jarvis*, at paragraph 94. That examination leads him to conclude that an adversarial relationship between the state and the appellants was in existence when the requirements were sent.

[47] Desjardins J.A. arrives at a different conclusion. At paragraphs 112 - 122 of her reasons, she deals with the issue of whether a clear decision to pursue a criminal investigation had been made at the time the requirements were sent and, at paragraphs 118 and 122, she makes the following remarks:

> When Faribault's statements are analyzed in context, it cannot be said, under the *Jarvis* test, *supra*, that a clear decision had been made to pursue a criminal investigation. Nothing of that sort could have been decided at that stage. The directive given by CCRA to Faribault was an assignment to look principally for evidence of a penal nature. It cannot be drawn from that directive that CCRA had made the decision to pursue a criminal investigation. Such decision could not be made. CCRA had no evidence on which to base such a decision and no search warrant could have been issued to implement it.
>
> . . .
>
> It is my view that "a clear decision to pursue a criminal investigation" had not been made and could have been made at that preliminary stage. Paragraphs 88 and 93 of *Jarvis*, *supra*, stand for the proposition that it is for the judge to objectively assess the nature of the inquiry and determine whether a clear decision is made to pursue the taxpayer for a criminal offence. If a clear decision is made, an analysis of the

à savoir si, au moment où les demandes péremptoires visant la fourniture de renseignements et la production de documents ont été envoyées aux appelantes, conformément à l'alinéa 231.2(1)*b*) de la *Loi de l'impôt sur le revenu*, L.R.C. (1985) (5e suppl.), ch. 1 (la Loi), Revenu Canada avait pris une décision claire de procéder à une enquête criminelle.

[46] Au paragraphe 27 de ses motifs, le juge Létourneau conclut qu'au moment pertinent, l'enquêteur, M. Faribault, était clairement «engagé dans une enquête criminelle mettant en cause les appelantes». Cette conclusion est suffisante pour trancher la question, mais le juge Létourneau examine ensuite, à la lumière de la preuve, les facteurs énoncés au paragraphe 94 de l'arrêt *Jarvis*. Cet examen l'amène à conclure qu'il existait une relation contradictoire entre l'État et les appelants lorsque les demandes péremptoires ont été envoyées.

[47] La juge Desjardins arrive à une conclusion différente. Aux paragraphes 112 à 122 de ses motifs, elle traite de la question de savoir si une décision claire de procéder à une enquête criminelle avait été prise au moment où les demandes péremptoires ont été envoyées et, aux paragraphes 118 et 122, elle fait les remarques suivantes:

> Si les déclarations de M. Faribault sont analysées dans leur contexte, on ne peut pas dire, selon le critère préconisé dans l'arrêt *Jarvis*, précité, qu'une décision claire de procéder à une enquête criminelle avait été prise. Il aurait été impossible de prendre une telle décision à ce stade. Selon la directive que l'ADRC lui avait donnée, M. Faribault devait principalement chercher une preuve de nature pénale. On ne saurait conclure à partir de cette directive que l'ADRC avait décidé de procéder à une enquête criminelle. Une telle décision ne pouvait pas être prise. L'ADRC ne disposait d'aucun élément de preuve justifiant pareille décision et aucun mandat de perquisition n'aurait pu être décerné pour y donner suite.
>
> [. . .]
>
> À mon avis, «une décision claire de procéder à une enquête criminelle» n'avait pas été prise et n'aurait pas pu être prise à ce stade préliminaire. Les paragraphes 88 et 93 de l'arrêt *Jarvis*, précité, étayent la thèse selon laquelle il incombe au juge d'apprécier objectivement la nature de l'examen et de déterminer s'il est clairement décidé de poursuivre le contribuable au criminel. Si une décision claire est prise, il

enumerated factors is not necessary. A contextual analysis of circumstances and attitudes is superfluous, because the evidence is clear. I do not understand *Jarvis* to say, however, that from a mere directive to conduct principally a penal investigation in circumstances where there is not one iota of evidence and where no search warrant can be issued, one can draw the conclusion that a decision to pursue a criminal investigation has been made. [Underlining in original.]

[48] As I understand Desjardins J.A.'s reasons, the fact that the investigator believed that he was conducting a criminal investigation, or that he had been so instructed by his superiors, is not determinative of the issue. As she states at paragraph 122, it is for the trial judge to determine whether, in a given case, a criminal investigation has been undertaken. In order to make that decision, the judge must examine all of the evidence and decide whether there was a proper basis or foundation to justify the commencement of a criminal investigation. That approach appears to be the one which the Supreme Court instructs judges to take when assessing the factors listed at paragraph 94 of *Jarvis*, and, in particular, when assessing factor (a):

> (a) Did the authorities have reasonable grounds to lay charges? Does it appear from the record that a decision to proceed with a criminal investigation could have been made?

[49] I repeat that the Supreme Court, at paragraphs 93 and 94 of its reasons, instructed trial judges to have recourse to the enumerated factors only when a clear decision to pursue a criminal investigation has not been made. However, that approach is not applicable here, because the issue is whether a clear decision to proceed with a criminal investigation has been made, and not whether a criminal investigation ought to have been commenced.

[50] In order to properly understand paragraphs 93 and 94 of *Jarvis*, it must be remembered that the conduct of the inquiry in both *Jarvis* and *Ling*, was, at all times, in the hands of the auditors and not in the hands of the investigators. That is the context which drives both decisions and, in particular, the discussion commencing at paragraph 85 of *Jarvis*, the subtitle of which is "*Delineating the Bounds Between Audit and Investigation: Nature of the Inquiry*".

n'est pas nécessaire d'analyser les facteurs énumérés. Une analyse contextuelle des circonstances et des attitudes est superflue parce que la preuve est claire. Toutefois, je ne crois pas que l'arrêt *Jarvis* dise qu'à partir d'une simple directive de mener principalement une enquête pénale dans des circonstances où il n'y a pas la moindre preuve et où aucun mandat de perquisition ne peut être décerné, il est possible de conclure qu'une décision de procéder à une enquête criminelle a été prise. [Soulignement dans l'original.]

[48] Selon mon interprétation des motifs de la juge Desjardins, le fait que l'enquêteur croyait qu'il menait une enquête criminelle, ou que ses supérieurs lui avaient donné une directive en ce sens, n'est pas déterminant. Comme la juge le dit au paragraphe 122, il incombe au juge de première instance de décider si, dans un cas donné, une enquête criminelle a été engagée. À cette fin, le juge doit examiner tous les éléments de preuve et décider s'il existait un fondement approprié justifiant la tenue d'une enquête criminelle. Cette approche semble être l'approche que la Cour suprême demande aux juges d'adopter lorsqu'ils apprécient les facteurs énumérés au paragraphe 94 de l'arrêt *Jarvis*, précité, et, en particulier, lorsqu'ils apprécient le facteur a):

> a) Les autorités avaient-elles des motifs raisonnables de porter des accusations? Semble-t-il, au vu du dossier, que l'on aurait pu prendre la décision de procéder à une enquête criminelle?

[49] Je répète que la Cour suprême, aux paragraphes 93 et 94 de ses motifs, a demandé aux juges de première instance d'avoir recours aux facteurs énumérés uniquement lorsqu'une décision claire de procéder à une enquête criminelle n'a pas été prise. Toutefois, cette approche ne s'applique pas ici, parce qu'il s'agit de décider si une décision claire de procéder à une enquête criminelle a été prise plutôt que de décider s'il fallait entreprendre une telle enquête.

[50] Afin de bien comprendre les paragraphes 93 et 94 de l'arrêt *Jarvis*, il faut se rappeler que l'examen, dans les affaires *Jarvis* et *Ling*, relevait toujours des vérificateurs plutôt que des enquêteurs. Tel est le contexte dans lequel s'inscrivent les deux décisions et, en particulier, l'analyse qui commence au paragraphe 85 de l'arrêt *Jarvis*, dont le sous-titre est «*La délimitation de la frontière entre une vérification et une enquête: la nature de l'examen*».

[51] In *Jarvis* and *Ling*, the Supreme Court sought to elaborate a test which would allow judges to determine whether an inquiry conducted by auditors had, in fact, become a criminal investigation, even though the matter remained at all times in their hands. The discussion which commences at paragraph 85 and which concludes at paragraph 99 can only be understood in that context. That is why, at paragraphs 88 and 89 of its reasons in *Jarvis*, the Supreme Court speaks of crossing the Rubicon and determining the predominant purpose of an inquiry.

[52] Of the seven factors listed in paragraph 94 of *Jarvis*, three of these factors, (c), (d) and (e), have in mind the investigative branch. They are as follows:

> (c) Had the auditor transferred his or her files and materials to the investigators?
>
> (d) Was the conduct of the auditor such that he or she was effectively acting as an agent for the investigators?
>
> (e) Does it appear that the investigators intended to use the auditor as their agent in the collection of evidence?

[53] These factors must be read in the light of what the Supreme Court states at paragraph 92:

> Whether a matter has been sent to the investigations section is another factor in determining whether the adversarial relationship exists. Again, though, this, by itself, is not determinative. An auditor's recommendation that investigators look at a file might result in nothing in the way of a criminal investigation since there is always the possibility that the file will be sent back. Still, if, in an auditor's judgment, a matter should be sent to the investigators, a court must examine the following behaviour very closely. If the file is sent back, does it appear that the investigators have actually declined to take up the case and have returned the matter so that the audit can be completed? Or, does it appear, rather, that they have sent the file back as a matter of expediency, so that the auditor may use ss. 231.1(1) and 231.2(1) to obtain evidence for a prosecution (as was found to be in the case in Norway *Insulation*, *supra*)?

[54] When factors (c), (d) and (e), and paragraph 92 are read in their proper context, it is clear that the

[51] Dans les arrêts *Jarvis* et *Ling*, la Cour suprême a cherché à élaborer un critère qui permettrait aux juges de décider si un examen effectué par les vérificateurs était de fait devenu une enquête criminelle, et ce, même si l'affaire était toujours demeurée entre leurs mains. L'analyse qui commence au paragraphe 85 et qui se termine au paragraphe 99 peut uniquement être comprise dans ce contexte. C'est pourquoi, aux paragraphes 88 et 89 des motifs de l'arrêt *Jarvis*, la Cour suprême parle de franchir le Rubicon et de déterminer l'objet prédominant d'un examen.

[52] Parmi les sept facteurs énumérés au paragraphe 94 de l'arrêt *Jarvis*, trois facteurs, les facteurs c), d) et e), se rapportent au volet de l'enquête. Il s'agit des facteurs ci-après énoncés:

> c) Le vérificateur avait-il transféré son dossier et ses documents aux enquêteurs?
>
> d) La conduite du vérificateur donnait-elle à croire qu'il agissait en fait comme un mandataire des enquêteurs?
>
> e) Semble-t-il que les enquêteurs aient eu l'intention d'utiliser le vérificateur comme leur mandataire pour recueillir des éléments de preuve?

[53] Ces facteurs doivent être interprétés à la lumière des remarques que la Cour suprême fait au paragraphe 92:

> Le fait que le dossier a été ou non transmis à la section des enquêtes constitue un autre facteur à prendre en compte pour déterminer s'il existe une relation de nature contradictoire. Encore une fois, ce facteur n'est pas déterminant en soi. Même lorsqu'un vérificateur recommande que les enquêteurs examinent un dossier, il se peut qu'aucune enquête criminelle ne soit engagée, car il est toujours possible que le dossier soit retourné à la vérification. Cependant, si un vérificateur est d'avis qu'un dossier devrait être envoyé aux enquêteurs, le tribunal doit examiner très attentivement ce qui se passe ensuite. Si le dossier est retourné à la vérification, les enquêteurs ont-ils réellement décidé de ne pas examiner le dossier et l'ont-ils retourné aux vérificateurs pour que ceux-ci terminent la vérification? L'ont-ils plutôt retourné pour des raisons de commodité afin que le vérificateur puisse utiliser les par. 231.1(1) et 231.2(1) pour obtenir des éléments de preuve pour les besoins d'une poursuite (comme le tribunal l'a constaté dans l'affaire *Norway Insulation*, précitée)?

[54] Il ressort clairement de la lecture des facteurs c), d) et e) ainsi que du paragraphe 92 dans le contexte

Supreme Court, in elaborating its test, intended to prevent the audit section from conducting a disguised criminal investigation. That is why, at paragraph 92 of *Jarvis*, the Supreme Court states that whenever the audit section sends a matter to the investigative section, the judge must pay close attention. The purpose of the exercise is, as I have already indicated, to assess whether a criminal investigation has begun.

[55] In the various scenarios outlined at paragraph 92 of *Jarvis*, i.e. where the audit section has referred a matter to the investigative section, it is clear that the assumption which the Supreme Court makes is that no decision to commence a criminal investigation has yet been made. In directing judges to pay close attention, the Supreme Court is reminding judges that there is a line which the auditors cannot cross.

[56] At paragraph 97 of *Jarvis*, the Supreme Court outlines another scenario, i.e. where parallel investigations are being conducted by the audit and the criminal investigation sections. In such a situation, the Court states that the audit inquiry can continue to resort to subsections 231.1(1) and 231.2(1), but makes it clear that once a criminal investigation has been undertaken, a taxpayer cannot be forced by the investigators to comply with the requirement powers of subsections 231.1(1) and 231.2(1). Specifically, the Court says at paragraph 97:

It may well be that there will be circumstances in which the CCRA officials conducting the tax liability inquiry will desire to inform the taxpayer that a criminal investigation is also under way and that the taxpayer is not obliged to comply with the requirement powers of ss. 231.1(1) and 231.2(1) for the purposes of a criminal investigation.

[57] What is before us in this case is a situation quite different from that which prevailed in *Jarvis* and *Ling*. When the requirements were sent, the matter was clearly in the hands of an investigator. On that part of the evidence, which Létourneau J.A. recites at paragraphs 14 to 17 of his reasons, there cannot be much doubt that the matter had been sent to Mr. Faribault for the specific purpose of carrying out a criminal investigation. Whether

approprié, que la Cour suprême, en élaborant le critère en question, voulait empêcher la section de la vérification de mener une enquête criminelle déguisée. C'est pourquoi, au paragraphe 92 de l'arrêt *Jarvis*, la Cour suprême dit que dès que la section de la vérification transmet un dossier à la section d'enquête, le juge doit faire énormément attention. Comme je l'ai déjà dit, il s'agit de décider si une enquête criminelle a commencé.

[55] Dans les divers scénarios décrits au paragraphe 92 de l'arrêt *Jarvis*, à savoir si la section de la vérification a renvoyé l'affaire à la section d'enquête, il est clair que l'hypothèse émise par la Cour suprême est qu'il n'a pas encore été décidé d'entreprendre une enquête criminelle. En demandant aux juges de faire énormément attention, la Cour suprême leur rappelle qu'il y a une ligne de démarcation que les vérificateurs ne peuvent pas franchir.

[56] Au paragraphe 97 de l'arrêt *Jarvis*, la Cour suprême décrit un autre scénario, à savoir un cas dans lequel des enquêtes parallèles sont menées par la section de la vérification et par la section des enquêtes criminelles. La Cour dit qu'en pareil cas, l'examen relatif à la vérification peut continuer à être fondé sur les paragraphes 231.1(1) et 231.2(1), mais elle dit clairement qu'une fois une enquête criminelle engagée, les enquêteurs ne peuvent pas contraindre le contribuable à se soumettre aux pouvoirs de contrainte prévus aux paragraphes 231.1(1) et 231.2(1). Plus précisément, la Cour dit ce qui suit au paragraphe 97:

Il pourrait bien survenir des circonstances dans lesquelles les fonctionnaires de l'ADRC qui évaluent l'obligation fiscale du contribuable voudront l'informer qu'une enquête criminelle est également en cours et qu'il n'est pas tenu de se soumettre aux pouvoirs de contrainte prévus par les par. 231.1(1) et 231.2(1) pour les besoins de l'enquête criminelle.

[57] Nous sommes ici saisis d'une situation fort différente de celle qui existait dans les affaires *Jarvis* et *Ling*. Lorsque les demandes péremptoires ont été envoyées, l'affaire était clairement entre les mains d'un enquêteur. En ce qui concerne cette partie de la preuve, dont le juge Létourneau fait état aux paragraphes 14 à 17 de ses motifs, il est passablement certain que l'on avait transmis le dossier à M. Faribault dans le but précis de

or not, when the requirements were sent, Revenue Canada and Mr. Faribault had sufficient information to commence a criminal investigation is, in my respectful view, irrelevant. The plain fact is that Mr. Faribault had been directed to conduct a criminal investigation and that is what he was doing.

[58] Consequently, when no clear decision to commence a criminal investigation has been made, it is entirely proper to go to factor (a) so as to determine whether there were reasonable grounds to lay charges and whether the record was such as to justify the commencement of a criminal investigation. That approach has as its objective the determination of whether a matter in the hands of auditors has become a criminal investigation, even though it has not been referred to the investigative section with a mandate to commence a criminal investigation. However, when the matter is in the hands of the investigators, as is the case here, and they are clearly conducting a criminal investigation, there is no necessity of examining the factors set forth at paragraph 94 of *Jarvis*.

[59] For these reasons, I can only give an affirmative answer to the question of whether a clear decision to conduct a criminal investigation had been made when the requirements were sent to the appellants. I would, therefore, dispose of the appeal in the manner proposed by Létourneau J.A.

* * *

The following are the reasons for judgment rendered in English by

[60] DESJARDINS J.A. (dissenting): Three corporate appellants, Les Plastiques Algar (Canada) Ltée., Modern Wood Fabricators (M.W.F.) Inc. and Snapshot Theatrical Productions Inc. appeal a decision of a Motions Judge of the Federal Court Trial Division (reported at [2003] 3 F.C. 569, holding that their rights under sections 7 and 8 of the *Canadian Charter of Rights and Freedoms* (the Charter) were not violated when they were served with requirements to provide documents pursuant to paragraph 231.2(1)(*b*) of the *Income Tax Act*, R.S.C., 1985 (5th Supp.),

procéder à une enquête criminelle. À mon avis, il importe peu de savoir si, lorsque les demandes péremptoires ont été envoyées, Revenu Canada et M. Faribault avaient en leur possession suffisamment de renseignements pour entreprendre une enquête criminelle. En fait, on avait demandé à M. Faribault de mener une enquête criminelle et c'est ce qu'il faisait.

[58] Par conséquent, lorsqu'aucune décision claire d'entreprendre une enquête criminelle n'a été prise, il est tout à fait légitime de se fonder sur le facteur a) pour décider s'il existait des motifs raisonnables permettant de porter des accusations et si le dossier était tel qu'il justifiait la conduite d'une enquête criminelle. Cette approche vise à permettre de décider si une affaire qui est entre les mains des vérificateurs est devenue une enquête criminelle, même si elle n'a pas été renvoyée à la section des enquêtes pour que celle-ci entame une enquête criminelle. Toutefois, lorsque l'affaire est entre les mains des enquêteurs, comme c'est ici le cas, et que les enquêteurs mènent clairement une enquête criminelle, il n'est pas nécessaire d'examiner les facteurs énoncés au paragraphe 94 de l'arrêt *Jarvis*.

[59] Pour ces motifs, je ne puis que répondre par l'affirmative à la question de savoir si une décision claire de mener une enquête criminelle avait été prise lorsque les demandes péremptoires ont été envoyées aux appelantes. Je statue donc sur l'appel de la façon proposée par le juge Létourneau.

* * *

Ce qui suit est la version française des motifs du jugement rendus par

[60] LA JUGE DESJARDINS, J.C.A. (motifs dissidents): Trois sociétés appelantes, Les Plastiques Algar (Canada) Ltée, Modern Wood Fabricators (M.W.F.) Inc. et Snapshot Theatrical Productions Inc. interjettent appel contre une décision (publiée à [2003] 3 C.F. 569) rendue par un juge de la Section de première instance de la Cour fédérale qui avait statué qu'il n'avait pas été porté atteinte aux droits qui leur étaient reconnus aux articles 7 et 8 de la *Charte canadienne des droits et libertés* (la Charte) lorsqu'elles avaient reçu signification de demandes péremptoires visant la production de

c. 1 (the Act).

[61] In the Federal Court Trial Division, two individuals, Messrs. Sam Kligman and Allan Sandler, directors of the corporate appellants, were also parties to the proceedings. The Motions Judge held in their favour under section 7 of the Charter. Consequently, they are not parties to this appeal.

[62] At issue are the scope of the Minister's powers to conduct an inquiry into the affairs of the three corporate taxpayers and the determination of the moment at which the predominant purpose of the inquiry became an investigation, as a consequence of which their rights under the Charter were allegedly violated.

I. The facts

[63] Before the Motions Judge, the two individuals and the three corporations challenged, by way of judicial review, letters issued on January 12, 2001, by the Special Investigations Division (SI) of the Canada Customs and Revenue Agency (CCRA) titled Requirements to Provide Information and Documents (the requirements). The letters addressed to the three corporations were sent pursuant to paragraph 231.2(1)(*b*) of the Act while those addressed to the two individuals were sent pursuant to paragraphs 231.2(1)(*a*) and (*b*) of the Act.

[64] CCRA stated in those letters that it required information from the five taxpayers with respect to donations made to four charitable organizations, being the Rabbinical College of Montréal, the Yeshiva Oir Hochaim, l'Association Gimilis Chasodim Keren Chava B'Nei Levi and Les Amis Canadiens des Institutions de la Terre Sainte.

[65] CCRA required information for various periods between 1994 to 1998 inclusive. The relevant periods differed for each party. Les Plastiques Algar (Canada) Ltée was required to produce documents regarding six charitable donations all made to the Rabbinical College of Montréal between 1994 and 1998 totalling $362,000. Modern Wood Fabricators (M.W.F.) Inc. was required

documents conformément à l'alinéa 231.2(1)*b*) de la *Loi de l'impôt sur le revenu*, L.R.C. (1985) (5e suppl.), ch. 1 (la Loi).

[61] Devant la Section de première instance de la Cour fédérale, deux particuliers, MM. Sam Kligman et Allan Sandler, administrateurs des sociétés appelantes, étaient également parties à l'instance. Le juge des requêtes a statué en leur faveur en se fondant sur l'article 7 de la Charte. Ils ne sont donc pas parties à l'appel.

[62] Le litige porte sur l'étendue des pouvoirs du ministre de procéder à un examen des affaires des trois sociétés appelantes et sur la détermination du moment où l'objet prédominant de l'examen est devenu une enquête par suite de laquelle il aurait été porté atteinte aux droits reconnus aux appelantes par la Charte.

I. Les faits

[63] Devant le juge des requêtes, les deux particuliers et les trois sociétés ont contesté, par voie de contrôle judiciaire, les lettres envoyées le 12 janvier 2001 par la section des enquêtes spéciales (ES) de l'Agence des douanes et du revenu du Canada (ADRC), lesquelles étaient intitulées «Demande de communication de renseignements et de documents» (les demandes péremptoires). Les lettres adressées aux trois sociétés ont été envoyées conformément à l'alinéa 231.2(1)*b*) de la Loi, alors que celles qui étaient adressées aux deux particuliers ont été envoyées conformément aux alinéas 231.2(1)*a*) et *b*) de la Loi.

[64] Dans ces lettres, l'ADRC disait qu'elle avait besoin d'obtenir des cinq contribuables des renseignements au sujet de dons qui avaient été faits à quatre organismes de charité, soit le Collège rabbinique de Montréal, le Yeshiva Oir Hochaim, l'Association Gimilis Chasodim Keren Chava B'Nei Levi et Les Amis Canadiens des Institutions de la Terre Sainte.

[65] L'ADRC avait besoin de renseignements pour diverses périodes allant des années 1994 à 1998 inclusivement. Les périodes pertinentes étaient différentes pour chaque partie. La société Les Plastiques Algar (Canada) Ltée devait produire des documents concernant six dons de charité qui avaient été faits au Collège rabbinique de Montréal entre les années 1994 et

to produce documents related to six charitable donations made from 1995 to 1998 totalling $744,000 to the Rabbinical College of Montréal and Yeshiva Oir Hochaim. Snapshot Theatrical Productions Inc. was asked to produce documents in connection to a $36,000 charitable donation made to the Rabbinical College of Montréal in 1994.

[66] The information required from Kligman and Sandler, the two individuals, consisted of account numbers (and the identification of the banks and branches at which the accounts were held) from which cheques were drawn to pay the donations and the cancelled cheques related to these donations. The material requested from the three corporations included cancelled cheques, bank statements and donation receipts related to donations to the organizations mentioned in the letters. Also requested were the cash disbursements journal, general ledger, adjusting entries and trial balance for the periods specified in the letters.

[67] Each of the five letters concluded with the following:

Your attention is directed to subsections 238(1) and (2) of the *Income Tax Act* for default in complying with this requirement.

[68] At the time the requirements were issued, two registered charities had been investigated by Gaétan Ouelette, an SI investigator, for falsely issuing tax receipts. The first, Construit Toujours avec Bonté, had pleaded guilty to an offence under paragraph 239(1)(*d*) of the Act. The other, the Rabbinical College of Montréal, was not charged and no further charges would be laid against it (see the affidavit of the SI investigator André Faribault, A.B., pages 75 and 77, paragraph 17).

[69] The appellants claimed deductions in respect of donations to the Rabbinical College of Montréal but not

1998, d'un montant total de 362 000 $. Modern Wood Fabricators (M.W.F.) Inc. devait produire des documents se rapportant à six dons de charité, d'un montant de 744 000 $, qui avaient été faits entre 1995 et 1998 au Collège rabbinique de Montréal et au Yeshiva Oir Hochaim. On a demandé à Snapshot Theatrical Productions Inc. de produire des documents à l'égard d'un don de charité de 36 000 $ qui avait été fait au Collège rabbinique de Montréal en 1994.

[66] Les renseignements demandés aux deux particuliers, MM. Kligman et Sandler, se rapportaient aux numéros de comptes (avec indication des banques et des succursales dans lesquelles se trouvaient ces comptes) sur lesquels des chèques avaient été tirés aux fins du paiement des dons ainsi qu'aux chèques oblitérés se rapportant à ces dons. Les renseignements demandés aux trois sociétés se rapportaient notamment à des chèques oblitérés, à des relevés bancaires et à des reçus pour des dons de charité effectués aux organismes mentionnés dans les lettres. On demandait également le journal des décaissements, le grand livre, les écritures d'ajustement et la balance de vérification pour les périodes mentionnées dans les lettres.

[67] Chacune des cinq lettres se terminait comme suit:

[TRADUCTION]

Nous appelons votre attention sur les paragraphes 238(1) et (2) de la *Loi de l'impôt sur le revenu* en cas de défaut d'observation de la présente demande.

[68] Au moment où les demandes péremptoires ont été délivrées, deux organismes de charité enregistrés avaient fait l'objet d'une enquête de la part de Gaétan Ouelette, enquêteur des ES, par suite de la remise de faux reçus à des fins fiscales. Le premier organisme, Construit Toujours avec Bonté, avait plaidé coupable à une accusation portée en vertu de l'alinéa 239(1)*d*) de la Loi. L'autre, le Collège rabbinique de Montréal, n'avait pas été accusé et aucune accusation n'allait être portée contre cet organisme (voir l'affidavit de l'enquêteur des ES André Faribault, dossier d'appel, pages 75 et 77, paragraphe 17).

[69] Les appelantes ont déduit certains montants à l'égard des dons effectués au Collège rabbinique de

in respect of donations to Construit Toujours avec Bonté.

[70] The five taxpayers challenged by way of judicial review the requirements of the Minister on the basis that their constitutional rights under sections 7 and 8 of the Charter had been violated. A notice under section 57 [as am. by S.C. 1990, c. 8, s. 19; 2002, c. 8, s. 54] of the *Federal Courts Act*, R.S.C., 1985, c. F-7 [s. 1 (as am. by S.C. 2002, c. 8, s. 14)] was given.

II. The decision of the Motions Judge

[71] Relying on the decisions of the Supreme Court of Canada in *R. v. Jarvis*, [2002] 3 S.C.R. 757 (*Jarvis*), and *R. v. Ling*, [2002] 3 S.C.R. 814 (*Ling*), the Motions Judge stated that while taxpayers are bound to cooperate with CCRA auditors for tax assessment purposes, an adversarial relationship crystallizes between CCRA and the taxpayer when the predominant purpose of the inquiry is the determination of a taxpayer's penal liability.

[72] At that stage, he said at paragraphs 74 and 75 of his reasons, the fundamental protection against self-incrimination guaranteed by the Charter comes into play. As a matter of statutory construction, the inspection and requirement powers granted by subsections 231.1(1) and 231.2(1) cannot be used for the purpose of criminal investigations. Rather, search warrants must be obtained pursuant to section 231.3 [as am. by S.C. 1994, c. 21, s. 108] of the Act. He reiterated the non-exhaustive list of factors set out by the Supreme Court of Canada to assist in the determination of whether the taxpayer's penal liability had become the predominant purpose of the inquiry. He concluded, based on his reading of the evidence, that there was "from the outset" an investigation where penal sanctions were sought by CCRA. He stated, at paragraph 90 of his reasons:

> The evidence on the record as a whole leads to the conclusion that the predominant purpose of the investigation of CCRA, from its outset, was prosecution of the applicants for tax evasion and eventual imposition of penal sanctions against

Montréal mais non à l'égard des dons effectués à Construit Toujours avec Bonté.

[70] Les cinq contribuables ont contesté par voie de contrôle judiciaire les demandes péremptoires faites par le ministre en alléguant qu'on avait porté atteinte aux droits qui leur étaient reconnus par les articles 7 et 8 de la Charte. L'avis prévu à l'article 57 [mod. par L.C. 1990, ch. 8, art. 19; 2002, ch. 8, art. 54] de la *Loi sur les Cours fédérales*, L.R.C. (1985), ch. F-7 [art. 1 (mod. par L.C. 2002, ch. 8, art. 14)] a été donné.

II. La décision du juge des requêtes

[71] En se fondant sur les décisions rendues par la Cour suprême du Canada dans les affaires *R. c. Jarvis*, [2002] 3 R.C.S. 757 (*Jarvis*), et *R. c. Ling*, [2002] 3 R.C.S. 814 (*Ling*), le juge des requêtes a dit que les contribuables étaient tenus de coopérer avec les vérificateurs de l'ADRC aux fins de l'établissement des cotisations d'impôt, mais qu'une relation contradictoire est créée entre l'ADRC et le contribuable lorsque l'examen a pour objet prédominant d'établir la responsabilité pénale du contribuable.

[72] À ce stade, le juge a dit, aux paragraphes 74 et 75 de ses motifs, que la protection fondamentale contre l'auto-incrimination fournie par la Charte entre en jeu. Sur le plan de l'interprétation législative, les pouvoirs d'inspection et de contrainte, conférés par les paragraphes 231.1(1) et 231.2(1), ne peuvent pas servir dans des enquêtes criminelles. Les mandats de perquisition doivent plutôt être obtenus conformément à l'article 231.3 [mod. par L.C. 1994, ch. 21, art. 108] de la Loi. Le juge a de nouveau énoncé la liste non exhaustive de facteurs que la Cour suprême du Canada avait dressée afin d'aider à établir si la responsabilité pénale du contribuable était devenue un objet prédominant de l'examen. Il a conclu, en se fondant sur son interprétation de la preuve, qu'il y avait «dès le départ» une enquête dans laquelle l'ADRC cherchait à imposer des sanctions pénales. Voici ce qu'il a dit, au paragraphe 90 de ses motifs:

> L'ensemble de la preuve versée dans le dossier permet de conclure que l'objet prédominant de l'enquête de l'ADRC était, dès le départ, la poursuite des demandeurs pour fraude fiscale et l'imposition éventuelle de sanctions pénales à leur

them. The statements on discovery by Faribault are not the only indicia of this predominant purpose; they are simply among the most succinct elements of evidence which support this conclusion. Accordingly, I find that the predominant purpose of the investigation was prosecution of the applicants for tax evasion. [Emphasis added.]

[73] The Motions Judge concluded, at paragraphs 91 and 92 of his reasons, that the section 7 Charter rights of the two individuals concerned would be in jeopardy if the requirements were maintained. He wrote:

In *Jarvis*, the Supreme Court noted that where the section 7 requirements of fundamental justice are engaged by a finding that the predominant purpose of an investigation is penal in nature, self-incrimination is the primary principle of fundamental justice on which the determination will be based. However, the Court added that protection against self-incrimination does not mean an absolute ban on requirements to provide information. The right of a person not to provide information adverse to his liberty interest must be balanced against the opposing principle of fundamental justice which posits that relevant evidence should be available to the trier of fact in the search for the truth.

With these conflicting principles in mind, I am inclined to follow the findings in *Jarvis* and *Ling* that CCRA cannot expect taxpayers to provide information that has the effect of assisting the state in its efforts to deprive them of their liberty. Accordingly, I find that the rights of Kligman and Sandler would be compromised by requirements to provide information to further an investigation which is geared mainly toward assessing criminal liability. [Emphasis added.]

[74] With regard to the three corporations involved, the Motions Judge concluded at paragraphs 95, 103 and 104 of his reasons that section 7 did not apply to corporations, and that their privacy interests in the requested records were minimal under section 8 of the Charter. He wrote:

A corporation cannot enjoy life, liberty or security of the person. Accordingly, section 7 of the Charter does not apply to corporations. The Supreme Court has held that a corporation cannot invoke this right in order to shield itself from criminal

encontre. Les affirmations faites durant l'interrogatoire préalable de Faribault ne sont pas les seuls indices de cet objet prédominant; elles comptent simplement parmi les éléments de preuve les plus succincts au soutien de cette conclusion. Par conséquent, je suis d'avis que l'objet prédominant de l'enquête était la poursuite des demandeurs pour fraude fiscale. [Non souligné dans l'original.]

[73] Le juge des requêtes a conclu, aux paragraphes 91 et 92 de ses motifs, que les droits garantis aux deux particuliers par l'article 7 de la Charte seraient en péril si les demandes péremptoires étaient maintenues. Sur ce point, il a fait les remarques suivantes:

Dans l'arrêt *Jarvis*, la Cour suprême faisait observer que, lorsque les principes de justice fondamentale dont parle l'article 7 entrent en jeu en raison d'une conclusion selon laquelle l'objet prédominant d'une enquête est de nature pénale, l'auto-incrimination est le principe premier de justice fondamentale sur lequel sera fondée la décision. Cependant, la Cour a ajouté que ce principe ne signifie pas interdiction absolue des directives ordonnant la production de renseignements. Le droit d'une personne de ne pas communiquer de renseignements susceptibles de mettre en péril son droit à la liberté doit contrebalancer le principe opposé de justice fondamentale selon lequel les preuves pertinentes doivent, dans la quête de la vérité, être portées à la connaissance du juge des faits.

Ces principes antagonistes à l'esprit, je suis enclin à suivre les conclusions tirées dans les arrêts *Jarvis* et *Ling*, selon lesquelles l'ADRC ne peut espérer que les contribuables lui communiquent des renseignements dont l'effet sera d'aider l'État à les priver de leur liberté. Par conséquent, je suis d'avis que les droits de Kligman et Sandler seraient mis en péril par des directives leur enjoignant de communiquer des renseignements afin de faire progresser une enquête dont l'objet principal est d'établir leur responsabilité pénale. [Non souligné dans l'original.]

[74] En ce qui concerne les trois sociétés en cause, le juge des requêtes a conclu, aux paragraphes 95, 103 et 104 de ses motifs, que l'article 7 ne s'appliquait pas aux sociétés et que leurs droits à la protection des renseignements personnels en ce qui concerne les documents demandés étaient minimes sous le régime de l'article 8 de la Charte. Le juge a dit ce qui suit:

Une personne morale ne peut prétendre à la vie, à la liberté ou à la sécurité de la personne. Par conséquent, l'article 7 de la Charte ne s'applique pas aux personnes morales. La Cour suprême a jugé qu'une personne morale ne peut invoquer ce

investigation or prosecution. This rule was originally stated in *Irwin Toy Ltd. v. Québec (Attorney General)*, [1989] 1 S.C.R. 927. The rule has been reiterated in *Thomson*, *supra*, and *British Columbia Securities Commission*, *supra*. It therefore remains only to be determined whether section 8 can be applied in respect of the corporate applicants.

. . .

Although the corporate applicants in the case at bar are not publicly traded companies like the company in question in *British Columbia Securities Commission*, *supra*, they still have records that they must maintain for regulatory purposes, including purposes related to the ITA. The privacy interest in these records will be minimal.

The privacy interests of corporate entities are substantially limited compared to those of individuals. The values on which the privacy interests of individuals rest, including recognition of, and respect for, the physical and psychological integrity of human beings, are simply not present in the case of corporate entities. Accordingly, I find that neither section 7 nor section 8 of the Charter would be violated by compelling the corporate applicants to comply with the requirements as issued by the CCRA.

[75] The Motions Judge then applied subsection 24(1) of the Charter and, in doing so, he quashed the requirements received by the individuals but upheld those received by the corporate appellants. He said, at paragraphs 110 and 111 of his reasons:

Subsection 24(1) allows me to provide "such remedy as the court considers appropriate and just in the circumstances" in the event of a breach of the Charter. Technically, a Charter breach has not yet occurred since the evidence has not yet been delivered. However, I have found that the Charter rights of Kligman and Sandler will be violated if they are compelled to provide the materials sought by CCRA. It is possible to order that they provide what they have been told to provide by the requirements, and leave it to the presiding judge to make a decision as to the exclusion or admission of that evidence in the event that Kligman and Sandler are charged with tax evasion. However, Iacobucci and Major JJ. addressed this hypothesis in *Jarvis*, *supra*, at paragraph 91:

> Although the respondent argued that such situations could be remedied by the courts, we view it as preferable that such situations be avoided rather than remedied.

droit pour se protéger d'une enquête criminelle ou de poursuites criminelles. Cette règle a été énoncée à l'origine dans l'arrêt *Irwin Toy Ltd. c. Québec (Procureur général)*, [1989] 1 R.C.S. 927. La règle a été réitérée dans les arrêts *Thomson* et *British Columbia Securities Commission*, précités. Il reste donc uniquement à se demander si l'article 8 peut s'appliquer ici aux sociétés demanderesses.

[. . .]

Dans la présente affaire, les sociétés demanderesses ne sont pas des sociétés cotées en bourse, contrairement à celle dont il était question dans l'arrêt *British Columbia Securities Commission*, précité, mais elles tiennent néanmoins des registres qu'elles doivent conserver à des fins administratives, notamment aux fins de la LIR. Le droit à la vie privée en ce qui a trait à ces registres sera minime.

Le droit des personnes morales à la vie privée est notablement restreint par comparaison au droit correspondant des particuliers. Les valeurs sur lesquelles repose le droit des particuliers à la vie privée sont la reconnaissance et le respect de l'intégrité physique et psychologique des êtres humains. Ces valeurs sont tout simplement absentes dans le cas des personnes morales. Par conséquent, je suis d'avis que ni l'article 7 ni l'article 8 de la Charte ne seront transgressés si les sociétés demanderesses sont contraintes de se conformer aux directives émises par l'ADRC.

[75] Le juge des requêtes a ensuite appliqué le paragraphe 24(1) de la Charte et, ce faisant, il a annulé les demandes péremptoires que les particuliers avaient reçues, mais il a confirmé celles reçues par les sociétés. Aux paragraphes 110 et 111 de ses motifs, il a dit ce qui suit:

Le paragraphe 24(1) me permet d'accorder «la réparation que le tribunal estime convenable et juste eu égard aux circonstances», pour le cas où il y aurait contravention à la Charte. Sur le plan technique, il n'y a pas eu violation de la Charte puisque les éléments de preuve n'ont pas encore été communiqués. Cependant, je suis arrivé à la conclusion que les droits de Kligman et Sandler au regard de la Charte seront niés s'ils sont contraints de produire les pièces demandées par l'ADRC. Il est possible de leur ordonner de produire ce que les directives les ont priés de produire et de laisser au président du tribunal le soin de décider s'il convient d'écarter ou d'admettre cette preuve pour le cas où Kligman et Sandler seraient accusés de fraude fiscale. Cependant, les juges Iacobucci et Major se sont penchés sur cette hypothèse dans l'arrêt *Jarvis*, précité, au paragraphe 91:

> Bien que l'intimée ait soutenu que les tribunaux pourraient remédier à de telles situations, nous estimons préférable de les éviter plutôt que d'y remédier.

I agree. Accordingly, I exercise my discretion under subsection 24(1) of the Charter to quash the requirements issued personally to Sandler and Kligman. As I have found no breach of the Charter in respect of the requirements issued to the corporate applicants, these requirements shall be upheld.

Je partage cet avis. Par conséquent, j'exerce le pouvoir discrétionnaire que me confère le paragraphe 24(1) de la Charte, et j'annule les directives signifiées personnellement à Sandler et Kligman. Comme je n'ai constaté aucune contravention à la Charte en ce qui concerne les directives émises aux sociétés demanderesses, lesdites directives sont confirmées.

III. The position of the parties

[76] The three corporate appellants claim that, having made the finding that the predominant purpose of the inquiry conducted by the SI division was to determine the corporate appellants' penal liability, the full panoply of their rights under sections 7 and 8 of the Charter applied and that, as a result, the requirements should have been quashed.

[77] The respondent claims that the reviewing judge exceeded his jurisdiction in finding that the *Jarvis* and *Ling* analyses, which were developed in the context of a criminal trial, applied to pre-charge proceedings such as a judicial review application to quash the requirements to produce tax records. The respondent further claims that the Motions Judge erred in finding that the predominant purpose of CCRA's requirements was to determine the corporate appellants' penal liability. He submits that, notwithstanding these errors, the reviewing judge correctly held that section 7 of the Charter does not apply to corporate entities and that the use of the requirements to compel the corporate appellants to produce pre-existing banking and business records did not violate their rights under section 8 of the Charter.

III. La position des parties

[76] Les trois sociétés appelantes allèguent qu'étant donné qu'il a été conclu que l'examen effectué par la section des ES avait pour objet prédominant d'établir leur responsabilité pénale, la panoplie complète des droits qui leur sont garantis aux articles 7 et 8 de la Charte s'appliquait et les demandes péremptoires auraient donc dû être annulées.

[77] L'intimé affirme que le juge de révision a excédé sa compétence en concluant que les analyses préconisées dans les arrêts *Jarvis* et *Ling*, lesquelles ont été élaborées dans le contexte d'un procès criminel, s'appliquaient aux procédures préalables aux accusations telles qu'une demande de contrôle judiciaire visant l'annulation des demandes péremptoires de production de documents fiscaux. L'intimé affirme en outre que le juge des requêtes a commis une erreur en concluant que les demandes péremptoires de l'ADRC avaient pour objet prédominant d'établir la responsabilité pénale des sociétés. Il soutient que, malgré ces erreurs, le juge de révision a correctement statué que l'article 7 de la Charte ne s'applique pas aux personnes morales et que le recours aux demandes péremptoires en vue de contraindre les sociétés appelantes à produire des documents bancaires et des documents commerciaux préexistants ne portait pas atteinte aux droits qui leur étaient reconnus à l'article 8 de la Charte.

IV. The relevant statutory provisions

[78] The Act provides the following [section 231.1(3) (as am. by S.C. 1994, c. 21, s. 107)]:

Part XV ADMINISTRATION AND ENFORCEMENT

. . .

231.1 (1) An authorized person may, at all reasonable times, for any purpose related to the administration or enforcement of this Act,

IV. Les dispositions législatives pertinentes

[78] La Loi prévoit ce qui suit [article 231.1(3) (mod. par L.C. 1994, ch. 21, art. 107)]:

Partie XV APPLICATION ET EXÉCUTION

[. . .]

231.1 (1) Une personne autorisée peut, à tout moment raisonnable, pour l'application et l'exécution de la présente loi, à la fois:

(*a*) inspect, audit or examine the books and records of a taxpayer and any document of the taxpayer or of any other person that relates or may relate to the information that is or should be in the books or records of the taxpayer or to any amount payable by the taxpayer under this Act, and

(*b*) examine property in an inventory of a taxpayer and any property or process of, or matter relating to, the taxpayer or any other person, an examination of which may assist the authorized person in determining the accuracy of the inventory of the taxpayer or in ascertaining the information that is or should be in the books or records of the taxpayer or any amount payable by the taxpayer under this Act,

and for those purposes the authorized person may

(*c*) subject to subsection (2), enter into any premises or place where any business is carried on, any property is kept, anything is done in connection with any business or any books or records are or should be kept, and

(*d*) require the owner or manager of the property or business and any other person on the premises or place to give the authorized person all reasonable assistance and to answer all proper questions relating to the administration or enforcement of this Act and, for that purpose, require the owner or manager to attend at the premises or place with the authorized person.

(2) Where any premises or place referred to in paragraph (1)(*c*) is a dwelling-house, an authorized person may not enter that dwelling-house without the consent of the occupant except under the authority of a warrant under subsection (3).

(3) Where, on *ex parte* application by the Minister, a judge is satisfied by information on oath that

(*a*) there are reasonable grounds to believe that a dwelling-house is a premises or place referred to in paragraph (1)(*c*),

(*b*) entry into the dwelling-house is necessary for any purpose relating to the administration or enforcement of this Act, and

(*c*) entry into the dwelling-house has been, or there are reasonable grounds to believe that entry will be, refused,

the judge may issue a warrant authorizing an authorized person to enter the dwelling-house subject to such conditions as are

a) inspecter, vérifier ou examiner les livres et registres d'un contribuable ainsi que tous documents du contribuable ou d'une autre personne qui se rapportent ou peuvent se rapporter soit aux renseignements qui figurent dans les livres ou registres du contribuable ou qui devraient y figurer, soit à tout montant payable par le contribuable en vertu de la présente loi;

b) examiner les biens à porter à l'inventaire d'un contribuable, ainsi que tout bien ou tout procédé du contribuable ou d'une autre personne ou toute matière concernant l'un ou l'autre, dont l'examen peut aider la personne autorisée à établir l'exactitude de l'inventaire du contribuable ou à contrôler soit les renseignements qui figurent dans les livres ou registres du contribuable ou qui devraient y figurer, soit tout montant payable par le contribuable en vertu de la présente loi;

à ces fins, la personne autorisée peut:

c) sous réserve du paragraphe (2), pénétrer dans un lieu où est exploitée une entreprise, est gardé un bien, est faite une chose en rapport avec une entreprise ou sont tenus ou devraient l'être des livres ou registres;

d) requérir le propriétaire, ou la personne ayant la gestion, du bien ou de l'entreprise ainsi que toute autre personne présente sur les lieux de lui fournir toute l'aide raisonnable et de répondre à toutes les questions pertinentes à l'application et l'exécution de la présente loi et, à cette fin, requérir le propriétaire, ou la personne ayant la gestion, de l'accompagner sur les lieux.

(2) Lorsque le lieu mentionné à l'alinéa (1)*c*) est une maison d'habitation, une personne autorisée ne peut y pénétrer sans la permission de l'occupant, à moins d'y être autorisée par un mandat décerné en vertu du paragraphe (3).

(3) Sur requête *ex parte* du ministre, le juge saisi peut décerner un mandat qui autorise une personne autorisée à pénétrer dans une maison d'habitation aux conditions précisées dans le mandat, s'il est convaincu, sur dénonciation sous serment, de ce qui suit:

a) il existe des motifs raisonnables de croire que la maison d'habitation est un lieu mentionné à l'alinéa (1)*c*);

b) il est nécessaire d'y pénétrer pour l'application ou l'exécution de la présente loi;

c) un refus d'y pénétrer a été opposé, ou il existe des motifs raisonnables de croire qu'un tel refus sera opposé.

Dans la mesure où un refus de pénétrer dans la maison d'habitation a été opposé ou pourrait l'être et où des

specified in the warrant but, where the judge is not satisfied that entry into the dwelling-house is necessary for any purpose relating to the administration or enforcement of this Act, the judge may

(*d*) order the occupant of the dwelling-house to provide to an authorized person reasonable access to any document or property that is or should be kept in the dwelling-house, and

(*e*) make such other order as is appropriate in the circumstances to carry out the purposes of this Act,

to the extent that access was or may be expected to be refused and that the document or property is or may be expected to be kept in the dwelling-house.

documents ou biens sont gardés dans la maison d'habitation ou pourraient l'être, le juge qui n'est pas convaincu qu'il est nécessaire de pénétrer dans la maison d'habitation pour l'application ou l'exécution de la présente loi peut ordonner à l'occupant de la maison d'habitation de permettre à une personne autorisée d'avoir raisonnablement accès à tous documents ou biens qui sont gardés dans la maison d'habitation ou devraient y être gardés et rendre tout autre ordonnance indiquée en l'espèce pour l'application de la présente loi.

231.2 (1) Notwithstanding any other provision of this Act, the Minister may, subject to subsection (2), for any purpose related to the administration or enforcement of this Act, including the collection of any amount payable under this Act by any person, by notice served personally or by registered or certified mail, require that any person provide, within such reasonable time as is stipulated in the notice,

(*a*) any information or additional information, including a return of income or a supplementary return; or

(*b*) any document.

231.2 (1) Malgré les autres dispositions de la présente loi, le ministre peut, sous réserve du paragraphe (2) et, pour l'application et l'exécution de la présente loi, y compris la perception d'un montant payable par une personne en vertu de la présente loi, par avis signifié à personne ou envoyé par courrier recommandé ou certifié, exiger d'une personne, dans le délai raisonnable que précise l'avis:

a) qu'elle fournisse tout renseignement ou tout renseignement supplémentaire, y compris une déclaration de revenu ou une déclaration supplémentaire;

b) qu'elle produise des documents.

. . .

[. . .]

231.3 (1) A judge may, on *ex parte* application by the Minister, issue a warrant in writing authorizing any person named therein to enter and search any building, receptacle or place for any document or thing that may afford evidence as to the commission of an offence under this Act and to seize the document or thing and, as soon as practicable, bring it before, or make a report in respect of it to, the judge or, where the judge is unable to act, another judge of the same court to be dealt with by the judge in accordance with this section.

231.3 (1) Sur requête *ex parte* du ministre, un juge peut décerner un mandat écrit qui autorise toute personne qui y est nommée à pénétrer dans tout bâtiment, contenant ou endroit et y perquisitionner pour y chercher des documents ou choses qui peuvent constituer des éléments de preuve de la perpétration d'une infraction à la présente loi, à saisir ces documents ou choses et, dès que matériellement possible, soit à les apporter au juge ou, en cas d'incapacité de celui-ci, à un autre juge du même tribunal, soit à lui en faire rapport, pour que le juge en dispose conformément au présent article.

(2) An application under subsection (1) shall be supported by information on oath establishing the facts on which the application is based.

(2) La requête visée au paragraphe (1) doit être appuyée par une dénonciation sous serment qui expose les faits au soutien de la requête.

(3) A judge may issue the warrant referred to in subsection (1) where the judge is satisfied that there are reasonable grounds to believe that

(*a*) an offence under this Act was committed;

(*b*) a document or thing that may afford evidence of the commission of the offence is likely to be found; and

(3) Le juge saisi de la requête peut décerner le mandat mentionné au paragraphe (1) s'il est convaincu qu'il existe des motifs raisonnables de croire ce qui suit:

a) une infraction prévue par la présente loi a été commise;

b) des documents ou choses qui peuvent constituer des éléments de preuve de la perpétration de l'infraction seront vraisemblablement trouvés;

(*c*) the building, receptacle or place specified in the application is likely to contain such a document or thing.

. . .

238. (1) Every person who has failed to file or make a return as and when required by or under this Act or a regulation or who has failed to comply with subsection 116(3), 127(3.1) or 127(3.2), 147.1(7) or 153(1), any of sections 230 to 232 or a regulation made under subsection 147.1(18) or with an order made under subsection (2) is guilty of an offence and, in addition to any penalty otherwise provided, is liable on summary conviction to

(*a*) a fine of not less than $1,000 and not more than $25,000; or

(*b*) both the fine described in paragraph (*a*) and imprisonment for a term not exceeding 12 months.

(2) Where a person has been convicted by a court of an offence under subsection (1) for a failure to comply with a provision of this Act or a regulation, the court may make such order as it deems proper in order to enforce compliance with the provision.

(3) Where a person has been convicted under this section of failing to comply with a provision of this Act or a regulation, the person is not liable to pay a penalty imposed under section 162 or 227 for the same failure unless the person was assessed for that penalty or that penalty was demanded from the person before the information or complaint giving rise to the conviction was laid or made.

239. (1) Every person who has

(*a*) made, or participated in, assented to or acquiesced in the making of, false or deceptive statements in a return, certificate, statement or answer filed or made as required by or under this Act or a regulation,

(*b*) to evade payment of a tax imposed by this Act, destroyed, altered, mutilated, secreted or otherwise disposed of the records or books of account of a taxpayer,

(*c*) made, or assented to or acquiesced in the making of, false or deceptive entries, or omitted, or assented to or acquiesced in the omission, to enter a material particular, in records or books of account of a taxpayer,

c) le bâtiment, contenant ou endroit précisé dans la requête contient vraisemblablement de tels documents ou choses.

[. . .]

238. (1) La personne qui ne produit ou ne présente pas ou ne remplit pas une déclaration de la manière et dans le délai prévus à la présente loi ou à son règlement ou qui contrevient au paragraphe 116(3), 127(3.1) ou (3.2), 147.1(7) ou 153(1) ou à l'un des articles 230 à 232 ou à une disposition réglementaire prise en vertu du paragraphe 147.1(18) ou encore qui contrevient à une ordonnance rendue en application du paragraphe (2) commet une infraction et encourt, sur déclaration de culpabilité par procédure sommaire et outre toute pénalité prévue par ailleurs:

a) soit une amende de 1 000 $ à 25 000 $;

b) soit une telle amende et un emprisonnement maximal de 12 mois.

(2) Le tribunal qui déclare une personne coupable d'une infraction prévue au paragraphe (1) peut rendre toute ordonnance qu'il estime indiquée pour qu'il soit remédié au défaut visé par l'infraction.

(3) La personne déclarée coupable, par application du présent article, d'avoir contrevenu à une disposition de la présente loi ou de son règlement n'est passible d'une pénalité prévue à l'article 162 ou 227 pour la même contravention que si une cotisation pour cette pénalité a été établie à son égard ou que si le paiement en a été exigé d'elle avant que la dénonciation ou la plainte qui a donné lieu à la déclaration de culpabilité ait été déposée ou faite.

239. (1) Toute personne qui, selon le cas:

a) a fait des déclarations fausses ou trompeuses, ou a participé, consenti ou acquiescé à leur énonciation dans une déclaration, un certificat, un état ou une réponse produits, présentés ou faits en vertu de la présente loi ou de son règlement;

b) a, pour éluder le paiement d'un impôt établi par la présente loi, détruit, altéré, mutilé, caché les registres ou livres de comptes d'un contribuable ou en a disposé autrement;

c) a fait des inscriptions fausses ou trompeuses, ou a consenti ou acquiescé à leur accomplissement, ou a omis, ou a consenti ou acquiescé à l'omission d'inscrire un détail important dans les registres ou livres de comptes d'un contribuable;

(*d*) wilfully, in any manner, evaded or attempted to evade compliance with this Act or payment of taxes imposed by this Act, or

(*e*) conspired with any person to commit an offence described in paragraphs (*a*) to (*d*),

is guilty of an offence and, in addition to any penalty otherwise provided, is liable on summary conviction to

(*f*) a fine of not less than 50%, and not more than 200%, of the amount of the tax that was sought to be evaded, or

(*g*) both the fine described in paragraph (*f*) and imprisonment for a term not exceeding 2 years. [Emphasis added.]

[79] Sections 7, 8 and subsection 24(1) of the Charter provide:

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.

. . .

24. (1) Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.

V. Was a cross-appeal necessary?

[80] A preliminary matter was raised as to whether the respondent had the obligation to file a cross-appeal if he wished to attack the finding of the Motions Judge that the predominant purpose of the inquiry conducted by CCRA was the determination of the penal liability of the corporate appellants for tax evasion.

[81] This query may be summarized along the following lines.

[82] The finding of the Motions Judge that the predominant purpose of the inquiry was penal in nature was binding on the corporate appellants, on the

d) a, volontairement, de quelque manière, éludé ou tenté d'éluder l'observation de la présente loi ou le paiement d'un impôt établi en vertu de cette loi;

e) a conspiré avec une personne pour commettre une infraction visée aux alinéas *a*) à *d*),

commet une infraction et, en plus de toute autre pénalité prévue par ailleurs, encourt, sur déclaration de culpabilité par procédure sommaire:

f) soit une amende de 50 % à 200 % de l'impôt que cette personne a tenté d'éluder;

g) soit à la fois l'amende prévue à l'alinéa *f*) et un emprisonnement d'au plus 2 ans. [Non souligné dans l'original.]

[79] Les articles 7 et 8 ainsi que le paragraphe 24(1) de la Charte sont ainsi libellés:

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.

[. . .]

24. (1) Toute personne, victime de violation ou de négation des droits ou libertés qui lui sont garantis par la présente charte, peut s'adresser à un tribunal compétent pour obtenir la réparation que le tribunal estime convenable et juste eu égard aux circonstances.

V. Était-il nécessaire d'interjeter un appel incident?

[80] Une question préliminaire a été soulevée, à savoir si l'intimé était tenu d'interjeter un appel incident s'il voulait contester la conclusion du juge des requêtes selon laquelle l'examen effectué par l'ADRC avait pour objet prédominant d'établir la responsabilité pénale des sociétés appelantes à l'égard d'une fraude fiscale.

[81] Cette question peut être résumée comme suit:

[82] La conclusion du juge des requêtes selon laquelle l'objet prédominant de l'examen était de nature pénale liait les sociétés appelantes, les particuliers et l'intimé.

individuals and on the respondent. The respondent, not having cross-appealed, is prevented from reopening the Judge's finding *vis-à-vis* the corporate appellants since by doing so, he is making a collateral attack on a vital point of the Motions Judge's reasons in a proceeding where he was a party. The corporate appellants could reasonably expect that the only issue on appeal would be related to the application of sections 7 and 8 of the Charter. By not cross-appealing, the respondent takes the corporate appellants by surprise.

[83] I hold that the respondent is entitled to question, as he does, the finding of the Motions Judge that the dominant purpose of the inquiry was penal in nature, although he has not filed a cross-appeal.

[84] The statutory source for an appeal in this Court lies in section 27 [as am. by S.C. 2002, c. 8, s. 34] of the *Federal Courts Act*, which reads:

27. (1) An appeal lies to the Federal Court of Appeal from any of the following decisions of the Federal Court:

(*a*) a final judgment,

. . .

(4) For the purposes of this section, a final judgment includes a judgment that determines a substantive right except as to any question to be determined by a referee pursuant to the judgment. [Emphasis added.]

[85] Subsection 2(1) [as am. by S.C. 1990, c. 8, s. 1] of the *Federal Courts Act*, defines "final judgment" as follows:

2. (1) . . .

"final judgment" means any judgment or other decision that determines in whole or in part any substantive right of any of the parties in controversy in any judicial proceeding;

[86] Subsection 341(1) of the *Federal Court Rules, 1998*, SOR/98-106 makes it clear that a respondent who intends to participate in an appeal shall, within 10 days after service of the notice of appeal, serve and file a

L'intimé, qui n'a pas interjeté d'appel incident, ne peut pas revenir sur la conclusion tirée par le juge à l'égard des sociétés appelantes étant donné que, ce faisant, il conteste d'une façon indirecte un point crucial des motifs énoncés par le juge des requêtes dans une procédure à laquelle il était partie. Les sociétés appelantes pouvaient avec raison s'attendre à ce que la seule question en appel soit liée à l'application des articles 7 et 8 de la Charte. En omettant d'interjeter un appel incident, l'intimé prend les sociétés appelantes par surprise.

[83] Je conclus que l'intimé peut à bon droit mettre en question, comme il le fait, la conclusion du juge des requêtes selon laquelle l'objet prédominant de l'examen était de nature pénale, et ce, même s'il n'a pas déposé d'appel incident.

[84] La source législative d'un appel interjeté devant la Cour se trouve à l'article 27 [mod. par L.C. 2002, ch. 8, art. 34] de la *Loi sur les Cours fédérales*, qui se lit comme suit:

27. (1) Il peut être interjeté appel, devant la Cour d'appel fédérale, des décisions suivantes de la Cour fédérale:

a) jugement définitif;

[. . .]

(4) Pour l'application du présent article, est assimilé au jugement définitif le jugement qui statue au fond sur un droit, à l'exception des questions renvoyées à l'arbitrage par le jugement. [Non souligné dans l'original.]

[85] Le paragraphe 2(1) [mod. par L.C. 1990, ch. 8, art. 1] de la *Loi sur les Cours fédérales* définit le «jugement définitif» comme suit:

2. (1) [. . .]

«jugement définitif» Jugement ou autre décision qui statue au fond, en tout ou en partie, sur un droit d'une ou plusieurs des parties à une instance.

[86] Le paragraphe 341(1) des *Règles de la Cour fédérale (1998)*, DORS/98-106, montre clairement que l'intimé qui entend participer à l'appel dépose et signifie, dans les 10 jours suivant la signification de l'avis

notice of appearance; or where he seeks a different disposition of the order appealed from, a notice of cross-appeal.

[87] Paragraphs 341(1)(*a*) and (*b*) of the Rules reads:

> **341.** (1) A respondent who intends to participate in an appeal shall, within 10 days after service of the notice of appeal, serve and file
>
> (*a*) a notice of appearance in Form 341A; or
>
> (*b*) where the respondent seeks a different disposition of the order appealed from, a notice of cross-appeal in Form 341B. [Emphasis added.]

[88] A cross-appeal is only appropriate where the respondent seeks a disposition different from that of the judgment under appeal. (See *Roberts v. Canada*, [2000] 3 C.N.L.R. 303 (F.C.A.); *Air Canada v. Canada (Commissioner of Competition)*, [2002] 4 F.C. 598 (C.A.), at paragraphs 32 and 33.)

[89] In the case at bar, the respondent could not have filed a cross-appeal against the corporate appellants since that part of the disposition of the case which dealt with the corporate appellants was favourable to him. The cross-appeal is directed at the decision under appeal and not at the reasons for judgment (*Redpath Industries Ltd. v. Fednav Ltd.* (1994), 113 D.L.R. (4th) 764 (F.C.A.)). The respondent was under no obligation to cross-appeal that part of the decision that dealt with the individuals in order to reach the corporate appellants.

[90] The corporate appellants appealed the decision. This gave the respondent the opportunity to raise all issues that were before the Motions Judge. In *Devinat v. Canada (Immigration and Refugee Board)*, [2000] 2 F.C. 212 (C.A.), leave to appeal to the S.C.C. refused [2000] 2 S.C.R. vii) this Court held, at paragraph 12, that "an appeal from the judgment by the appellant allows the respondent to make all the arguments it considers relevant and which have a bearing on the questions of law or fact that were before the Motions Judge or that led to the judgment". It is open to the respondent therefore

d'appel, un avis de comparution ou, s'il entend demander la réformation de l'ordonnance portée en appel, un avis d'appel incident.

[87] Les alinéas 341(1)*a*) et *b*) des Règles se lisent comme suit:

> **341.** (1) L'intimé qui entend participer à l'appel dépose et signifie, dans les 10 jours suivant la signification de l'avis d'appel:
>
> *a*) soit un avis de comparution établi selon la formule 341A;
>
> *b*) soit, s'il entend demander la réformation de l'ordonnance portée en appel, un avis d'appel incident établi selon la formule 341B. [Non souligné dans l'original.]

[88] Il ne convient d'interjeter un appel incident que lorsque l'intimé entend demander la réformation du jugement porté en appel. (Voir *Roberts c. Canada*, [2000] 3 C.N.L.R. 303 (C.A.F.); *Air Canada c. Canada (Commissaire de la concurrence)*, [2002] 4 C.F. 598 (C.A.), aux paragraphes 32 et 33.)

[89] En l'espèce, l'intimé n'aurait pas pu interjeter un appel incident contre les sociétés appelantes étant donné que la partie de la décision qui concernait les sociétés appelantes lui était favorable. L'appel incident vise la décision portée en appel plutôt que les motifs du jugement (*Redpath Industries Ltd. c. Fednav Ltd.* (1994), 113 D.L.R. (4th) 764 (C.A.F.)). L'intimé n'était pas tenu, afin d'atteindre les sociétés appelantes, d'interjeter un appel incident contre la partie de la décision qui concernait les particuliers.

[90] Les sociétés appelantes en ont appelé de la décision. Cela a permis à l'intimé de soulever toutes les questions dont le juge des requêtes était saisi. Dans l'arrêt *Devinat c. Canada (Commission de l'immigration et du statut de réfugié)*, [2000] 2 C.F. 212 (C.A.), autorisation de pourvoi à la C.S.C. refusée [2000] 2 R.C.S. vii), cette Cour a statué, au paragraphe 12, que «[l]'appel du jugement par la partie appelante permet, cependant, à l'intimée de faire valoir tous les arguments qu'elle juge utiles et qui ont trait aux questions de droit ou de fait qui étaient devant le juge des requêtes et qui

to try to convince this Court that the Motions Judge erred on some issues, although he may have come to the right conclusion in the end.

[91] John Sopinka and Mark A. Gelowitz state at page 7 of their book *The Conduct of an Appeal*, 2nd ed. (Toronto: Butterworths, 2000):

> The importance of a lower court's reasons for judgment should not, of course, be understated. As mentioned above, those reasons often contain the foundation upon which an appellate court will draw its conclusions concerning whether the judgment or order below was based upon a reviewable error, and those reasons are generally the focus of an appeal.

[92] The corporate appellants were not taken by surprise. Appellants generally know or ought to know that an appeal of a judgment opens for scrutiny the grounds on which it is based. In casting doubt on the Motions Judge's finding that the predominant purpose of the inquiry was penal in nature, the respondent is not making a collateral attack on the decision rendered below. A collateral attach presupposes that a party attacks in the wrong forum a decision which could have been attacked directly but was not. In *Toronto (City) v. C.U.P.E., Local 79*, [2003] 3 S.C.R. 77, Arbour J. for the Court cited, at paragraph 33, the case of *Wilson v. R.*, [1983] 2 S.C.R. 594, at page 599, where it was said that the rule against collateral attack:

> . . . has long been a fundamental rule that a court order, made by a court having jurisdiction to make it, stands and is binding and conclusive unless it is set aside on appeal or lawfully quashed. It is also well settled in the authorities that such an order may not be attacked collaterally—and a collateral attack may be described as an attack made in proceedings other than those whose specific object is the reversal, variation, or nullification of the order or judgment.

The respondent is in the proper forum. He was taken here by an appeal process lodged by the corporate

ont conduit au jugement». Il est donc loisible à l'intimé d'essayer de convaincre cette Cour que le juge des requêtes a commis une erreur sur certains points bien qu'en fin de compte, il soit peut-être arrivé à la bonne conclusion.

[91] John Sopinka et Mark A. Gelowitz disent, à la page 7 de leur ouvrage intitulé *The Conduct of an Appeal*, 2e éd. (Toronto: Butterworths, 2000):

> [TRADUCTION] Bien sûr, il ne faut pas sous-estimer l'importance des motifs de jugement du tribunal d'instance inférieure. Comme il en a ci-dessus été fait mention, ces motifs renferment souvent le fondement à partir duquel le tribunal d'appel tirera ses conclusions quant à la question de savoir si le jugement ou l'ordonnance d'instance inférieure était entaché d'une erreur susceptible de révision, et l'appel met en général l'accent sur ces motifs.

[92] Les sociétés appelantes n'ont pas été prises par surprise. Les appelants savent généralement ou devraient généralement savoir que l'appel ouvre la porte à un examen des motifs sur lequel le jugement porté en appel est fondé. En mettant en doute la conclusion du juge des requêtes selon laquelle l'objet prédominant de l'examen était de nature pénale, l'intimé ne conteste pas indirectement la décision rendue par l'instance inférieure. Une contestation indirecte présuppose qu'une partie attaque devant le mauvais tribunal une décision qui aurait pu être attaquée directement, mais qui ne l'a pas été. Dans l'arrêt *Toronto (Ville) c. S.C.E.P., section locale 79*, [2003] 3 R.C.S. 77, la juge Arbour, au nom de la Cour, a cité, au paragraphe 33, l'arrêt *Wilson c. R.*, [1983] 2 R.C.S. 594, à la page 599, où il était dit que la règle interdisant les contestations indirectes est:

> [. . .] un principe fondamental établi depuis longtemps [selon lequel] une ordonnance rendue par une cour compétente est valide, concluante et a force exécutoire, à moins d'être infirmée en appel ou légalement annulée. De plus, la jurisprudence établit très clairement qu'une telle ordonnance ne peut faire l'objet d'une attaque indirecte; l'attaque indirecte peut être décrite comme une attaque dans le cadre de procédures autres que celles visant précisément à obtenir l'infirmation, la modification ou l'annulation de l'ordonnance ou du jugement.

L'intimé s'est adressé au bon tribunal. Il a été amené devant ce tribunal par une procédure d'appel engagée par

appellants who, by doing so, took all the risks inherent to an appeal.

[93] I conclude that the respondent does not seek a different disposition than the one arrived at by the Motions Judge and, consequently, that it would have been inappropriate for him to cross-appeal. Since the corporate taxpayers are appealing the decision of the Motions Judge, it is open to the respondent to oppose those reasons which he finds in error. The decision of the Motions Judge has become *res judicata* between the respondent and the individuals but not between the respondent and the corporate appellants.

VI. Issues

[94] The issues before us are the following:

(1) Whether the Motions Judge exceeded his jurisdiction in finding that the *Jarvis* and *Ling*, analyses apply not only to criminal proceedings but also to pre-charge proceedings, such as a judicial review directed at the requirements;

(2) Whether the Motions Judge erred in finding that the letters issued under section 231.1 of the Act were requirements issued for the predominant purpose of determining the corporate appellants' penal liability;

(3) Whether the Motions Judge erred in deciding that the requirements did not infringe the corporate appellants' rights against self-incrimination under section 7 of the Charter and their rights against unreasonable search and seizure pursuant to section 8 of the Charter.

VII. Analysis

(1) Charter protection and pre-charge proceedings

[95] The Motions Judge made no error in applying *Jarvis* and *Ling* to the case at bar.

les sociétés appelantes qui, ce faisant, ont pris tous les risques que comporte un appel.

[93] Je conclus que l'intimé n'entend pas demander la réformation de la décision à laquelle est arrivé le juge des requêtes et, par conséquent, qu'il ne convenait pas d'interjeter un appel incident. Étant donné que les sociétés contribuables en appellent de la décision du juge des requêtes, il est loisible à l'intimé de s'opposer aux motifs qui, selon lui, sont erronés. La décision du juge des requêtes est devenue chose jugée entre l'intimé et les particuliers, mais non entre l'intimé et les sociétés appelantes.

VI. Les points litigieux

[94] Les questions dont nous sommes ici saisis sont ci-après énoncées:

1) Le juge des requêtes a-t-il excédé sa compétence en concluant que les analyses préconisées dans les arrêts *Jarvis* et *Ling*, s'appliquent non seulement aux procédures criminelles, mais aussi aux procédures préalables aux accusations, comme le contrôle judiciaire des demandes péremptoires?

2) Le juge des requêtes a-t-il commis une erreur en concluant que les lettres qui ont été envoyées en vertu de l'article 231.1 de la Loi étaient des demandes péremptoires dont l'objet prédominant était d'établir la responsabilité pénale des sociétés appelantes?

3) Le juge des requêtes a-t-il commis une erreur en décidant que les demandes péremptoires ne portaient pas atteinte aux droits reconnus aux sociétés appelantes par l'article 7 de la Charte en matière d'auto-incrimination et aux droits qui leur étaient garantis à l'article 8 de la Charte à l'encontre des fouilles, des perquisitions et saisies abusives?

VII. Analyse

1) La protection accordée par la Charte et les procédures préalables aux accusations

[95] Le juge des requêtes n'a pas commis d'erreur en appliquant les arrêts *Jarvis* et *Ling* en l'espèce.

[96] It is uncontested that the issues examined in both *Jarvis* and *Ling* were raised during criminal trials for tax evasion. But as recognized by Iacobucci and Major JJ. in *Jarvis*, at paragraph 91, "[i]t would be a fiction to say that the adversarial relationship only comes into being when charges are laid". The adversarial relationship may appear at an earlier stage. It is at this stage that the taxpayer needs the protection of the Charter. It is then that he should obtain it. Iacobucci and Major JJ. have explained that situations where Charter rights are violated should be avoided rather than remedied (paragraph 91 of their reasons). The Motions Judge was therefore justified in applying the analyses developed in those two cases in order to determine the validity of the requirements on a judicial review application.

(2) The letters issued under section 231.1 of the Act

[97] In *R. v. McKinlay Transport Ltd.*, [1990] 1 S.C.R. 627 (*McKinlay*), Wilson J. qualified the Act as "essentially a regulatory statute" since it controls the manner in which federal income tax is calculated and collected (at page 641). In the same decision at page 650, La Forest J. in concurring reasons described the Act as "essentially of an administrative nature."

[98] Based on self-assessment and self-reporting characteristics, the success of the administration of the tax scheme depends primarily upon a taxpayer's honesty. As Cory J. noted in *Knox Contracting*, "[t]he entire system of levying and collecting income tax is dependent upon the integrity of the taxpayer in reporting and assessing income." (*Knox Contracting Ltd. v. Canada*, [1990] 2 S.C.R. 338, at page 350). To short-circuit the possibilities that taxpayers may omit to report revenues, "a system of random monitoring may be the only way in which the integrity of the tax system can be maintained." (*McKinlay*, at page 648).

[99] To achieve such an end, the Minister is granted broad supervisory powers to audit and inspect relevant

[96] Il n'est pas contesté que les questions qui ont été examinées dans les arrêts *Jarvis* et *Ling* ont été soulevées au cours de procès criminels portant sur une fraude fiscale. Cependant, comme l'ont reconnu les juges Iacobucci et Major au paragraphe 91 de l'arrêt *Jarvis*, «[c]e serait une fiction de dire que la relation de nature contradictoire ne prend naissance qu'au moment du dépôt des accusations». La relation contradictoire peut se manifester à un stade antérieur. C'est à ce stade que le contribuable a besoin de la protection accordée par la Charte. C'est alors qu'il devrait l'obtenir. Les juges Iacobucci et Major ont expliqué qu'il faut éviter des situations dans lesquelles il est porté atteinte aux droits garantis par la Charte plutôt que d'y remédier (paragraphe 91 de leurs motifs). Le juge des requêtes pouvait donc à juste titre appliquer les analyses élaborées dans ces deux arrêts afin de déterminer la validité des demandes péremptoires dans le cadre d'une demande de contrôle judiciaire.

2) Les lettres envoyées en vertu de l'article 231.1 de la Loi

[97] Dans l'arrêt *R. c. McKinlay Transport Ltd.*, [1990] 1 R.C.S. 627 (*McKinlay*), la juge Wilson a dit que la Loi est «essentiellement une mesure de réglementation», puisqu'elle régit la façon dont l'impôt sur le revenu fédéral est calculé et perçu (à la page 641). Dans la même décision, à la page 650, le juge La Forest, dans des motifs concourants, a décrit la Loi comme étant «essentiellement de nature administrative».

[98] Compte tenu des caractéristiques d'autocotisation et d'autodéclaration, le succès de l'administration du régime fiscal dépend principalement de l'honnêteté du contribuable. Comme le juge Cory l'a fait remarquer dans l'arrêt *Knox Contracting*, «[l]e système d'imposition dépend entièrement de l'intégrité du contribuable qui déclare et évalue son revenu» (*Knox Contracting Ltd. c. Canada*, [1990] 2 R.C.S. 338, à la page 350). Pour éviter la possibilité que les contribuables omettent de déclarer des revenus, «un système de vérification au hasard peu[t] constituer le seul moyen de préserver l'intégrité du régime fiscal» (*McKinlay*, à la page 648).

[99] À cette fin, le ministre se voit accorder de larges pouvoirs de supervision pour vérifier et inspecter les

documents to the productions of those returns. However, to be effective, the self-enforcing regulatory scheme that is the Act requires resort to adequate investigation and the existence of effective penalties (*Thomson Newspapers Ltd. v. Canada (Director of Investigation and Research, Restrictive Trade Practices Commission)*, [1990] 1 S.C.R. 425).

[100] In *Del Zotto v. Canada*, [1997] 3 F.C. 40 (C.A.); reversed by [1999] 1 S.C.R. 3 (*Del Zotto*) Strayer J.A., dissenting, but confirmed by a unanimous panel of the Supreme Court of Canada, noted at paragraph 12 of his reasons that, when trying to label the Act as "regulatory" or "criminal", "one must look at the total context of the particular process in question". Strayer J.A. stated at paragraph 13 that "the nature and the purpose of the legislative scheme whose administration or enforcement is in question" constitute contextual elements to be considered in the interpretation of provisions related to mandatory production of documents.

[101] The Act already requires from the taxpayer to disclose an important amount of information. As found by Strayer J.A. at paragraph 24 of his reasons:

> The Act requires all manner of disclosure. The taxpayer must, for example, disclose: his place of residence; his age; his social insurance number; his marital status or whether he is living common law; his sources and amounts of income; his dependants, their ages and possible physical conditions if handicapped; the amounts and objects of his charitable or political donations, if he is to claim tax credits; whom he employs and entertains if he seeks to deduct the costs as business expenses; and details of his pension arrangements. If he is employed he must disclose many of these details not only to Revenue Canada but also to his employer so that mandatory tax deductions can be made.

[102] Subsection 238(1) of the Act sets out a summary conviction offence that is triggered by non-compliance with the filing requirements or with other of the Act's provisions—including subsections 231.1(1) and 231.2(1) and the documentary retention rules imposed by

documents pertinents quant à la production des déclarations. Toutefois, l'efficacité du régime réglementaire, dont l'existence même de la Loi suffit à le faire observer, exige la tenue d'enquêtes appropriées et l'existence de sanctions efficaces (*Thomson Newspapers Ltd. c. Canada (Directeur des enquêtes et recherches, Commission sur les pratiques restrictives du commerce)*, [1990] 1 R.C.S. 425).

[100] Dans l'arrêt *Del Zotto c. Canada*, [1997] 3 C.F. 40 (C.A.); infirmé par [1999] 1 R.C.S. 3 (*Del Zotto*), le juge Strayer, qui était dissident, mais dont la décision a été confirmée par une formation unanime de la Cour suprême du Canada, a fait remarquer, au paragraphe 12 de ses motifs, qu'en essayant de qualifier la Loi de «mesure de réglementation» ou de «mesure pénale», «il faut examiner tout le contexte du processus particulier en question». Au paragraphe 13, le juge Strayer a dit que «la nature et l'objet du régime législatif dont l'application ou l'exécution est en cause» constituent des éléments contextuels dont il faut tenir compte en interprétant les dispositions relatives à la production obligatoire de documents.

[101] La Loi exige déjà que le contribuable révèle une multitude de renseignements. Comme le juge Strayer l'a conclu au paragraphe 24 de ses motifs:

> La Loi exige la divulgation de toutes sortes de renseignements. Le contribuable doit notamment divulguer son lieu de résidence, son âge, son numéro d'assurance sociale, son état civil ou s'il vit en union de fait, ses sources de revenu et les montants gagnés, les noms des personnes à sa charge, leur âge et leurs déficiences physiques possibles si elles sont handicapées, les montants et les usages de ses dons de bienfaisance ou de ses contributions politiques, s'il entend réclamer des crédits d'impôt, les noms de ses employés ou des personnes qu'il reçoit s'il veut déduire les frais engagés à titre de dépenses d'entreprise, et des précisions sur son mécanisme de pension. S'il a un employeur, il doit divulguer bon nombre de ces renseignements non seulement à Revenu Canada, mais aussi à son employeur afin que les retenues d'impôt obligatoires puissent être faites.

[102] Le paragraphe 238(1) de la Loi prévoit que le non-respect des exigences de production ou d'autres dispositions de la Loi—dont les paragraphes 231.1(1) et 231.2(1) ainsi que les règles de conservation des documents imposées par le paragraphe 230(1)—

subsection 230(1) (see *Jarvis*, at paragraph 55).

[103] For its part, section 239 creates a number of additional offences. In *Del Zotto*, Strayer J.A., at paragraph 23, described section 239 as a section "designed to ensure compliance with the self-reporting requirements of the *Income Tax Act*". The existence in the Act of section 239 does nothing to alter its regulatory or administrative nature but rather ensures that taxpayers act in conformity with its requirements. Non-compliance with the mandatory provisions of the Act can, however, lead to criminal charges being laid under section 239, which bears the formal hallmark of criminal legislation.

[104] At that stage, the Charter must receive contextual application (*Jarvis*, at paragraph 63). The powers of the Minister, under subsections 231.1(1) and 231.2(1), which are available "for any purpose related to the administration or enforcement" of the Act, do not include the prosecution of offences under section 239 (*Jarvis*, at paragraph 78). Recourse must be had to subsection 231.3(1), which sets out an *ex parte* application process for a warrant to search "for any document or thing that may afford evidence [of] the commission of [the] offence under this Act" (*Jarvis*, at paragraph 81 [underlining in original]).

[105] The Court in *Jarvis* noted, at paragraph 88, that "where the predominant purpose of a particular inquiry is the determination of penal liability, CCRA officials must relinquish the authority to use the inspection and requirement powers under ss. 231.1(1) and 231.2(1)" of the Act. The Minister must then apply to the court for a search warrant pursuant to section 231.3 of the Act. At that stage, officials have crossed the Rubicon. The adversarial relationship between the taxpayer and the state is engaged and the inquiry has become an investigation.

[106] An analysis is required to determine whether the Rubicon has been crossed (*Jarvis*, at paragraph 88). The

constitue une infraction punissable sur déclaration de culpabilité par procédure sommaire (voir *Jarvis*, au paragraphe 55).

[103] De son côté, l'article 239 crée un certain nombre d'autres infractions. Dans l'arrêt *Del Zotto*, le juge Strayer a décrit l'article 239, au paragraphe 23, comme étant une disposition «conçue pour garantir le respect des exigences d'auto-déclaration de la *Loi de l'impôt sur le revenu*». L'existence dans la Loi de l'article 239 ne change en rien sa nature réglementaire ou administrative, mais assure plutôt que les contribuables agissent conformément à ses exigences. Toutefois, l'inobservation des dispositions obligatoires de la Loi peut donner lieu à des accusations criminelles en vertu de l'article 239, qui porte la marque formelle d'une disposition législative de nature criminelle.

[104] À ce stade-ci, la Charte doit être appliquée suivant une approche contextuelle (*Jarvis*, au paragraphe 63). Les pouvoirs du ministre, en vertu des paragraphes 231.1(1) et 231.2(1), lesquels sont destinés à être utilisés «pour l'application et l'exécution» de la Loi n'incluent pas la poursuite des infractions prévues à l'article 239 (*Jarvis*, au paragraphe 78). Il faut avoir recours au paragraphe 231.3(1), qui prévoit un processus de requête *ex parte* en vue d'obtenir un mandat de perquisition permettant de chercher «des documents ou choses qui peuvent constituer des éléments de preuve de la perpétration d'une infraction à la présente loi» (*Jarvis*, au paragraphe 81 [soulignement dans l'original]).

[105] Dans l'arrêt *Jarvis*, la Cour a fait remarquer au paragraphe 88 que «lorsqu'un examen dans un cas particulier a pour objet prédominant d'établir la responsabilité pénale du contribuable, les fonctionnaires de l'ADRC doivent renoncer à leur faculté d'utiliser les pouvoirs d'inspection et de demande péremptoire que leur confèrent les paragraphes 231.1(1) et 231.2(1)» de la Loi. Le ministre doit ensuite demander à la cour de décerner un mandat de perquisition conformément à l'article 231.3 de la Loi. À ce stade-là, les autorités ont franchi le Rubicon. La relation contradictoire entre le contribuable et l'État est créée et l'examen devient une enquête.

[106] Il faut procéder à une analyse pour décider si le Rubicon a été franchi (*Jarvis*, au paragraphe 88). L'objet

predominant purpose of the inquiry in question may be found in a clear decision to pursue a criminal investigation. Apart from that clear decision, one must weigh all the factors that have a bearing on the nature of the inquiry in order to characterize the inquiry. A finding on the predominant purpose of an inquiry is a question of mixed fact and law. In *Jarvis*, at paragraphs 88, 93 and 94, the Court sets the test in the following manner:

In essence, officials "cross the Rubicon" when the inquiry in question engages the adversarial relationship between the taxpayer and the state. There is no clear formula that can answer whether or not this is the case. Rather, to determine whether the predominant purpose of the inquiry in question is the determination of penal liability, one must look to all factors that bear upon the nature of that inquiry.

. . .

To reiterate, the determination of when the relationship between the state and the individual has reached the point where it is effectively adversarial is a contextual one, which takes account of all relevant factors. In our opinion, the following list of factors will assist in ascertaining whether the predominant purpose of an inquiry is the determination of penal liability. Apart from a clear decision to pursue a criminal investigation, no one factor is necessarily determinative in and of itself, but courts must assess the totality of the circumstances, and make a determination as to whether the inquiry or question in issue engages the adversarial relationship between the state and the individual.

In this connection, the trial judge will look at all factors, including but not limited to such questions as:

(a) Did the authorities have reasonable grounds to lay charges? Does it appear from the record that a decision to proceed with a criminal investigation could have [underlining in original] been made?

(b) Was the general conduct of the authorities such that it was consistent with the pursuit of a criminal investigation?

(c) Had the auditor transferred his or her files and materials to the investigators?

(d) Was the conduct of the auditor such that he or she was effectively acting as an agent for the investigators?

(e) Does it appear that the investigators intended to use the auditor as their agent in the collection of evidence?

prédominant de l'examen en question peut se trouver dans une décision claire de procéder à une enquête criminelle. À part cette décision claire, il faut soupeser, afin de qualifier l'examen, l'ensemble des facteurs qui ont une incidence sur la nature de cet examen. Une conclusion relative à l'objet prédominant d'un examen est une question mixte de fait et de droit. Dans l'arrêt *Jarvis*, aux paragraphes 88, 93 et 94, la Cour énonce le critère comme suit:

Essentiellement, les fonctionnaires [TRADUCTION] «franchissent le Rubicon» lorsque l'examen crée la relation contradictoire entre le contribuable et l'État. Il n'existe pas de méthode claire pour décider si tel est le cas. Pour déterminer si l'objet prédominant d'un examen consiste à établir la responsabilité pénale du contribuable, il faut plutôt examiner l'ensemble des facteurs qui ont une incidence sur la nature de cet examen.

[. . .]

Rappelons que, pour déterminer à quel moment la relation entre l'État et le particulier est effectivement devenue une relation de nature contradictoire, il faut tenir compte du contexte, en examinant tous les facteurs pertinents. À notre avis, la liste suivante de facteurs sera utile pour déterminer si un examen a pour objet prédominant d'établir la responsabilité pénale du contribuable. À l'exception de la décision claire de procéder à une enquête criminelle, aucun facteur n'est nécessairement déterminant en soi. Les tribunaux doivent plutôt apprécier l'ensemble des circonstances et déterminer si l'examen ou la question en cause crée une relation de nature contradictoire entre l'État et le particulier.

À cet égard, le juge de première instance examinera tous les facteurs, y compris les suivants:

a) Les autorités avaient-elles des motifs raisonnables de porter des accusations? Semble-t-il, au vu du dossier, que l'on aurait pu [soulignement dans l'original] prendre la décision de procéder à une enquête criminelle?

b) L'ensemble de la conduite des autorités donnait-elle à croire que celles-ci procédaient à une enquête criminelle?

c) Le vérificateur avait-il transféré son dossier et ses documents aux enquêteurs?

d) La conduite du vérificateur donnait-elle à croire qu'il agissait en fait comme un mandataire des enquêteurs?

e) Semble-t-il que les enquêteurs aient eu l'intention d'utiliser le vérificateur comme leur mandataire pour recueillir des éléments de preuve?

(f) Is the evidence sought relevant to taxpayer liability generally? Or, as is the case with evidence as to the taxpayer's *mens rea*, is the evidence relevant only to the taxpayer's penal liability?

(g) Are there any other circumstances or factors that can lead the trial judge to the conclusion that the compliance audit had in reality become a criminal investigation? [Emphasis added.]

[107] The Minister acknowledged that criteria (c), (d), (e) and (g) of the analysis did not apply since at no time was the Audit Section of CCRA ever involved. The Motions Judge noted, at paragraph 84 of his reasons, that although the list of factors was not exhaustive, his analysis would focus on factors (a), (b) and (f).

[108] The Motions Judge did not, however, proceed with an analysis of the three factors he mentioned. He quoted an excerpt from Faribault's testimony in examination for discovery and then promptly concluded that, "from the outset", the predominant purpose of the investigation was the determination of penal liability. He said at paragraph 90, which I repeat, that:

The evidence on the record as a whole leads to the conclusion that the predominant purpose of the investigation of CCRA, from its outset, was prosecution of the applicants for tax evasion and eventual imposition of penal sanctions against them. The statements on discovery by Faribault are not the only indicia of this predominant purpose; they are simply among the most succinct elements of evidence which support this conclusion. Accordingly, I find that the predominant purpose of the investigation was prosecution of the applicants for tax evasion.

Yet, the Motions Judge pointed to not even one of the indicia he found, "on the record as a whole", to support his conclusion.

[109] The Supreme Court of Canada in *Jarvis*, at paragraph 100, stated:

Whether or not a given inquiry is auditorial or investigatory in nature is a question of mixed fact and law. It involves subjecting the facts of a case to a multi-factored legal standard (*Canada (Director of Investigation and Research) v. Southam*

f) La preuve recherchée est-elle pertinente quant à la responsabilité générale du contribuable ou, au contraire, uniquement quant à sa responsabilité pénale, comme dans le cas de la preuve de la *mens rea*?

g) Existe-t-il d'autres circonstances ou facteurs susceptibles d'amener le juge de première instance à conclure que la vérification de la conformité à la loi était en réalité devenue une enquête criminelle? [Soulignements ajoutés.]

[107] Le ministre a reconnu que les critères c), d), e) et g) de l'analyse ne s'appliquaient pas étant donné que la section de la vérification de l'ADRC n'a jamais été en cause. Le juge des requêtes a fait remarquer, au paragraphe 84 de ses motifs, que la liste des facteurs n'était pas exhaustive, mais qu'il ferait porter l'analyse sur les facteurs a), b) et f).

[108] Toutefois, le juge des requêtes n'a pas procédé à une analyse des trois facteurs qu'il a mentionnés. Il a cité un extrait du témoignage que M. Faribault avait présenté à l'interrogatoire préalable et il a ensuite rapidement conclu que «dès le départ», l'enquête avait pour objet prédominant d'établir la responsabilité pénale. Au paragraphe 90, qui est ci-dessous reproduit, il a dit ce qui suit:

L'ensemble de la preuve versée dans le dossier permet de conclure que l'objet prédominant de l'enquête de l'ADRC était, dès le départ, la poursuite des demandeurs pour fraude fiscale et l'imposition éventuelle de sanctions pénales à leur encontre. Les affirmations faites durant l'interrogatoire préalable de Faribault ne sont pas les seuls indices de cet objet prédominant; elles comptent simplement parmi les éléments de preuve les plus succincts au soutien de cette conclusion. Par conséquent, je suis d'avis que l'objet prédominant de l'enquête était la poursuite des demandeurs pour fraude fiscale.

Pourtant, le juge des requêtes n'a indiqué aucun des indices qu'il avait trouvés dans «[l]'ensemble de la preuve versée dans le dossier» à l'appui de sa conclusion.

[109] Dans l'arrêt *Jarvis*, au paragraphe 100, la Cour suprême du Canada a fait la remarque suivante:

La question de savoir si un examen constitue une vérification ou une enquête est une question mixte de fait et de droit. Elle commande l'examen des faits au regard d'un critère juridique comportant de multiples facteurs (*Canada (Directeur*

Inc., [1997] 1 S.C.R. 748, at para. 35) and, accordingly, Judge Fradsham's finding is not immune from appellate review.

[110] That same Court observed in *Housen v. Nikolaisen*, [2002] 2 S.C.R. 235, that questions of law can sometimes be mistaken for questions of mixed fact and law. Iacobucci and Major JJ. wrote at paragraph 27:

> Once it has been determined that a matter being reviewed involves the application of a legal standard to a set of facts, and is thus a question of mixed fact and law, then the appropriate standard of review must be determined and applied. Given the different standards of review applicable to questions of law and questions of fact, it is often difficult to determine what the applicable standard of review is. In *Southam*, *supra*, at para. 39, this Court illustrated how an error on a question of mixed fact and law can amount to a pure error of law subject to the correctness standard:
>
> > . . . if a decision-maker says that the correct test requires him or her to consider A, B, C, and D, but in fact the decision-maker considers only A, B, and C, then the outcome is as if he or she had applied a law that required consideration of only A, B, and C. If the correct test requires him or her to consider D as well, then the decision-maker has in effect applied the wrong law, and so has made an error of law.

Therefore, what appears to be a question of mixed fact and law, upon further reflection, can actually be an error of pure law.

[111] The absence of a proper application of the legal test to the facts in the case at bar would justify this Court to intervene if an error of law or of mixed fact and law is committed. The standard of review on appeal is one of correctness.

[112] Before I go into the detailed examination of factors (a) (b) and (f) of the list in *Jarvis* which were mentioned by the Motions Judge, I must examine whether there was, in the words of the Supreme Court of Canada, at paragraph 93 of *Jarvis*, "a clear decision to pursue a criminal investigation".

[113] The evidence is clear that Faribault suspected that a tax evasion had occurred and was mandated by CCRA to investigate the matter.

des enquêtes et recherches) c. Southam Inc., [1997] 1 R.C.S. 748, par. 35); en conséquence, la décision du juge Fradsham n'est pas à l'abri d'un examen en appel.

[110] Dans l'arrêt *Housen c. Nikolaisen*, [2002] 2 R.C.S. 235, la Cour suprême a fait observer que les questions de droit peuvent parfois être prises pour des questions mixtes de fait et de droit. Au paragraphe 27, les juges Iacobucci et Major ont dit ce qui suit:

> Une fois établi que la question examinée exige l'application d'une norme juridique à un ensemble de faits et qu'il s'agit donc d'une question mixte de fait et de droit, il faut alors déterminer quelle est la norme de contrôle appropriée et l'appliquer. Vu les diverses normes de contrôle qui s'appliquent aux questions de droit et aux questions de fait, il est souvent difficile de déterminer celle qui s'applique. Dans l'arrêt *Southam*, précité, par. 39, notre Cour a expliqué comment une erreur touchant une question mixte de fait et de droit peut constituer une pure erreur de droit, assujettie à la norme de la décision correcte:
>
> > . . . si un décideur dit que, en vertu du critère applicable, il lui faut tenir compte de A, B, C et D, mais que, dans les faits, il ne prend en considération que A, B et C, alors le résultat est le même que s'il avait appliqué une règle de droit lui dictant de ne tenir compte que de A, B, et C. Si le bon critère lui commandait de tenir compte aussi de D, il a en fait appliqué la mauvaise règle de droit et commis, de ce fait, une erreur de droit.

Par conséquent, ce qui peut paraître une question mixte de fait et de droit peut, après plus ample examen, se révéler en réalité une pure erreur de droit.

[111] En l'absence d'une application appropriée du critère juridique aux faits de l'affaire, cette Cour pourrait à juste titre intervenir si une erreur de droit ou une erreur mixte de fait et de droit est commise. La norme de contrôle en appel est celle de la décision correcte.

[112] Avant d'examiner en détail les facteurs a) b) et f) de la liste établie dans l'arrêt *Jarvis* dont le juge des requêtes a fait mention, je dois me demander s'il existait, comme l'a dit la Cour suprême du Canada au paragraphe 93 de l'arrêt *Jarvis*, une «décision claire de procéder à une enquête criminelle».

[113] Il est clairement établi que M. Faribault soupçonnait une fraude fiscale et que l'ADRC l'avait chargé d'enquêter sur l'affaire.

[114] Faribault explained in his cross-examination the principal purpose of his investigation (A.B., at page 120, questions 72 - 74):

72. Q- In this case . . . here, it says "of suspected tax evasion", in this case, you had suspicions that . . . that there had been tax evasion when you issued the requirements, is that correct?

A- Suspicions? Yes.

73. Q- So . . . and your primary responsibility as investigator for Special Investigations was to . . . investigate this case involving these applicants . . .

A- Yes.

74. Q- . . . for the purpose of obtaining evidence of any criminal offence, in accordance with section 7, that may have been committed, and where such evidence is found, to prepare the case for prosecution in the courts under section 239 of the Act?

A- Yes. [Emphasis added.]

[115] He admitted that, while the principal objective of his investigation was to look for evidence of tax evasion, special investigations do not always lead to such a finding and may result in a reassessment. He stated (A.B., page 132, questions 129-132):

129. Q- So your objective then . . . if I understand correctly, your main objective with respect to the applicants was to establish thatthey had committed tax evasion, is that right?

A- To investigate tax evasion, yes. . .

130. Q- Yes.

A- . . . it's. . .

131. Q- But obviously if that was not successful, you still had an opportunity to issue a civil assessment?

A- That's right.

132. Q- O.K. O.K. But you're not telling me that your main objective in the case here was simply to issue

[114] Lors du contre-interrogatoire, M. Faribault a expliqué le but principal de son enquête (dossier d'appel, à la page 120, questions 72 à 74):

72. Q- Dans le présent dossier [. . .] ici, on mentionne «Où l'on soupçonne qu'il y ait eu évasion fiscale», dans le présent dossier, vous aviez des soupçons qu'il y [. . .] qu'il y avait eu évasion fiscale au moment où vous avez émis les directives, c'est exact?

R- Des soupçons? Oui.

73. Q- Donc [. . .] et votre principale responsabilité comme enquêteur des enquêtes spéciales était de. . . d'enquêter dans ce cas qui occupe les requérants ici [. . .]

R- Oui.

74. Q- [. . .] dans le but de recueillir des preuves de toute infraction criminelle, conformément au paragraphe 7, qui ont pu être commises, et si de telles preuves sont recueillies, de prendre les [. . .] des dispositions en vue de porter l'affaire devant les tribunaux en vertu de l'article 239 de la loi?

R- Oui. [Non souligné dans l'original.]

[115] M. Faribault a admis que, même si l'objectif principal de son enquête était de chercher une preuve de fraude fiscale, les enquêtes spéciales ne mènent pas toujours à pareille conclusion et peuvent donner lieu à l'établissement d'une nouvelle cotisation. Voici ce qu'il a dit (dossier d'appel, à la page 132, questions 129 à 132):

129. Q- Alors, votre objectif, donc [. . .] si je comprends bien, votre objectif principal à l'égard des requérants était d'établir qu'ils aient commis une évasion fiscale, c'est ça?

R- Enquêter l'évasion fiscale, oui [. . .]

130. Q- Oui.

R- [. . .] c'est [. . .]

131. Q- Mais si évidemment, ça arrivait pas en bout de ligne, vous avez toujours l'opportunité de cotiser au civil?

R- Voilà.

132. Q- O.K. O.K. Mais vous êtes pas en train de me dire que votre objectif principal dans le dossier ici,

a tax assessment?

A- No. . . [Emphasis added.]

[116] The following specific questions were later put to him and the following answers were given (A.B., page 145, questions 164-167):

164. Q- And in this case you mentioned earlier, you had suspicions that . . . that resulted then, in the investigation you began, but you tell us that you did . . . not yet have grounds, reasonable and probable grounds to believe that an offence of tax evasion had been committed?

A- Yes.

165. Q- So you proceeded then to . . . to apply for a search warrant?

A- No.

166. Q- Instead, you proceeded by issuing requirements?

A- Yes.

167. Q- Under section 231.2 of the Act?

A- Yes. [Emphasis added.]

[117] The characterization of whether "a clear decision to pursue a criminal investigation" was made, is not to be considered with a pure criminal law perspective in mind. Quite the contrary, it flows from the nature and purpose of the Act which is essentially administrative and regulatory.

[118] When Faribault's statements are analyzed in context, it cannot be said, under the *Jarvis* test, that a clear decision had been made to pursue a criminal investigation. Nothing of that sort could have been decided at that stage. The directive given by CCRA to Faribault was an assignment to look principally for evidence of a penal nature. It cannot be drawn from that directive that CCRA had made the decision to pursue a criminal investigation. Such decision could not be made. CCRA had no evidence on which to base such a decision and no search warrant could have been issued to

c'était simplement d'établir des cotisations d'impôt?

R- Non [. . .] [Non souligné dans l'original.]

[116] Les questions précises suivantes ont par la suite été posées à M. Faribault, qui a donné les réponses suivantes (dossier d'appel, à la page 145, questions 164 à 167):

164. Q- Puis dans le présent dossier, comme vous l'avez mentionné tantôt, vous entreteniez des soupçons qui ont [. . .] qui ont résulté, là, à l'enquête que vous avez amorcée, mais vous nous dites que vous ne [. . .] n'aviez pas des motifs encore, là, raisonnables et probables de croire qu'une infraction d'évasion fiscale avait été commise?

R- Oui.

165. Q- Donc vous avez pas procédé, là, à [. . .] à demander un mandat de perquisition?

R- Non.

166. Q- Vous avez plutôt procédé par le biais de demandes péremptoires?

R- Oui.

167. Q- Selon l'article 231.2 de la loi?

R- Oui. [Non souligné dans l'original.]

[117] Il ne faut pas considérer la question de savoir si une «décision claire de procéder à une enquête criminelle» a été prise en ayant simplement à l'esprit le droit criminel. Au contraire, cela ressort de la nature et de l'objet de la Loi, qui est essentiellement de nature administrative et réglementaire.

[118] Si les déclarations de M. Faribault sont analysées dans leur contexte, on ne peut pas dire, selon le critère préconisé dans l'arrêt *Jarvis*, qu'une décision claire de procéder à une enquête criminelle avait été prise. Il aurait été impossible de prendre une telle décision à ce stade. Selon la directive que l'ADRC lui avait donnée, M. Faribault devait principalement chercher une preuve de nature pénale. On ne saurait conclure à partir de cette directive que l'ADRC avait décidé de procéder à une enquête criminelle. Une telle décision ne pouvait pas être prise. L'ADRC ne disposait

implement it.

[119] The principle applicable in income tax cases is that the Minister must be capable of exercising his broad supervisory powers whether or not he has reasonable grounds for believing that a particular taxpayer has breached the Act (*Jarvis*, at paragraph 89). Faribault's firm intent and directive did not act as shackles. No adversarial relationship had yet crystallized between the parties (*Jarvis*, at paragraph 88; *Ling*, at paragraph 30). CCRA had not yet crossed the Rubicon.

[120] The gathering of evidence, through the administrative process, could therefore legally continue. The request to produce documents, which taxpayers are required to keep under section 230 [as am. by S.C. 1994, c. 21, s. 105; 1998, c. 19, s. 227] of the Act, is in order. The gathering of evidence must cease when the collaboration of the taxpayer could cause his auto-incrimination. CCRA has then the duty to warn the taxpayer of such a potential consequence. The taxpayer may in turn invoke the protection of the Charter. At that stage, either through a clear decision or *de facto*, CCRA chooses to pursue a criminal investigation. Before that stage has been reached, and when only a directive to look principally for evidence of a penal nature has been given, it cannot be said that a criminal investigation has begun. Faribault entertained suspicion. He had a clear mandate, a strong intent but no evidence whatsoever. At paragraph 90 of *Jarvis* it is said:

> On what evidence could investigators ever obtain a search warrant if the whiff of suspicion were enough to freeze auditorial fact-finding? The state interest in prosecuting those who wilfully evade their taxes is of great importance, and we should be careful to avoid rendering nugatory the state's ability to investigate and obtain evidence of these offences.

[121] The absence of evidence is not an irrelevant consideration. It goes to the essence of the making of a

d'aucun élément de preuve justifiant pareille décision et aucun mandat de perquisition n'aurait pu être décerné pour y donner suite.

[119] Selon le principe qui s'applique dans les affaires d'impôt sur le revenu, le ministre doit être capable d'exercer ses larges pouvoirs de supervision, qu'il ait ou non des motifs raisonnables de croire qu'un certain contribuable a violé la Loi (*Jarvis*, paragraphe 89). L'intention ferme de M. Faribault et la directive n'étaient pas des entraves. Aucune relation contradictoire ne s'était cristallisée entre les parties (*Jarvis*, au paragraphe 88; *Ling*, au paragraphe 30). L'ADRC n'avait pas encore franchi le Rubicon.

[120] La collecte de la preuve, au moyen de la procédure administrative, pouvait donc légalement se poursuivre. La demande de production de documents, que les contribuables sont obligés de tenir en vertu de l'article 230 [mod. par L.C. 1994, ch. 21, art. 105; 1998, ch. 19, art. 227] de la Loi, est en règle. La collecte de la preuve doit cesser lorsque la collaboration du contribuable pourrait l'amener à s'incriminer. L'ADRC est alors tenue d'avertir le contribuable des conséquences possibles. Le contribuable peut de son côté invoquer la protection de la Charte. À ce stade-là, que ce soit au moyen d'une décision claire ou en fait, l'ADRC choisit de procéder à une enquête criminelle. Avant d'en arriver à ce stade, et lorsque seule une directive de chercher principalement des éléments de preuve d'une nature pénale a été donnée, on ne peut pas dire qu'une enquête criminelle a été engagée. M. Faribault avait des soupçons. Son mandat était clair; il avait de fermes intentions, mais il ne disposait d'aucun élément de preuve. Au paragraphe 90 de l'arrêt *Jarvis*, il est dit ce qui suit:

> Sur le fondement de quels éléments de preuve un enquêteur pourrait-il obtenir un mandat de perquisition si un vague soupçon était suffisant pour bloquer le processus de vérification qui permet d'établir les faits? L'intérêt qu'a l'État à poursuivre ceux qui éludent volontairement le paiement d'un impôt revêt une grande importance, et nous devons nous garder de neutraliser la capacité de l'État d'enquêter et de recueillir des éléments de preuve de la perpétration de ces infractions.

[121] L'absence de preuve n'est pas une considération non pertinente. Cette considération influe sur l'essence

"clear decision to pursue a criminal investigation". A clear decision must be distinguished from the appearance of a decision. What is the reality of a decision if the decision-maker knows from the start that he cannot implement it?

[122] It is my view that "a clear decision to pursue a criminal investigation" had not been made and could have been made at that preliminary stage. Paragraphs 88 and 93 of *Jarvis*, stand for the proposition that it is for the judge to objectively assess the nature of the inquiry and determine whether a clear decision is made to pursue the taxpayer for a criminal offence. If a clear decision is made, an analysis of the enumerated factors is not necessary. A contextual analysis of circumstances and attitudes is superfluous, because the evidence is clear. I do not understand *Jarvis* to say, however, that from a mere directive to conduct principally a penal investigation in circumstances where there is not one iota of evidence and where no search warrant can be issued, one can draw the conclusion that a decision to pursue a criminal investigation has been made.

[123] I now turn to a detailed analysis of factors (a), (b) and (f) of *Jarvis*. This will allow me to further explain my position.

(a) Did the authorities have reasonable grounds to lay charges? Does it appear from the record that a decision to proceed with a criminal investigation could have been made?

[124] Faribault, at paragraph 22 of his affidavit, made it clear that:

. . when this requirement was issued, I had no reasonable and probable grounds to believe that an offence of tax evasion had been committed by the applicant.

[125] He repeated that proposition during his testimony (A.B., at page 145).

[126] The evidence shows that at the time the requirements were issued, the authorities did not have reasonable grounds to lay charges. It is clear from the record that a decision to proceed with a criminal

de la prise d'une «décision claire de procéder à une enquête criminelle». Or, il faut faire une distinction entre une décision claire et une décision apparente. En quoi une décision est-elle réelle si le décideur sait au départ qu'il ne peut pas y donner suite?

[122] À mon avis, «une décision claire de procéder à une enquête criminelle» n'avait pas été prise et n'aurait pas pu être prise à ce stade préliminaire. Les paragraphes 88 et 93 de l'arrêt *Jarvis*, étayent la thèse selon laquelle il incombe au juge d'apprécier objectivement la nature de l'examen et de déterminer s'il est clairement décidé de poursuivre le contribuable au criminel. Si une décision claire est prise, il n'est pas nécessaire d'analyser les facteurs énumérés. Une analyse contextuelle des circonstances et des attitudes est superflue parce que la preuve est claire. Toutefois, je ne crois pas que l'arrêt *Jarvis* dise qu'à partir d'une simple directive de mener principalement une enquête pénale dans des circonstances où il n'y a pas la moindre preuve et où aucun mandat de perquisition ne peut être décerné, il est possible de conclure qu'une décision de procéder à une enquête criminelle a été prise.

[123] J'analyserai maintenant en détail les facteurs a), b) et f) de l'arrêt *Jarvis*. Cela me permettra d'expliquer plus à fond ma position.

a) Les autorités avaient-elles des motifs raisonnables de porter des accusations? Semble-t-il, au vu du dossier, que l'on aurait pu prendre la décision de procéder à une enquête criminelle?

[124] Au paragraphe 22 de son affidavit, M. Faribault a clairement dit ce qui suit:

[. . .] au moment de l'émission de cette demande péremptoire, je n'avais aucun motif raisonnable et probable de croire à la commission d'une infraction d'évasion fiscale par la requérante.

[125] Il a repris cette proposition dans son témoignage (dossier d'appel, à la page 145).

[126] La preuve montre qu'au moment où les demandes péremptoires ont été délivrées, les autorités n'avaient pas de motifs raisonnables de porter des accusations. Il ressort clairement du dossier qu'une

investigation could not have been made at that point.

(b) Was the general conduct of the authorities consistent with a criminal investigation?

[127] The fact that Faribault had a long experience with CCRA, that he was the sole person assigned to the inquiry directed at the corporate appellants, that he suspected that a tax evasion had occurred, that his main responsibility was to gather evidence of a criminal offence and that, if found, he was to bring the matter before the court under the penal provision of section 239 of the Act, do not lead to the conclusion that a criminal investigation is in process as these words are to be understood in an income tax context. In *Jarvis*, the Supreme Court of Canada accepted that criminal investigations and administrative audits may be conducted in parallel (paragraph 97). It said that the mere existence of reasonable grounds that an offence may have occurred is by itself insufficient to support the conclusion that the predominant purpose of an inquiry is the determination of penal liability (*Jarvis*, at paragraph 89). All the more, the test cannot be set at the level of mere suspicion that an offence has occurred. Even where reasonable grounds to suspect an offence exist, it will not always be true that the inquiry has become an investigation. The Minister must be capable of exercising his broad supervisory powers whether or not he has reasonable grounds for believing a particular taxpayer has breached the Act. The existence of reasonable grounds is not a sufficient indicator that CCRA is conducting a *de facto* investigation. In most cases, if all ingredients of an offence are reasonably thought to have occurred, it is likely that the investigation function is triggered. Paragraphs 88 - 90 of *Jarvis* set the tests in the following manner:

> In essence, officials "cross the Rubicon" when the inquiry in question engages the adversarial relationship between the taxpayer and the state. There is no clear formula that can answer whether or not this is the case. Rather, to determine whether the predominant purpose of the inquiry in question is the determination of penal liability, one must look to all factors that bear upon the nature of that inquiry.

décision de procéder à une enquête criminelle n'aurait pas pu être prise à ce moment-là.

b) L'ensemble de la conduite des autorités donnait-elle à croire que celles-ci procédaient à une enquête criminelle?

[127] Le fait que M. Faribault avait une longue expérience au sein de l'ADRC, qu'il était la seule personne affectée à l'examen concernant les sociétés appelantes, qu'il soupçonnait une fraude fiscale, que sa principale tâche consistait à recueillir la preuve d'une infraction criminelle et que, s'il trouvait cette preuve, il devait saisir la cour de l'affaire en vertu de la disposition pénale figurant à l'article 239 de la Loi ne permet pas de conclure qu'une enquête criminelle était en cours au sens attribué à ces mots dans un contexte fiscal. Dans l'arrêt *Jarvis*, la Cour suprême du Canada a reconnu que les enquêtes criminelles et les vérifications administratives peuvent être menées parallèlement (paragraphe 97). Elle a dit que la simple existence de motifs raisonnables de croire qu'il peut y avoir eu perpétration d'une infraction est insuffisante en soi pour conclure que l'objet prédominant d'un examen consiste à établir la responsabilité pénale (*Jarvis*, au paragraphe 89). On peut encore moins retenir comme critère le simple soupçon qu'une infraction a été commise. Même lorsqu'il existe des motifs raisonnables de soupçonner qu'une infraction a été commise, il n'est pas toujours vrai que l'examen est devenu une enquête. Le ministre doit être capable d'exercer ses larges pouvoirs de surveillance, qu'il ait ou non des motifs raisonnables de croire qu'un certain contribuable a violé la Loi. L'existence de motifs raisonnables ne suffit pas pour établir que l'ADRC mène une enquête *de facto*. Dans la plupart des cas, si l'on croit raisonnablement à la présence de tous les éléments d'une infraction, il est probable que le processus d'enquête sera enclenché. Aux paragraphes 88 à 90 de l'arrêt *Jarvis*, les critères sont énoncés comme suit:

> Essentiellement, les fonctionnaires [TRADUCTION] «franchissent le Rubicon» lorsque l'examen crée la relation contradictoire entre le contribuable et l'État. Il n'existe pas de méthode claire pour décider si tel est le cas. Pour déterminer si l'objet prédominant d'un examen consiste à établir la responsabilité pénale du contribuable, il faut plutôt examiner l'ensemble des facteurs qui ont une incidence sur la nature de cet examen.

To begin with, the mere existence of reasonable grounds that an offence may have occurred is by itself insufficient to support the conclusion that the predominant purpose of an inquiry is the determination of penal liability. Even where reasonable grounds to suspect an offence exist, it will not always be true that the predominant purpose of an inquiry is the determination of penal liability. In this regard, courts must guard against creating procedural shackles on regulatory officials; it would be undesirable to "force the regulatory hand" by removing the possibility of seeking the lesser administrative penalties on every occasion in which reasonable grounds existed of more culpable conduct. This point was clearly stated in *McKinlay Transport*, *supra*, at p. 648, where Wilson J. wrote: "The Minister must be capable of exercising these [broad supervisory] powers whether or not he has reasonable grounds for believing that a particular taxpayer has breached the Act." While reasonable grounds indeed constitute a necessary condition for the issuance of a search warrant to further a criminal investigation (s. 231.3 of the ITA; *Criminal Code*, s. 487), and might in certain cases serve to indicate that the audit powers were misused, their existence is not a sufficient indicator that the CCRA is conducting a *de facto* investigation. In most cases, if all ingredients of an offence are reasonably thought to have occurred, it is likely that the investigation function is triggered.

All the more, the test cannot be set at the level of mere suspicion that an offence has occurred. Auditors may, during the course of their inspections, suspect all manner of taxpayer wrongdoing, but it certainly cannot be the case that, from the moment such suspicion is formed, an investigation has begun. On what evidence could investigators ever obtain a search warrant if the whiff of suspicion were enough to freeze auditorial fact-finding? The state interest in prosecuting those who wilfully evade their taxes is of great importance, and we should be careful to avoid rendering nugatory the state's ability to investigate and obtain evidence of these offences. [Emphasis added.]

[128] The Rubicon is crossed when the inquiry in question engages the adversarial relationship between the taxpayer and the state (*Jarvis*, at paragraph 88).

[129] At paragraph 97, the Court further explains in *Jarvis* that if an investigation into penal liability is subsequently commenced, the investigators can avail

D'abord, la simple existence de motifs raisonnables de croire qu'il peut y avoir eu perpétration d'une infraction est insuffisante en soi pour conclure que l'objet prédominant d'un examen consiste à établir la responsabilité pénale du contribuable. Même lorsqu'il existe des motifs raisonnables de soupçonner la perpétration d'une infraction, il ne sera pas toujours exact de dire que l'objet prédominant de l'examen est d'établir la responsabilité pénale du contribuable. À cet égard, les tribunaux doivent se garder d'imposer des entraves de nature procédurale aux fonctionnaires; il ne serait pas souhaitable de [TRADUCTION] «forcer la main des autorités réglementaires» en les privant de la possibilité de recourir à des peines administratives moindres chaque fois qu'il existe des motifs raisonnables de croire à l'existence d'une conduite plus coupable. Ce point a été exprimé clairement dans l'arrêt *McKinlay Transport*, précité, p. 648, où le juge Wilson affirme: «Le Ministre doit être capable d'exercer ces [larges] pouvoirs [de surveillance], qu'il ait ou non des motifs raisonnables de croire qu'un certain contribuable a violé la Loi». Bien que l'existence de motifs raisonnables constitue en fait une condition nécessaire à la délivrance d'un mandat de perquisition pour mener une enquête criminelle (art. 231.3 de la LIR et 487 du *Code criminel*) et pourrait, dans certains cas, indiquer que les pouvoirs de vérification ont été utilisés à mauvais escient, cet élément ne suffit pas pour établir que l'ADRC mène une enquête *de facto*. Dans la plupart des cas, si l'on croit raisonnablement à la présence de tous les éléments d'une infraction, il est probable que le processus d'enquête sera enclenché.

On peut encore moins retenir comme critère le simple soupçon qu'une infraction a été commise. Au cours de sa vérification, le vérificateur peut soupçonner toutes sortes de conduites répréhensibles, mais on ne peut certainement pas affirmer qu'une enquête est enclenchée dès l'apparition d'un soupçon. Sur le fondement de quels éléments de preuve un enquêteur pourrait-il obtenir un mandat de perquisition si un vague soupçon était suffisant pour bloquer le processus de vérification qui permet d'établir les faits? L'intérêt qu'a l'État à poursuivre ceux qui éludent volontairement le paiement d'un impôt revêt une grande importance, et nous devons nous garder de neutraliser la capacité de l'État d'enquêter et de recueillir des éléments de preuve de la perpétration de ces infractions. [Non souligné dans l'original.]

[128] Le Rubicon est franchi lorsque l'examen en question crée la relation contradictoire entre le contribuable et l'État (*Jarvis*, au paragraphe 88).

[129] Au paragraphe 97 de l'arrêt *Jarvis*, la Cour explique en outre que si une enquête sur la responsabilité pénale est engagée postérieurement, les enquêteurs

themselves of the information obtained pursuant to the audit powers prior to the commencement of the criminal investigation but not with respect to information obtained pursuant to the commencement of the investigation into penal liability. This is no less true where the investigations into penal liability and tax liability are in respect of the same tax period.

[130] The test set by the Supreme Court to determine when an administrative audit has become a criminal investigation is a demanding one. The evidence in the case at bar shows that the general conduct of the authorities was not consistent with a criminal investigation under the *Jarvis* test at the time the requirements were issued because the Rubicon had not and could not be crossed.

(f) Is the evidence sought relevant to taxpayer liability generally? Or, as is the case with evidence as to the taxpayer's *mens rea*, is the evidence relevant only to the taxpayer's penal liability?

[131] Faribault's affidavit indicates that he was given the principal responsibility to gather evidence of a criminal offence and, if found, to bring the matter before the Court under the penal provision of section 239 of the Act. Faribault did not indicate, however, whether that was the only evidence sought except to say that if no evidence of a penal nature was found, he had jurisdiction to reassess and impose a penalty under section 163 [as am. by S.C. 1994, c. 7, Sch. II, s. 135; Sch. VII, s. 17; c. 8, s. 26; 1995, c. 3, s. 48; 1996, c. 21, s. 43; 1997, c. 25, s. 52; 1998, c. 19, ss. 45, 189; 2000, c. 12, s. 142; c. 19, s. 49] of the Act (see A.B., at page 76, paragraphs 10 and 11, and page 119, question 68).

[132] The record does not allow a calculation that would determine if a reassessment could be done in a timely fashion since we have no evidence of the date of mailing of the various notices of assessments. It may be that the Minister would still be in time for a reassessment for the 1998 taxation year in the cases of Les Plastiques Algar (Canada) Ltée and Modern Wood Fabricators

peuvent utiliser les renseignements obtenus conformément aux pouvoirs de vérification avant le début de l'enquête criminelle, mais non les renseignements obtenus conformément à ces pouvoirs après le début de l'enquête sur la responsabilité pénale. Cela vaut tout autant lorsque les enquêtes touchant la responsabilité pénale et l'obligation fiscale se rapportent à la même période visée par l'impôt.

[130] Le critère que la Cour suprême a énoncé pour déterminer les circonstances dans lesquelles une vérification administrative est devenue une enquête criminelle est rigoureux. La preuve en l'espèce montre que la conduite générale des autorités n'était pas compatible avec une enquête criminelle selon le critère préconisé dans l'arrêt *Jarvis* au moment où les demandes péremptoires ont été délivrées parce que le Rubicon n'avait pas été franchi et ne pouvait pas être franchi.

f) La preuve recherchée est-elle pertinente quant à la responsabilité générale du contribuable ou, au contraire, uniquement quant à sa responsabilité pénale, comme dans le cas de la preuve de la *mens rea*?

[131] L'affidavit de M. Faribault indique que celui-ci avait pour tâche principale de recueillir la preuve d'une infraction criminelle et, s'il en trouvait, de saisir la cour de l'affaire en vertu de la disposition pénale figurant à l'article 239 de la Loi. Toutefois, M. Faribault n'a pas indiqué s'il s'agissait de la seule preuve recherchée, sauf pour dire que s'il ne trouvait aucune preuve d'une nature pénale, il avait compétence pour établir une nouvelle cotisation et imposer une pénalité en vertu de l'article 163 [mod. par L.C. 1994, ch. 7, ann. II, art. 135; ann. VII, art. 17; ch. 8, art. 26; 1995, ch. 3, art. 48; 1996, ch. 21, art. 43; 1997, ch. 25, art. 52; 1998, ch. 19, art. 45, 189; 2000, ch. 12, art. 142; ch. 19, art. 49] de la Loi (voir le dossier d'appel, page 76, paragraphes 10 et 11, et page 119, question 68).

[132] Le dossier ne permet pas de déterminer si une nouvelle cotisation pouvait être établie en temps opportun puisque nous ne connaissons pas la date à laquelle les divers avis de cotisation ont été envoyés par la poste. Il se peut que le délai de nouvelle cotisation ne soit pas encore expiré pour l'année d'imposition 1998 à l'égard de Les Plastiques Algar (Canada) Ltée et de

(M.W.F.) Inc., but one can only speculate. Faribault's mandate was however clear. He was definitely looking for evidence relevant to the appellants' penal liability. This was the principal evidence he was looking for.

[133] The statement of Faribault, mentioned in the above paragraph, read in the light of the two other relevant factors, does not detract however from the fact that CCRA did not and could not make a clear decision to cross the Rubicon when the letters were issued. The superior interest of the income tax system must therefore prevail.

[134] The fact that CCRA started the inquiry after the Rabbinical College of Montréal was cleared of the charges against it does not alter my conclusion. The Motions Judge erred by misapplying the legal tests elaborated in *Jarvis*.

VIII. Conclusion

[135] I conclude from the evidence that the Minister is still capable of exercising these broad supervisory powers given to him under subsections 231.1(1) and 231.2(1) of the Act.

[136] The requirements are valid and I need not consider the third issue raised in this appeal, namely whether the appellants' Charter rights were violated.

[137] I must stress, however, that the Motions Judge made another error in the context of his reasons for judgment. Having concluded that the predominant purpose of the inquiry had become criminal in nature, a conclusion I do not share, he nevertheless concluded in the end that the requirements directed at the corporate appellants were valid under the Charter. That, he could not do.

[138] In *Jarvis*, Iacobucci and Major JJ. stated at paragraph 78 that by their express terms, both subsections 231.1(1) and 231.2(2) of the Act are available "for any purpose related to the administration

Modern Wood Fabricators (M.W.F.) Inc., mais sur ce point on peut uniquement faire des conjectures. Toutefois, le mandat de M. Faribault était clair. Il cherchait nettement une preuve pertinente quant à la responsabilité pénale des appelantes. C'était la principale preuve qu'il cherchait.

[133] La déclaration de M. Faribault, dont il est ci-dessus fait mention, interprétée à la lumière des deux autres facteurs pertinents, ne change toutefois rien au fait que l'ADRC n'a pas pris de décision claire et ne pouvait pas prendre une décision claire de franchir le Rubicon au moment où les lettres ont été envoyées. L'intérêt supérieur du système fiscal doit donc l'emporter.

[134] Le fait que l'ADRC a commencé l'examen après que le Collège rabbinique de Montréal eut été blanchi des accusations portées contre lui ne change rien à ma conclusion. Le juge des requêtes a commis une erreur en appliquant d'une façon erronée les critères juridiques élaborés dans l'arrêt *Jarvis*.

VIII. Conclusion

[135] Je conclus, en me fondant sur la preuve, que le ministre est encore en mesure d'exercer les larges pouvoirs de supervision qui lui sont conférés aux paragraphes 231.1(1) et 231.2(1) de la Loi.

[136] Les demandes péremptoires sont valides et je n'ai pas à examiner la troisième question soulevée dans cet appel, à savoir s'il a été porté atteinte aux droits reconnus aux appelantes par la Charte.

[137] Toutefois, je dois souligner que le juge des requêtes a commis une autre erreur dans ses motifs de jugement. Après avoir conclu que l'objet prédominant de l'examen était désormais de nature criminelle, conclusion que je ne partage pas, il a néanmoins en fin de compte conclu que les demandes péremptoires adressées aux sociétés appelantes étaient valides en vertu de la Charte. Or, il ne pouvait pas le faire.

[138] Dans l'arrêt *Jarvis*, les juges Iacobucci et Major ont dit, au paragraphe 78, que comme ils le prévoient expressément, les paragraphes 231.1(1) et 231.2(2) de la Loi sont destinés à être utilisés «pour l'application et

or enforcement" or, in French, "*pour l'application et l'exécution*" of the Act. And that although these terms are, at first glance, extremely broad, they do not include the prosecution of section 239 offences. At paragraph 88, they observed that "where the predominant purpose of a particular inquiry is the determination of penal liability, CCRA officials must relinquish the authority to use the inspection and requirement powers under ss. 231.1(1) and 231.2(1)" of the Act. Search warrants under section 231.3 of the Act or section 487 of the *Criminal Code* [R.S.C., 1985, c. C-46] are then required (paragraph 83).

l'exécution» ou, en anglais, «*for any purpose related to the administration or enforcement*» de la Loi et que, bien que ces expressions soient à première vue extrêmement générales, elles n'incluent pas la poursuite des infractions prévues à l'article 239. Au paragraphe 88, les juges ont fait remarquer que «lorsqu'un examen dans un cas particulier a pour objet prédominant d'établir la responsabilité pénale du contribuable, les fonctionnaires de l'ADRC doivent renoncer à leur faculté d'utiliser les pouvoirs d'inspection et de demande péremptoire que leur confèrent les paragraphes 231.1(1) et 231.2(1)» de la Loi. Les mandats de perquisition dont il est question à l'article 231.3 de la Loi et à l'article 487 du *Code criminel* [L.R.C. (1985), ch. C-46] sont ensuite nécessaires (paragraphe 83).

[139] Having found that a criminal investigation had begun, a conclusion, I repeat, I do not share, the Motions Judge could not have concluded to the validity of the requirements under the Charter. As a matter of statutory construction, search warrants would have been required if such a situation had arisen.

[139] Puisqu'il a conclu qu'une enquête criminelle avait été engagée, conclusion que je ne partage pas comme je l'ai déjà dit, le juge des requêtes n'aurait pas pu conclure à la validité des demandes péremptoires en vertu de la Charte. Sur le plan de l'interprétation législative, des mandats de perquisition auraient été nécessaires en pareil cas.

IX. Disposition

[140] For the above reasons, I would dismiss this appeal with costs.

IX. Dispositif

[140] Pour les motifs susmentionnés, je rejette l'appel avec dépens.

1985 CarswellNat 161
Federal Court of Canada — Appeal Division

Please see in particular paras. 31-37

MacBain v. Canada (Canadian Human Rights Commission)

1985 CarswellNat 161, 1985 CarswellNat 628, [1985] 1 F.C. 856, [1985] F.C.J. No. 907, 16 Admin. L.R. 109, 18 C.R.R. 165, 22 D.L.R. (4th) 119, 33 A.C.W.S. (2d) 481, 62 N.R. 117, 6 C.H.R.R. D/3064, 85 C.L.L.C. 17,023

MacBAIN v. CANADIAN HUMAN RIGHTS COMMISSION; MacBAIN v. LEDERMAN et al.

Heald, Mahoney and Stone JJ.

Heard: September 12 and 13, 1985
Judgment: October 7, 1985
Docket: Nos. A-703-84; A-704-84; A-996-84

Counsel: *P. Genest, Q.C.*, and *J. Page*, for Alistair MacBain.
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Mary Cornish, for Kristina Potapczyk.
J.J. Carthy, Q.C., and *R.E. Hawkins*, for Attorney General of Canada.

Subject: Public; Employment; Constitutional; Civil Practice and Procedure

Headnote

Human Rights --- Practice and procedure — Judicial review — Grounds — Apprehension of bias

Procedural fairness — Bias — Canadian Human Rights Commission appointing tribunal and prosecuting case after finding that complaint substantiated — Reasonable apprehension of bias created in minds of right-thinking people properly informed — Procedure contrary to Canadian Bill of Rights, s. 2(e) granting entitlement to "fair hearing in accordance with principles of fundamental justice" where obligations being determined.

Constitutional law — Canadian Bill of Rights — Entitlement to fair hearing in accordance with principles of fundamental justice where obligations being determined — Accusation of discrimination contrary to Canadian Human Rights Act involving obligations of person complained against — Canadian Human Rights Commission appointing tribunal and prosecuting case after finding that complaint substantiated — Procedure creating reasonable apprehension of bias in minds of right-thinking people properly informed.

M was the subject of a complaint of sexual harassment made to the CHRC by one of his former employees. The CHRC assigned an investigator to the complaint and upon receipt of the

investigator's report, determined that the complaint had been "substantiated" (Canadian Human Rights Act, s. 26(3)) and appointed a Human Rights Tribunal to inquire into the matter (s. 39(1)). The members of the tribunal were selected by the Chief Commissioner from a short list drawn from approximately 100 prospective panel members established by Order in Council (s. 39(5)). At the hearing, counsel for the CHRC carried the case against M. The tribunal refused a request by M that it disqualify itself for bias and also a request that it adjourn the proceedings to enable the determination of the issue of bias by the Federal Court.

M then applied to the Federal Court, Trial Division, for prohibition and commenced an action for a declaration that the tribunal was disqualified by reason of bias. He also sought an interlocutory injunction to prevent the continuation of the tribunal's proceedings pending the outcome of the action for a declaration.

Collier J. dismissed the motions for an interlocutory injunction and prohibition and the action for a declaration ((1984), 7 Admin. L.R. 233). He held that while the process was one that would have given rise to a reasonable apprehension that the Commission was biased against M, that process was statutorily authorized. He further held that s. 2(e) of the Canadian Bill of Rights and its call for "a fair hearing" where "rights and obligations" where being determined did not justify holding the process to be destroyed. Finally, arguments based on ss. 7 and 11 of the Canadian Charter of Rights and Freedoms were rejected on the basis that the statutory regime did not come within the ambit of those provisions. It did not threaten M's "security of the person" (s. 7) nor was M a "person charged with an offence" (s. 11). Subsequently, the Tribunal found the complaint against M substantiated and ordered the cessation of his conduct and compensation of $1500.

M appealed to the Federal Court of Appeal. As a matter of original jurisdiction, the Federal Court of Appeal also entertained an application under s. 28 of the Federal Court Act for a review and setting aside of the Tribunal's decision.

Held:

1. Appeal from dismissal of motion for prohibition dismissed as now academic.

2. Appeal from dismissal of application for a declaration allowed and ss. 39(1) and (5) of Canadian Human Rights Act declared inoperative with respect to the proceedings against M.

3. Application under s. 28 granted and decision of Tribunal set aside.

As Collier J. had held, the scheme of the Act was such as to give rise to a reasonable apprehension of bias on the part of reasonable and right-minded persons properly informed of the scheme of the statute and its application, and who had thought the matter through realistically and practically. This arose not only because the Commission had substantiated the complaint against M thereby suggesting that his guilt had been proved before the Tribunal had heard the matter but also by reason of the fact that the Commission had then acted as prosecutor before a Tribunal which it had selected. Independent adjudication was seriously compromised when adjudicators were selected on a case by case basis by the administrators and enforcers of an Act and where, in general, case management was not in the hands of the adjudicators. It did not affect the matter that half of all Tribunals had found the complaints they were adjudicating not to be substantiated.

In this respect, the use of the word "substantiated" twice in the Act, once in relation to the initial functions of the Commission and once in reference to the final decision of the Tribunal was supportive of the contention that the statutory scheme gave rise to a reasonable apprehension of bias. It was not appropriate to read "substantiate" as having different meanings in each place and meaning something less than "proved" in relation to the initial role of the Commission. That was contrary to the general presumption of statutory interpretation.

In considering whether the statute was contrary to the Canadian Bill of Rights or the Canadian Charter of Rights and Freedoms, the Court was to have no concern with utilitarian considerations such as volume, expense, efficiency and expediency.

Insofar as the Act placed on M an obligation not to treat his employees in a discriminatory way, the process of the Commission was one of determining whether he had fulfilled his "obligation". This therefore engaged the provisions of s. 2(e) of the Canadian Bill of Rights which entitled persons to "a fair hearing in accordance with the principles of fundamental justice" where their obligations were being determined. Given the finding that but for the statute the process would have given rise to a reasonable apprehension of bias and the general need for "consummate care" when human rights violations were being alleged, the statutory scheme was therefore contrary to s. 2(e). Having regard to s. 5(2) and its provision that the Bill of Rights applied to laws enacted subsequently, it mattered not for these purposes that the Act was enacted after the Canadian Bill of Rights.

Where a statute was contrary to the Canadian Bill of Rights the appropriate course of action was to declare it inoperative for the purposes of the particular proceedings before the Court. This was in contrast to relief under the Charter (which was ultimately not pursued here) where a proper outcome would have been to declare the offensive provisions of no force and effect. Moreover, it was not for the Court to rewrite the Act. Thus, there was no necessity to declare the whole of the relevant part of the Act inoperative but rather only those subsections (ss. 39(1) and (5)) making the Commission the body which appointed the Tribunal.

Given that it was the appointment of the Tribunal that was being challenged, not the Commission's substantiation of the complaint, the finding of substantiation under s. 36(3) was left intact with the possiblity that it could be still utilized should Parliament now establish a proper method for constituting of Tribunals. Given the paramountcy of the provisions of s. 2(e) of the Bill of Rights, the doctrine of necessity did not apply to save a scheme which could not be sensibly construed or applied without abrogating, abridging or infringing a protected right. Further, to declare ss. 39(1) and (5) inoperative in this case would not entail legal chaos or conditions of emergency of the kind that sometimes justified the temporary sustaining of constitutionally flawed laws. In particular, other decisions already taken under the existing scheme would not now be opened to challenge because of the protection afforded by the law to decisions taken under apparently constitutional provisions.

Annotation

In June 1985, legislative amendments were made to those aspects of the Canadian Human Rights Act which were under consideration in MacBain. See the Statute Law (Canadian Charter of Rights and Freedoms) Amendment Act, S.C. 1985, c. 26.

69. Subsection 36(3) of the said Act is repealed and the following substituted therefor:

(3) On receipt of a report mentioned in subsection (1), the Commission

(a) may request the President of the Human Rights Tribunal Panel to appoint a Human Rights Tribunal in accordance with section 39 to inquire into the complaint to which the report relates if the Commission is satisfied

(i) that, having regard to all the circumstances of the complaint, an inquiry thereinto is warranted, and

(ii) that the complaint to which the report relates should not be referred pursuant to subsection (2) or dismissed on any ground mentioned in subparagraphs 33(b)(ii) to (iv); or

(b) shall dismiss the complaint to which the report relates if it is satisfied

(i) that, having regard to all the circumstances of the complaint, an inquiry thereinto is not warranted, or

(ii) that the complaint should be dismissed on any ground mentioned in subparagraphs 33(b)(ii) to (iv).

70. The said Act is further amended by adding thereto, immediately after section 38 thereof, the following heading and section:

Human Rights Tribunal Panel

38.1 There is hereby established a panel to be known as the Human Rights Tribunal Panel consisting of a President and such other members as may be appointed by the Governor in Council.

38.2 The President of the Human Rights Tribunal Panel shall be appointed to hold office during good behaviour for a term of three years and each of the other members of the Panel shall be appointed to be a member of the Panel during good behaviour for a term not exceeding five years, but may be removed by the Governor in Council for cause.

38.3 In the event of the absence or incapacity of the President of the Human Rights Tribunal Panel, or if there is no President, the Governor in Council may authorize a member of the Panel to act as President and a member so authorized, while so acting, has and may exercise and perform all the powers and duties of the President.

38.4 A President of the Human Rights Tribunal Panel as well as any member of the Panel whose term has expired is eligible for re-appointment in the same or any other capacity.

38.5 The President of the Human Rights Tribunal Panel shall be paid such remuneration and expenses for the performance of duties as President at the same rate as is prescribed by by-law of the Commission for a member of a Tribunal acting in the capacity of a Chairman thereof.

71.(1) Subsection 39(1) of the said Act is repealed and the following substituted therefor:

39.(1) The Commission may, at any stage after the filiing of a complaint, request the President of the Human Rights Tribunal Panel to appoint a Human Rights Tribunal (in this Part referred to as a "Tribunal") to inquire into the complaint if the Commission is satisfied that, having regard to all the circumstances of the complaint, an inquiry thereinto is warranted.

(1.1) On receipt of a request under subsection (1), the President of the Human Rights Tribunal Panel shall appoint a Tribunal to inquire into the complaint to which the request relates.

(2) Subsections 39(5) and (6) of the said Act are repealed and the following substituted therefor:

(5) Subject to subsection (5.1), in selecting any individual or individuals to be appointed as a Tribunal, the President of the Human Rights Tribunal Panel shall select from among the members of the Human Rights Tribunal Panel.

(5.1) The President of the Human Rights Tribunal Panel may sit as a Tribunal or as a member of a Tribunal.

(6) Subject to subsection (7), where a Tribunal consists of more than one member, the President of the Human Rights Tribunal Panel shall designate one of the members to be the Chairman of the Tribunal.

(7) Where the President of the Human Rights Tribunal Panel is a member of a Tribunal consisting of more than one member, the President shall be Chairman of the Tribunal.

72. Subsection 42.1(2) of the said Act is repealed and the following substituted therefor:

(2) Where an appeal is made pursuant to subsection (1), the President of the Human Rights Tribunal Panel shall select three members from the Human Rights Tribunal Panel, other than the member or members of the Tribunal whose decision or order is being appealed from, to constitute a Review Tribunal to hear the appeal.

73. Every Tribunal appointed prior to the coming into force of this Act shall continue to act as though this section had not come into force.

69. Le paragraphe 36(3) de la même loi est abrogé et remplacé par ce qui suit:

(3) Sur réception du rapport d'enquête prévu au paragraphe (1), la Commission:

a) peut demander au président du Comité du tribunal des droits de la personne de constituer un tribunal des droits de la personne, en application de l'article 39, chargé d'examiner la plainte visée par le rapport, si elle est convaincue:

(i) que, compte tenu des circonstances relatives à la plainte, l'examen de cell-ci est justifié,

(ii) qu'il n'y a pas lieu de renvoyer la plainte en application du paragraphe (2) ni de la rejeter aux termes des sous-alinéas 33b) (ii) à (iv);

b) doit rejeter la plainte, si elle est convaincue:

(i) que, compte tenu des circonstances relatives à la plainte, l'examen de celle-ci n'est pas justifié,

(ii) que la plainte doit être rejetée pour l'un des motifs énoncés aux sousalinéas 33b)(ii) à (iv).

70. La même loi est modifiée par insertion, après l'article 38, de ce qui suit:

Le Comité du tribunal des droits de la personne

38.1 Est constitué le Comité du tribunal des droits de la personne composé du président et des membres nommés par le gouverneur en conseil.'

38.2 Le président du Comité du tribunal des droits de la personne est nommé à titre inamovible pour un mandat de trois ans; les autres membres sont nommés à titre inamovible pour un mandat maximal de cinq ans sous réserve de révocation motivée par le gouverneur en conseil.

38.3 En cas d'absence ou d'empêchement du président du Comité du tribunal des droits de la personne ou de vacance de son poste, le gouverneur en conseil peut autoriser un membre à assurer l'intérim.

38.4 Le président du Comité du tribunal des droits de la personne ainsi que les autres membres peuvent recevoir un nouveau mandat, aux fonctions identiques ou non.

38.5 Le président du Comité du tribunal des droits de la personne a droit, pour l'exercice de ses fonctions, à la rémunération et aux indemnités de dépenses selon le taux fixé par le réglement de la Commission pour le membre du tribunal qui agit à titre de président du tribunal.

71.(1) Le paragraphe 39(1) de la même loi est abrogé et remplacé par ce qui suit:

39.(1) La Commission peut, à toute étape postérieure au dépôt de la plainte, demander au président du Comité du tribunal des droits de la personne de constituer un tribunal des droits de la personne

(ci-après dénommé, à la présente Partie, le "tribunal") chargé d'examiner la plainte, si elle est convaincue, compte tenu des circonstances relatives à celle-ci, que l'examen est justifé.

(1.1) Sur réception d'une demande présentée en application du paragraphe 36(3), le président du Comité du tribunal des droits de la personne constitue un tribunal des droits de la personne (ci-après dénommé, à la présente Partie, le "Tribunal") chargé d'examiner la la plainte visée par cette demande.

(2) Les paragraphes 39(5) et (6) sont abrogés et replacés par ce qui suit:

(5) Le président du Comité du tribunal des droits de la personne choisit parmi ce Comité, sous réserve du paragraphe (5.1), les membres du tribunal.

(5.1) Le président du Comité du tribunal des droits de la personne peut se constituer tribunal ou se désigner membre du tribunal.

(6) Le président du Comité du tribunal des droits de la personne nomme, sous réserve du paragraphe (7), le président du tribunal dans le cas où celui-ci se compose de plus d'un membre.

(7) Le président du Comité du tribunal des droits de la personne, s'il est membre du tribunal, préside celui-ci lorsqu'il se compose de plus d'un membre.

72. Le paragraphe 42.1(2) de la même loi est abrogé et remplacé par ce qui suit:

(2) En cas de pourvoi, en application du paragraphe (1), le président du Comité du tribunal des droits de la personne constitue un tribunal d'appel composé de trois membres de ce Comité autres que ceux qui ont rendu la décision ou l'ordonnance visée par le pourvoi.

73. Les dispositions du présent article n'ont aucun effet sur les tribunaux constitués avant l'entrée en vigueur de la présente loi.

Table of Authorities

Cases considered:

A.G. Can. v. Canard, [1976] 1 S.C.R. 170, [1975] 3 W.W.R. 1, 52 D.L.R. (3d) 548, 4 N.R. 91 (S.C.C.) — *referred to*

A.G. Can. v. Lavell; Isaac v. Bedard, [1974] S.C.R. 1349, 23 C.R.N.S. 197, 11 R.F.L. (2d) 333, 38 D.L.R. (3d) 481 (S.C.C.) — *referred to*

Caccamo v. Min. of Manpower & Immigration, [1978] 1 F.C. 368, 75 D.L.R. (3d) 720 (sub nom. Re Caccamo and Minister of Manpower and Immigration), 16 N.R. 405 (Fed. C.A.) — *distinguished*

Cashin v. CBC, [1984] 2 F.C. 209, 8 Admin. L.R. 161, 5 C.H.R.R. D/2234, 84 C.L.L.C. 17,009, 8 D.L.R. (4th) 622 (sub nom. Cashin v. Cdn. Human Rights Comm.), 55 N.R. 112 (Fed. C.A.) — *referred to*

Committee for Justice & Liberty v. National Energy Bd., [1978] 1 S.C.R. 369, 68 D.L.R. (3d) 716, 9 N.R. 115 (S.C.C.) — *applied*

Crawford v. Spooner (1846), 6 Moo. P.C.C. 1, 13 E.R. 582 (P.C.) — *referred to*

Curr v. R., [1972] S.C.R. 889, 18 C.R.N.S. 281, 7 C.C.C. (2d) 181, 26 D.L.R. (3d) 603 (S.C.C.) — *referred to*

Giffels & Vallett of Can. Ltd. v. R., [1951] O.R. 652, [1952] 1 D.L.R. 620 (Ont. C.A.)*applied*

Hogan v. R., [1975] 2 S.C.R. 574, 9 N.S.R. (2d) 145, 26 C.R.N.S. 207, 18 C.C.C. (2d) 65, 2 N.R. 343 (S.C.C.) — *referred to*

Hunter, Dir. of Investigation & Research, Combines Investigation Branch v. Southam Inc., [1984] 2 S.C.R. 145, [1984] 6 W.W.R. 577, 33 Alta. L.R. (2d) 193, 27 B.L.R. 297, 41 C.R. (3d) 97, 55 A.R. 291, 14 C.C.C. (3d) 97, 2 C.P.R. (3d) 1, 9 C.R.R. 355 (sub nom. Hunter v. Southam Inc.), 11 D.L.R. (4th) 641, 55 N.R. 241 (S.C.C.) — *considered*

Latimer (W.D.) Co. and Bray, Re; Re Onuska and Bray (1974), 6 O.R. (2d) 129, 52 D.L.R. (3d) 161 (Ont. C.A.) — *referred to*

McGavin Toastmaster Ltd. and Powlowski, Re (1973), 37 D.L.R. (3d) 100 (Man. C.A.) — *considered*

Reference re Language Rights under s. 23 of Manitoba Act, 1870 and s. 133 of Constitution Act, 1867, [1985] 4 W.W.R. 385, 35 Man. R. (2d) 83 (sub nom. Man. Language Rights Reference), 19 D.L.R. (4th) 1, 59 N.R. 321 (S.C.C.) — *distinguished*

R. v. Burnshine, [1975] 1 S.C.R. 693, [1974] 4 W.W.R. 94, 25 C.R.N.S. 270, 15 C.C.C. (2d) 505, 44 D.L.R. (3d) 504, 2 N.R. 53 (S.C.C.) — *referred to*

R. v. Drybones, [1970] S.C.R. 282, 71 W.W.R. 161, 10 C.R.N.S. 334, [1970] 3 C.C.C. 355, 9 D.L.R. (3d) 473 (S.C.C.) — *followed*

R. v. Hayden, [1983] 6 W.W.R. 655, 23 Man. R. (2d) 315, 36 C.R. (3d) 187, 8 C.C.C. (3d) 33, 7 C.R.R. 325, [1984] 1 C.N.L.R. 148, 5 C.H.R.R. D/2121, 3 D.L.R. (4th) 361 (Man. C.A.) — *distinguished*

R. v. Valente (No. 2) (1983), 41 O.R. (2d) 187, 20 M.V.R. 168 (sub nom. R. v. Valente), 2 C.C.C. (3d) 417, 14 C.R.R. 137, 145 D.L.R. (3d) 452 (Ont. C.A.) [affirmed, S.C.C., No. 17583, Dickson C.J.C., Beetz, Estey, McIntyre, Chouinard, Lamer and Le Dain JJ., December 19, 1985]*distinguished* Singh v. Min. of Employment & Immigration, [1985] 1 S.C.R. 177, 12 Admin. L.R. 137, 14 C.R.R. 13, 17 D.L.R. (4th) 422, 58 N.R. 1 (S.C.C.) — *applied*

Statutes considered:

Canadian Bill of Rights, R.S.C. 1970, App III, s. 2(e), 5(2).

Canadian Human Rights Act, S.C. 1976-77, c. 33 —

s. 7(a), (b)

s. 10(a)

s. 35

s. 36

s. 39

s. 40

s. 41 [am. 1980-81-82-83, c. 143, s. 20]

Combines Investigation Act, R.S.C. 1970, c. C-23.

Constitution Act, 1982 [en. by the Canada Act, 1982 (U.K., c. 11, s. l] —

Pt. I (Canadian Charter of Rights and Freedoms),

ss. 7, 8, 11(d), 24(1)

Pt. VII (General),

s. 52

Human Rights Act (Manitoba), S.M. 1974, c. 65 (also C.C.S.M., c. H175).

Immigration Act, S.C. 1976-77, c. 52.

Indian Act, R.S.C. 1970, c. I-6.

Manitoba Act, 1870, R.S.C. 1970, App II, No. 8, s. 23.

Official Language Act, S.M. 1890, c. 14.

Authorities considered:

Deschênes, Independent Judicial Administration of the Courts (September 1981), pp. 105, 124.

Driedger, Construction of Statutes (2nd ed., 1983), p. 93.

Tarnopolsky, Canadian Bill of Rights (2nd rev. ed., 1975), pp. 140-41.

Words and phrases considered:

DOCTRINE OF NECESSITY

. . . the Supreme Court of Canad has recently considered the question of necessity in the *Manitoba Language Rights Reference*, (1985) 59 N.R. 321 . . . the Court, at page 368, stated the doctrine in the context of the Manitoba language situation as follows:

A Court may temporarily treat as valid and effective laws which are constitutionally flawed in order to preserve the Rule of Law . . . under conditions of emergency, when it is impossible to comply with the Constitution, the Court may allow the government a temporary reprieve from such compliance in order to preseve society, and maintain, as nearly as possible, normal conditions. The overriding concern is the protection of the Rule of Law.

REASONABLE APPREHENSION OF BIAS

Counsel all agreed that the proper test to be applied when considering the issue of reasonable apprehension of bias was that set out by Mr. Justice de Grandpré in the [*Committee for Justice & Liberty v. National Energy Board*, [1978] 1 S.C.R. 369 at pp. 394-95 . . .]. The relevant portion of his reasons read as follows:

The proper test to be applied in a matter of this type was correctly expressed by the Court of Appeal . . . the apprehension of bias must be a reasonable one, held by reasonable and right minded persons, applying themselves to the question and obtaining thereon the required information. In the words of the Court of Appeal, that test is "what would an informed person, viewing the matter realistically and practically — and having thought the matter through — conclude" . . .

I can see no real difference between the expressions found in the decided cases, be they "reasonable apprehension of bias", "reasonable suspicion of bias" or "real likelihood of bias". The grounds for this apprehension must, however, be substantial and I entirely agree with the Federal Court of Appeal which refused to accept the suggestion that the test be related to the "very sensitive or scrupulous conscience".

Counsel all agreed that the proper test to be applied when considering the issue of reasonable apprehension of bias was that set out by Mr. Justice de Grandpre in the [*Committee for Justice and Liberty v. Canada National Energy Board*, [1978] 1 S.C.R. 369]. The relevant portion of his reasons read as follows:

The proper test to be applied in a matter of this type was correctly expressed by the Court of Appeal . . . that test is "what would an informed person, viewing the matter realistically and practically — and having thought the matter through — conclude." Would he think that it is more likely than not that Mr. Crowe, whether consciously or unconsciously, would not decide fairly?

I can see no real difference between the expressions found in the decided cases, be they "reasonable apprehension of bias", "reasonable suspicion of bias", or "real likelihood of bias". The grounds for this apprehension must, however, be substantial and I entirely agree with the Federal Court of Appeal which refused to accept the suggestion that the test be related to the "very sensitive or scrupulous conscience".

. . . . .

. . . the apprehension of bias also exists in this case because there is a direct connection between the prosecutor of the complaint (the Commission) and the decision-maker (the Tribunal). That connection easily gives rise . . . to a suspicion of influence or dependency.

APPEAL from decision of Federal Court, Trial Division, reported (1984), 7 Admin. L.R. 233, [1984] 1 F.C. 696, 5 C.H.R.R. D/2214, 84 C.L.L.C. 17,013, 11 C.R.R. 319, 11 D.L.R. (4th) 202, dismissing both a motion for prohibition and an action for a declaration. Application to review and set aside a decision of a Trubunal appointed under the Canadian Human Rights Act.

The judgment of the Court was delivered by *Heald J.*:

1 These reasons apply to three different proceedings in this Court which, by order of the court, and on the consent of all parties, were argued together.

2 The proceeding in File No. A-703-84 is an appeal from a judgment of the Trial Division which dismissed, without costs, the appellant's application for a writ of prohibition. The proceeding in File No. A-704-84 is an appeal from a judgment of the Trial Division which dismissed, with costs, the appellant's claim for declaratory relief as specified in the appellant's amended statement of claim filed in that action. The proceeding in File No. A-996-84 is a s. 28 application which attacks a decision made by the respondents Lederman, Robson and Cumming, acting as a Human Rights Tribunal (the Tribunal) appointed under s. 39 of the Canadian Human Rights Act, S.C. 1976-77, c. 33 (the Act).

3 All three proceedings arise from a complaint filed with the Canadian Human Rights Commission (the Commission) by the respondent Potapczyk. That complaint alleged that the appellant/applicant Alistair MacBain (MacBain) engaged in a discriminatory practice against her on the basis of her sex during the course of her employment with him in contravention of ss. 7(a), 7(b) and 10(a) of the Act. After the filing of the complaint, the Commission appointed an investigator pursuant to s. 35 of the Act who completed an investigation into that complaint, thereafter reporting her findings to the Commission pursuant to s. 36 of the Act. The relevant portions of ss. 35 and 36 read as follows:

> **Investigation**
>
> 35.(1) The Commission may designate a person (hereinafter referred to as an "investigator") to investigate a complaint.
>
> 36.(1) An investigator shall, as soon as possible after the conclusion of an investigation, submit to the Commission a report of the findings of the investigation.

(2) If, on receipt of a report mentioned in subsection (1), the Commission is satisfied

(a) that the complainant ought to exhaust grievance or review procedures otherwise reasonably available, or

(b) that the complaint could more appropriately be dealt with, initially or completely, by a procedure provided for under an Act of Parliament other than this Act,

it shall refer the complainant to the appropriate authority.

(3) On receipt of a report mentioned in subsection (1), the Commission

(a) may adopt the report if it is satisfied that the complaint to which the report relates has been substantiated and should not be referred pursuant to subsection (2) or dismissed on any ground mentioned in subparagraphs 33(b)(ii) to (iv); or

(b) shall dismiss the complaint to which the report relates if it is satisfied that the complaint has not been substantiated or should be dismissed on any ground mentioned in subparagraphs 33(b)(ii) to (iv).

(4) After receipt of a report mentioned in subsection (1), the Commission

(a) shall notify in writing the complainant and the person against whom the complaint was made of its action under subsection (2) or (3); and

(b) may, in such manner as it sees fit, notify any other person whom it considers necessary to notify of its action under subsection (2) or (3).

4 On November 22, 1983, the Commission passed a resolution in which it found that Potapczyk's complaint against MacBain was substantiated pursuant to the authority conferred upon it pursuant to subs. 36(3) of the Act.1 This decision has not been questioned in any of the proceedings presently before the Court. Accordingly, it remains as a finding against MacBain respecting his conduct towards Potapczyk. The Commission further resolved to appoint a Tribunal to inquire into the complaint and authorized the Chief Commissioner to do so. The authority to appoint such a Tribunal is contained in subs. 39(1) of the Act.

5 Sections 39, 40 and 41 read:

Human Rights Tribunal

39.(1) The Commission may, at any stage after the filing of a complaint, appoint a Human Rights Tribunal (hereinafter in this Part referred to as 'Tribunal') to inquire into the complaint.

(2) A Tribunal may not consist of more than three members.

(3) No member, officer or employee of the Commission, and no individual who has acted as investigator or conciliator in respect of the complaint in relation to which a Tribunal is appointed, is eligible to be appointed to the Tribunal.

(4) A member of a Tribunal is entitled to be paid such remuneration and expenses for the performance of duties as a member of the Tribunal as may be prescribed by by-law of the Commission.

(5) In selecting any individual or individuals to be appointed as a Tribunal, the Commission shall make its selection from a panel of prospective members, which shall be established and maintained by the Governor in Council.

40.(1) A Tribunal shall, after due notice to the Commission, the complainant, the person against whom the complaint was made and, at the discretion of the Tribunal, any other interested party, inquire into the complaint in respect of which it was appointed and shall give all parties to whom notice has been given a full and ample opportunity, in person or through counsel, of appearing before the Tribunal, presenting evidence and making representations to it.

(2) The Commission, in appearing before a Tribunal, presenting evidence and making representations to it, shall adopt such position as, in its opinion, is in the public interest having regard to the nature of the complaint being inquired into.

(3) In relation to a hearing under this Part, a Tribunal may

(a) in the same manner and to the same extent as a superior court of record, summon and enforce the attendance of witnesses and compel them to give oral or written evidence on oath and to produce such documents and things as the Tribunal deems requisite to the full hearing and consideration of the complaint;

(b) administer oaths; and

(c) receive and accept such evidence and other information, whether an oath or by affidavit or otherwise, as the Tribunal sees fit, whether or not such evidence or information is or would be admissible in a court of law.

(4) Notwithstanding paragraph (3)(c), a Tribunal may not receive or accept as evidence anything that would be inadmissible in a court by reason of any privilege under the law of evidence.

(5) Notwithstanding subsection (2), a conciliator appointed to settle a complaint is not a competent or compellable witness at a hearing of a Tribunal appointed to inquire into the complaint.

(6) A hearing of a Tribunal shall be public, but a Tribunal may exclude members of the public during the whole or any of a hearing if it considers such exclusion to be in the public interest.

(7) Any person summoned to attend a hearing pursuant to this section is entitled in the discretion of the Tribunal to receive the like fees and allowances for so doing as if summoned to attend before the Federal Court of Canada.

41.(1) If, at the conclusion of its inquiry, a Tribunal finds that the complaint to which the inquiry relates is not substantiated, it shall dismiss the complaint.

(2) If, at the conclusion of its inquiry, a Tribunal finds that the complaint to which the inquiry relates is substantiated, subject to subsection (4) and section 42, it may make an order against the person found to be engaging or to have engaged in the discriminatory practice and include in such order any of the following terms that it considers appropriate:

(a) that such person cease such discriminatory practice and, in consultation with the Commission on the general purposes thereof, take measures, including adoption of a special program, plan or arrangement referred to in subsection 15(1), to prevent the same or a similar practice occurring in the future;

(b) that such person make available to the victim of the discriminatory practice on the first reasonable occasion such rights, opportunities or privileges as, in the opinion of the Tribunal, are being or were denied the victim as a result of the practice;

(c) that such person compensate the victim, as the Tribunal may consider proper, for any or all of the wages that the victim was deprived of and any expenses incurred by the victim as a result of the discriminatory practice; and

(d) that such person compensate the victim, as the Tribunal may consider proper, for any or all additional cost of obtaining alternative goods, services, facilities or accommodation and any expenses incurred by the victim as a result of the discriminatory practice.

(3) In addition to any order that the Tribunal may make pursuant to subsection (2), if the Tribunal finds that

(a) a person is engaging or has engaged in a discriminatory practice wilfully or recklessly, or

(b) the victim of the discriminatory practice has suffered in respect of feelings or self-respect as a result of the practice,

the Tribunal may order the person to pay such compensation to the victim, not exceeding five thousand dollars, as the Tribunal may determine.

(4) If, at the conclusion of its inquiry into a complaint regarding discrimination in employment that is based on a physical handicap of the victim, the Tribunal finds that the complaint is substantiated but that the premises or facilities of the person found to be engaging or to have engaged in the discriminatory practice impede physical access thereto by, or lack proper amenities for, persons suffering from the physical handicap of the victim, the Tribunal shall, by order, so indicate and shall include in such order any recommendations that it considers appropriate but the Tribunal may not make an order under subsection (2) or (3).

6 After the Commission decided to substantiate the complaint and to appoint a Tribunal, a short list of potential members was prepared for the Chief Commissioner of the Commission. The Chief Commissioner proceeded to personally select the respondents Lederman, Robson and Cumming to constitute the Tribunal to inquire into the complaint against MacBain. As of December 1983, approximately one hundred persons had been appointed by the Governor in Council as prospective members of Tribunals to be selected under subs. 39(5) of the Act. The Chief Commissioner, in testimony before the House of Commons Standing Committee on Justice and Legal Affairs, on December 13, 1983, stated that only 26 of these prospective members had been selected during 1982 to sit as Tribunals.

7 The Tribunal commenced its hearing into the complaint against MacBain on April 9, 1984, with the Commission appearing as prosecutor. Meanwhile, on March 30, 1984, MacBain had commenced an action in the Trial Division of this Court for a declaration, inter alia, that Pt. III of the Act (which includes s. 39) was inconsistent with subs. 11(d) of the Canadian Charter of Rights and Freedoms (the Charter). On June 21, 1984, MacBain filed an amended statement of claim wherein the declaration asked for in respect of Pt. III and s. 39 was broadened to allege inconsistency with s. 7 of the Charter as well. The amended statement of claim also asked for a declaration that Pt. III and portions of s. 39 of the Act were inoperative as abrogating, abridging and infringing MacBain's right to a fair hearing under subs. 2(e) of the Bill of Rights, R.S.C. 1970, App. III (the Bill).

8 As noted supra, MacBain also sought a writ of prohibition to prohibit the Tribunal from proceeding to hear the complaint against him citing in support of that application, the same grounds on which the declaratory relief was sought. On March 29, 1984, MacBain had requested in writing that the hearing scheduled to commence on April 9, 1984, be adjourned pending resolution of the applicant's proceedings in the Trial Division. The adjournment request was declined by the Tribunal at the opening of the hearing on April 9th. It also declined to stay its proceedings pending the application for prohibition. The Tribunal went on to hear the complaint in the absence of MacBain and his counsel who withdrew from the hearing. At the hearings before the Tribunal, the Commission, pursuant to s. 40, prosecuted the complaint against MacBain.

9 The applications for prohibition and for judgment in the action were heard together by Collier J. on May 7 and 8, 1984, and he delivered oral reasons for judgment on May 9, 1984. When the

motions before Collier J. were heard, the Tribunal had heard only part of the evidence and had adjourned its hearings to a date to be fixed. The Tribunal proceeded with its hearings on May 17 and 18, 1984. When the hearings resumed, MacBain's counsel asked for an adjournment pending an appeal from the judgment of Collier J. That motion was refused and the Tribunal went on to hear the remainder of the evidence in the absence of MacBain and his counsel who withdrew from that hearing also. Like the Commission, the Tribunal found that Potapczyk's complaint against MacBain had been substantiated and made the following order dated July 23, 1984:

> (a) That the Respondent, Alistair MacBain, cease any further contravention of Section 7(b) of the Canadian Human Rights Act in the manner set out in the aforesaid Reasons and that he refrain henceforth from committing the same or similar contraventions against his employees;
>
> (b) That the Respondent, Alistair MacBain, pay to the Complainant, Kristina Potapczyk, compensation in the amount of $1,500.00 under section 41(3) of the Canadian Human Rights Act.
>
> Decision of Tribunal, Case, Vol. I, pp. 64-65

Reasonable Apprehension of Bias

10 The central issue in all three proceedings presently before the Court is an allegation that MacBain had a reasonable apprehension of bias arising out of the method of prosecuting and deciding the complaint. It is common ground that in the circumstances of this case, there was no evidence of actual bias. The matters, both in the Trial Division and in this Court were argued on the basis of reasonable apprehension of bias. Collier J. held that, on all the facts in the two proceedings before him, there was a well-founded reasonable apprehension of bias. In this Court, counsel for the appellant/applicant supported that finding. In essence his submission was to the following effect: in the instant case, and pursuant to the scheme envisaged in the Act, the Commission investigated, made findings of substantiation and then prosecuted this complaint; the very same Commission also appointed the Tribunal members who heard and decided the case adversely to the appellant/applicant. Such a scheme violates the principle that no one will judge his own cause since it cannot be said that there is any meaningful distinction between being your own judge and selecting the judges in your own cause. Accordingly, the scheme is inherently offensive and gives rise to a reasonable apprehension of bias thereby violating the principles of natural justice.

11 Counsel all agreed that the proper test to be applied when considering the issue of reasonable apprehension of bias was that set out by Mr. Justice de Grandpré in the Crowe [1] case. The relevant portion of his reasons read as follows:

> The proper test to be applied in a matter of this type was correctly expressed by the Court of Appeal. As already seen by the quotation above, the apprehension of bias must be a reasonable one, held by reasonable and right minded persons, applying themselves to the question and

> obtaining thereon the required information. In the words of the Court of Appeal, that test is 'what would an informed person, viewing the matter realistically and practically — and having thought the matter through — conclude'. Would he think that it is more likely than not that Mr. Crowe, whether consciously or unconsciously, would not decide fairly.
>
> I can see no real difference between the expressions found in the decided cases, be they 'reasonable apprehension of bias' 'reasonable suspicion of bias' or 'real likelihood of bias'. The grounds for this apprehension must, however, be substantial and I entirely agree with the Federal Court of Appeal which refused to accept the suggestion that the test be related to the 'very sensitive or scrupulous conscience'.
>
> This is the proper approach which, of course, must be adjusted to the facts of the case. The question of bias in a member of a court of justice cannot be examined in the same light as that in a member of an administrative tribunal entrusted by statute with an administrative discretion exercised in the light of its experience and of that of its technical advisers.

Collier J. after reviewing the facts, the scheme of the Act and the test set out in the Crowe case supra, concluded that (A.B. pp. 28-29):

> ... the reaction of a reasonable and right-minded person, viewing the whole procedure as set out in the statute and as adopted in respect of this particular complaint, would be to say: there is something wrong here; the complaint against me has been ruled proved; now that complaint is going to be heard by a tribunal appointed by the body who said the complaint has been proved; that same body is going to appear against me in that hearing and urge the complaint to be found to be proved.

12 It is clear from a perusal of the reasons of the learned trial Judge in their entirety that, in his view, the most serious problem with the scheme of the Act is the requirement initially for the Commission to determine whether the complaint has been "substantiated" (subs. 36(3)) whereas the Tribunal is obligated in its deliberations to make the same determination — namely substantiation of the complaint (subss. 41(1) and (2)). He observed that the same word "substantiate" was used in both subsections and it was his opinion that the same meaning should be ascribed to that word in both subsections. He defined "substantiate" to mean "prove" and applied that definition to both subsections. In his view, it was the fact that the Commission had already found that the case against MacBain had been "proved" prior to the appointment of the Tribunal that gave rise to a reasonable apprehension of bias. The trial Judge made it clear that his finding of apprehension of bias rested on the provisions requiring substantiation and that if the statute had simply required the Commission to be satisfied that there was enough evidence to warrant a hearing, no apprehension of bias would exist. I say this because of that portion of his reasons which reads (A.B. p. 29):

> No feeling of disquietude could arise, nor indeed any complaint be made, if the provisions regarding substantiation of the complaint by the Commission were absent. Or, if the procedural provision there, merely required the Commission to be satisfied there was enough material or evidence warranting a hearing and decision by a tribunal.

13 With respect, I differ from the view of the learned trial Judge that the issue of substantiation is the only factor when considering apprehension of bias. In my view, the apprehension of bias also exists in this case because there is a direct connection between the prosecutor of the complaint (the Commission) and the decision-maker (the Tribunal). That connection easily gives rise, in my view, to a suspicion of influence or dependency. After considering a case and deciding that the complaint has been substantiated, the "prosecutor" picks the Tribunal which will hear the case. It is my opinion that even if the statute only required the Commission to decide whether there was sufficient evidence to warrant the appointment of a Tribunal, reasonable apprehension of bias would still exist.

14 The situation in the case at Bar is quite different, in my view, from the issue decided by the Ontario Court of Appeal in the case of R. v. Valente (No. 2) (1983), 41 O.R. (2d) 187, 20 M.V.R. 168 (sub nom. R. v. Valente), 2 C.C.C. (3d) 417, 14 C.R.R. 137, 145 D.L.R. (3d) 452 [affirmed S.C.C., No. 17583, Dickson C.J.C., Beetz, Estey, McIntyre, Chouinard, Lamer and Le Dain JJ., December 19, 1985]. The issue there was the independence of provincially appointed Judges in the Province of Ontario. It is beyond argument that the principle of judicial independence is essential to the administration of justice in our system. This principle is supported by the tradition of a division of powers. However, as a practical matter, absolute independence is not possible at present. This is so because the Government of Canada as well as the Government of the Province exercise considerable, albeit varying degrees of administrative oversight over the judiciary. I refer to the financial and administrative control over Judges which presently resides in the Executive Branch of the Federal and most Provincial Governments. It is to this nebulous area where the division of powers is not absolute that the Ontario Court of Appeal addressed itself in Valente (No. 2), supra and concluded that the principle of independence had been maintained.

15 I see at least two very important differences between the system of appointment of Provincial Judges in Ontario which was reviewed in Valente (No. 2), and the system employed by the Commission under this Act. Firstly, in most jurisdictions in this country, the appointment of Judges is permanent [2] whereas the scheme of this Act contemplates the appointment of temporary "Judges" on a case by case basis.

16 At p. 105 of his study, Chief Justice Deschênes said:

> An appointment during pleasure or for a probationary period is inconsistent with the independence necessary to the judicial function.

> In this way, the executive hangs a sword of Damocles over the head of a new judge. A judge who accepts a one-year appointment is, in all likelihood, interested in carving out a career in the judiciary but this career will hinge on the goodwill of the Prince. Clearly, a judge on probation is not independent and there is a risk that his decisions may be coloured by his plans for the future. Could he rule against a government from whose 'pleasure' his appointment derives? And in private litigation, could he take the position that the law and his conscience dictate but that might displease the government of the day? Then too, what criteria will the government apply in deciding after one year of probation whether a judge merits a permanent appointment?

His firm recommendation was, accordingly, that the system of appointing Judges during pleasure or for a probationary period should be abolished. That criticism of the system of probationary and "at pleasure" appointments applies even more forcibly to the system of case-by-case assignments employed under this Act. At the very least, the prosecutor should not be able to choose his "Judge" from a list of temporary "Judges". That, however, is precisely what happens when the Commission chooses the Tribunal members who will hear a particular case.

17 The second important distinction between the Valente facts and the facts in the case at Bar relates to the distinction which has to be made between independent *administration* (which, as we have seen does not totally exist at the present time) and independent *adjudication* which, in my view, is a necessary and vital component of judicial independence and the proper administration of justice. Independent adjudication must necessarily include such matters as the preparation of trial lists, decisions on the order in which cases are to be tried, the assignment of Judges to the cases and the allocation of court rooms. Chief Justice Deschênes characterizes these items as being "caseflow management". His comments read as follows (see Deschênes, supra, p. 124):

> These are all factors on which the integrity of the judicial process itself depends. Leave its control to outsiders, civil servants or others, and soon one will see a particular judge being assigned to a particular case for reasons irrelevant to the proper administration of justice. The independence of the judiciary requires absolutely that the judiciary and it alone manage and control the movement of cases on the trial lists and the assigning of the judges who will hear these cases.

In my view, those comments have particular pertinence to the appointment of a Tribunal under this Act. Given a scheme in which both of the objectionable features discussed by Chief Justice Deschênes, are present, I have no hesitation in concluding that an informed person, viewing the matter realistically and practically, and having thought the matter through, would conclude that a reasonable apprehension of bias exists under this scheme and in this case.

18 In attempting to impeach the findings of the learned trial Judge on reasonable apprehension of bias, counsel for the Commission submitted that Collier J. did not properly apply the test from

the Crowe case. More particularly, it was his submission that the trial Judge omitted from the Crowe test the issue as to whether a reasonable and right-minded person was properly informed. I do not agree with this submission. A reading of the reasons of Collier J. persuades me that he did in fact apply the Crowe test. At p. 28 of the Appeal Book, Mr. Justice Collier clearly prefaces his conclusion with the following: "Keeping in mind the test propounded in the Marshall Crowe case ..." It is correct to observe that later on at pp. 28 and 29 of the Appeal Book, he does not include in his reference to "a reasonable and right-minded person" the further qualification that such a person must also be "properly informed". However, in my view, in applying the Crowe test, he did not lose sight of this additional requirement since he applies the test of a reasonable and right-minded person "... viewing the whole procedure as set out in the statute and as adopted in respect of this particular complaint ..." I think it clear from this passage that in view of Collier J. a "properly informed person" was one who was knowledgeable about the scheme of the statute and was also knowledgeable as to the way in which that scheme was applied in the processing of the complaint at Bar. Accordingly, I do not think he failed to properly apply the Crowe test. Counsel for the Commission then went on to analyze the cases which had been heard by Tribunals under this Act. The analysis indicates that during the years 1979 to 1984, approximately one-half of the Tribunals appointed did not substantiate the complaints before them. With respect, I fail to appreciate the relevance of such statistics. They would only be relevant, in my view, if the issue being discussed was *actual* bias rather than *apprehension* of bias.

19 Counsel also submitted that Mr. Justice Collier erred in finding that "substantiate" as used both in subss. 36(3) and 41(1) meant "proved" in both subsections.

20 As stated earlier herein, I do not consider the issue of substantiation to be the only factor when considering apprehension of bias. Having said that, let me hasten to add that, in my view, Mr. Justice Collier was correct in concluding that "substantiate" has the same meaning in subs. 36(3) as it does in subs. 41(1). I so conclude because, in my view, since the word is used in two sections of the Act, both of which form part of the same procedure for the disposition of complaints, it should be presumed initially that the same word should have the same meaning. Dr. Driedger, in the Construction of Statutes (2nd ed., 1983), says at p. 93:

> There is another draftsman's guide to good drafting and hence also a reader's guide, namely, the same words should have the same meaning, and, conversely, different words should have different meanings. (Called the 'presumption against a change of terminological usage' by Lord Simon in Black-Clawson International Ltd. v. Papierwerke Wadlhof-Aschaffenburg A.G. [1975] 1 All E.R. 810 at p. 847).

Likewise, in the case of Giffels & Vallett of Can. Ltd. v. R., [1951] O.R. 652, [1952] 1 D.L.R. 620 at 630 (Ont. C.A.), Gale J. said:

> Whilie it is quite true that a word may have different meanings in the same statute or even in the same section, it is not to be forgotten that the first inference is that a word carries the same connotation in all places where it is found in a statute.

In order to give effect to this submission, it would be necessary to read subs. 36(3)(a) of the Act as though the word "substantiated" was deleted and the following word or words of like import were substituted therefor: "that an inquiry into the complaint is warranted." The Courts have resisted this practice of adding or deleting words in a statute. The rationale for this resistance was well stated by Lord Brougham in Crawford v. Spooner (1846), 6 Moo. P.C.C. 1, 13 E.R. 582 (P.C.C.), where he said:

> The construction of the Act must be taken from the bare words of the Act. We cannot fish out what possibly may have been the intention of the Legislature; we cannot aid the Legislature's defective phrasing of the Act; we cannot add, and mend, and, by construction make up deficiencies ...

For these reasons, I find no basis for this submission by counsel for the Commission.

21 I turn now to the submissions made by counsel for the members of the Tribunal. Counsel relied on the decision of this Court in Caccamo v. Min. of Manpower & Immigration, [1978] 1 F.C. 368, 75 D.L.R. (3d) 720 (sub nom. Re Caccamo and Minister of Manpower & Immigration), 16 N.R. 405, to answer the submissions of MacBain's counsel that the scheme of the Act as applied to this case gave rise to a reasonable apprehension of bias. In that case, it was submitted that a reasonable apprehension of bias existed in respect of a Special Inquiry Officer designated to hold an inquiry under the Immigration Act, S.C. 1976-77, c. 52, to determine whether the appellant Caccamo should be deported. The alleged basis for deportation was that the appellant had been adjudged by the Ontario Courts and the Supreme Court of Canada to be a member of the Mafia and was, therefore, a member of an inadmissible class, namely, a member of a group which engages in or advocates subversion of democratic government, institutions or processes as they are understood in Canada and that prior to the inquiry, a newspaper report quoted the Director of Information of the Department of Manpower and Immigration as saying that the Department must take the position that the Mafia is a subversive organization. The Court decided that the Special Inquiry Officer would not be disqualified in such a situation merely because he, along with every other officer of the Department of Manpower and Immigration was an officer subject to the direction and control of the Deputy Minister of Manpower and Immigration as was the Information Director who made the press statements complained of. The Court expressed the view that since the newspaper report indicated no more than that the Department had instituted deportation proceedings against the appellant because of its views with respect to the appellant's activities, there was no suggestion that the Department was imposing its views on the Special Inquiry Officer. The Special Inquiry Officer was still under a duty to determine, on the evidence, whether the appellant was subject to

deportation. In my opinion, the Caccamo case, supra, is easily distinguishable on its facts from the case at Bar. In Caccamo there was no suggestion that the Department had taken the firm position in advance of the inquiry that the allegations against the appellant had been substantiated. The press release simply stated the position that the Department was going to take at the Special Inquiry. That is quite a different situation from the one at Bar where the Commission, *after* deciding that the complaint has been substantiated, chooses the part-time Judges who will hear the complaint, and at that hearing takes the position that its earlier decision was correct. Such a scheme represents after-the-fact justification for a decision already made by it and before Judges of its own choosing.

22 Counsel for the Attorney General opened his oral submissions with a frank concession that "What we have here is an appearance of unfairness" which "may deserve relief." He then went on to urge that any relief granted should not "demolish the statute". He proceeded to emphasize that in this case we are dealing with an administrative tribunal and not a Court in the traditional sense. He submitted that, in these circumstances, the procedure set out in the Act should be seen "... through the eyes of an informed person examining this tribunal and its functions realistically and practically." He then proceeded to detail numerous features of the scheme of the Act. With respect, it seems to me that this analysis begs the question because it fails to consider whether the respondent was afforded fundamental justice under that scheme. Some of the features mentioned by counsel relate to "utilitarian considerations" such as volume, expense, efficiency and expediency. In this connection, I think the observations made by Madame Justice Wilson in Singh v. Min. of Employment & Immigration, [1985] 1 S.C.R. 177, 12 Admin. L.R. 137, 14 C.R.R. 13, 17 D.L.R. (4th) 422, 58 N.R. 1, are relevant. The learned Justice was discussing the s. 1 limits on s. 7 of the Charter. At pp. 218 and 219 [S.C.R.], she expressed doubt that "utilitarian considerations" can constitute a limitation on the rights set out in the Charter. She went on to state:

> Certainly the guarantees of the Charter would be illusory if they could be ignored because it was administratively convenient to do so. No doubt considerable time and money can be saved by adopting administrative procedures which ignore the principles of fundamental justice but such an argument, in my view, misses the point of the exercise under s. 1. The principles of natural justice and procedural fairness which have long been espoused by our courts, and the constitutional entrenchment of the principles of fundamental justice in s. 7, implicitly recognize that a balance of administrative convenience does not override the need to adhere to these principles.

Since the constitutional or quasi-constitutional rights under the Charter and Bill are central to this case, I consider these statements of the law to be germane to the issue being discussed.

23 For all of the above reasons, I have concluded that Mr. Justice Collier did not err in finding a reasonable apprehension of bias in this case.

The Application of the Bill of Rights

24 The relevant sections of the Bill of Rights for the purpose of considering the issues in these proceedings are subss. 2(e) and 5(2). Those provisions read as follows:

> 2. Every law of Canada shall, unless it is expressly declared by an Act of the Parliament of Canada that it shall operate notwithstanding the Canadian Bill of Rights, be so construed and applied as not to abrogate, abridge or infringe or to authorize the abrogation, abridgment or infringement of any of the rights or freedoms herein recognized and declared, and in particular, no law of Canada shall be construed or applied so as to
>
> . . . . .
>
> (e) deprive a person of the right to a fair hearing in accordance with the principles of fundamental justice for the determination of his rights and obligations.
>
> 5. ...
>
> (2) The expression 'law of Canada' in Part I means an Act of the Parliament of Canada enacted before or after the coming into force of this Act, any order, rule or regulation thereunder, and any law in force in Canada or in any part of Canada at the commencement of this Act that is subject to be repealed, abolished or altered by the Parliament of Canada.

At the hearing before Mr. Justice Collier, counsel for MacBain urged the application of subs. 2(e) of the Bill to this case. This argument was rejected. His reasons for refusing to apply the Bill are found in the Appeal Book at pp. 30 to 33 inclusive. I quote herewith the pertinent portions of those reasons:

> The Bill of Rights is not part of Canada's Constitution. It has had an unhappy, ineffective judicial history. ...
>
> For MacBain, it was said it can be brought into play here: The Commission has, in this instance, so applied the Canadian Human Rights Act to create a reasonable apprehension of bias; a fair hearing cannot be had; if the Commission intends to appoint a tribunal, it must first not substantiate the complaint. Mr. Genest did not submit that I should hold the relevant provisions of the legislation to be inoperative. He argued I should merely hold the application of the statute by the Commission, in this case, to be contrary to the strictures found in paragraph 2(e) of the Bill of Rights.
>
> I have concluded, with regret, misgiving, and doubt, I cannot utilize the Bill of Rights in that manner. Nor can I, in the facts and circumstances here, hold the relevant provisions of the Canadian Human Rights Act to be inoperative.
>
> . . . . .

> In partial self defense I suggest the Bill of Rights is an awkward statute. That is all it is: a statute. It has no real fangs. It is, as phrased, to my mind, a tool for construction of legislation, not for destruction of impingements on rights.

25 With deference I agree with Mr. Justice Collier's appreciation of the state of the law pertaining to the Bill as of the date his reasons for judgment were given in this case. However, since that time the decision of the Supreme Court of Canada in the Singh case, supra, has been delivered. I think it accurate to observe that most certainly one of the consequences of that landmark decision has been to reinvigorate the Canadian Bill of Rights. Accordingly, I think it necessary to consider that decision in some depth. Madame Justice Wilson speaking for herself, the Chief Justice and Lamer J. at p. 185 of her reasons made the following comments concerning the Bill in general:

> There can be no doubt that this statute continues in full force and effect and that the rights conferred in it are expressly preserved by s. 26 of the Charter. However, since I believe that the present situation falls within the constitutional protection afforded by the Canadian Charter of Rights and Freedoms, I prefer to base my decision upon the Charter.

26 On the other hand, Mr. Justice Beetz, speaking for himself and Estey and McIntyre JJ. found that the procedures followed for determining Convention refugee status as set out in the Immigration Act, 1976 were in conflict with subs. 2(e) of the Canadian Bill of Rights. At p. 224 of his reasons, Mr. Justice Beetz stated:

> Thus, the Canadian Bill of Rights retains all its force and effect, together with the various provincial charters of rights. Because these constitutional or quasi-constitutional instruments are drafted differently, they are susceptible of producing cumulative effects for the better protection of rights and freedoms. But this beneficial result will be lost if these instruments fall into neglect. It is particularly so where they contain provisions not to be found in the Canadian Charter of Rights and Freedoms and almost tailor-made for certain factual situations such as those in the cases at bar.

In my view, this statement puts to rest the concept stated by Collier J. (as established in the pre-Singh jurisprudence) that the Bill is merely an instrument of construction or interpretation. At p. 226 of his reasons, Beetz J. appears to have adopted the submission of the appellant's counsel that two points must be established in order to find a breach of subs. 2(e): *Firstly*, it must be shown that a party's "rights and obligations" fall to be determined by a Federal Tribunal; and, *secondly*, it must be established that the party concerned was not afforded a "fair hearing in accordance with the principles of fundamental justice". On the first branch of the test, Beetz J. stated at p. 228:

> Be that as it may, it seems clear to me that the ambit of s. 2(e) is broader than the list of rights enumerated in s. 1 which are designated as 'human rights and fundamental freedoms' whereas in s. 2(e), what is protected by the right to a fair hearing is the determination of one's 'rights and obligations', whatever they are and whenever the determination process is one

> which comes under the legislative authority of the Parliament of Canada. It is true that the first part of s. 2 refers to 'the rights or freedoms herein recognized and declared', but s. 2(e) does protect a right which is fundamental, namely 'the right to a fair hearing in accordance with the principles of fundamental justice' for the determination of one's rights and obligations, fundamental or not. It is my view that, as was submitted by Mr. Coveney, it is possible to apply s. 2(e) without making reference to s. 1 and that the right guaranteed by s. 2(e) is in no way qualified by the 'due process' concept mentioned in s. 1(a).

27 Applying that view of the matter to the instant case, I think that this Act imposes upon MacBain the obligation not to treat his employees in a discriminatory way. MacBain's position is that he has fulfilled that condition. The position of the Commission and the complainant Potapczyk is that he has not. Accordingly, it seems clear that the Tribunal appointed in this case was charged with determining MacBain's obligations under the Act. Therefore the first branch of the test as above stated has been met, in my view.

28 Insofar as the second branch of the test is concerned, if my conclusions on reasonable apprehension of bias supra, are correct, it necessarily follows that MacBain was not afforded a fair hearing in accordance with the principles of fundamental justice. While actual bias was neither alleged or established in this case, the appearance of injustice also constitutes bias in law.[3] The case at Bar has some similarities to the case of Re McGavin Toasmaster Ltd. and Powlowski (1973), 37 D.L.R. (3d) 100, decided by the Manitoba Court of Appeal. Although the scheme of the Manitoba Human Rights Act, S.M. 1974, c. 65 (also C.C.S.M., c. H175), therein being considered is somewhat different, I find relevant a statement made by Hall J.A. for the majority at p. 119 where he said:

> The Commission and the statute under which it functions are concerned with human rights of both the complainant and the person complained against, and for that reason alone justice demanded consummate care on their part in the procudures to be followed in disposing of the complaints.

As in the McGavin case supra, we are also concerned here with human rights legislation which by its very nature demands "consummate care" in respect of the procedures to be followed. In this case, the scheme of the statute and the procedure prescribed therein for the appointment of Tribunals offends fundamental justice since the "consummate care" referred to by Hall J.A. which is reasonably to be expected when dealing with the human rights of individuals, cannot be taken under this procedure.

29 Before leaving the Singh case, I should observe that, in applying the Bill to an Act which post-dated the enactment of the Bill, Mr. Justice Beetz expressly rejected any suggestion that the Bill only applied to Acts which pre-dated it. At p. 239 of the reasons he said:

> I do not see any reason not to apply the principle in the Drybones case to a provision enacted after the Canadian Bill of Rights. Section 5(2) provides:
>
> (2) The expression 'law of Canada' in Part I means an Act of the Parliament of Canada enacted before or after the coming into force of this Act, any order, rule or regulation thereunder, and any law in force in Canada or in any part of Canada at the commencement of this Act that is subject to be repealed, abolished or altered by the Parliament of Canada.

The Canadian Charter of Rights and Freedoms

30 On the hearing of the appeal, the principal thrust of the argument by counsel for MacBain pertained to subs. 2(e) of the Bill of Rights. It was his position that if the Court agreed with his submissions on subs. 2(e), there would be no need to consider whether s. 7 or subs. 11(d) of the Charter have any application to this case. Nevertheless, in his submissions in chief and in his memorandum of fact and law he did make submissions with respect to s. 7 and subs. 11(d) of the Charter. However, during the course of the submissions being made to us by counsel for the Attorney General of Canada, counsel for MacBain advised us that he was not asking the Court to make a finding on the applicability of any section of the Charter. On this basis, the Court did not hear further argument from counsel for the respondents on this issue. Accordingly, I do not propose to deal with the applicability of the Charter in this case.

Remedies

31 Since I have concluded that the adjudicative structure of the Canadian Human Rights Act contains an inherent bias, thereby offending subs. 2(e) of the Bill, it becomes necessary to consider the appropriate form of remedy in all the circumstances of these proceedings. Like its American counterpart, the Canadian Bill of Rights does not expressly address the issue of the consequences of failure to comply with its provisions. This circumstance is in marked contrast to the Charter which deals with this matter with clarity and unprecedented scope. I refer to subs. 52(1) of the Charter which provides that any law inconsistent with the provisions of the Charter "... is, to the extent of the inconsistency, of no force and effect". Likewise, reference should be made to subs. 24(1) of the Charter which empowers "a court of competent jurisdiction" to grant such remedy as it considers "appropriate and just in the circumstances". However, the Bill's silence in this regard does not, in my view, imply unenforceability for it is trite law that there can be no right without a remedy. Furthermore, the relevant jurisprudence supports that view of the matter. In R. v. Drybones, [1970] S.C.R. 282 at 294, 71 W.W.R. 161, 10 C.R.N.S. 334, [1970] 3 C.C.C. 355, 9 D.L.R. (3d) 473, Ritchie J. writing for the majority of the Supreme Court of Canada quoted the opening words of s. 2 of the Bill which read:

> Every law of Canada shall, *unless it is expressly declared by an Act of the Parliament of Canada that it shall operate notwithstanding the Canadian Bill of Rights*, be so construed and applied as not to abrogate ...

[The emphasis is that of Ritchie J.] Thereafter, Mr. Justice Ritchie went on to state:

> It seems to me that a more realistic meaning must be given to the words in question and they afford, in my view, the clearest indication that s. 2 is intended to mean and does mean that if a law of Canada cannot be 'sensibly construed and applied' so that it does not abrogate, abridge or infringe one of the rights and freedoms recognized and declared by the Bill, then such law is inoperative 'unless it is expressly declared by an Act of the Parliament of Canada that it shall operate notwithstanding the Canadian Bill of Rights.'
>
> I think a declaration by the courts that a section or portion of a section of a statute is inoperative is to be distinguished from the repeal of such a section and is to be confined to the particular circumstances of the case in which the declaration is made. The situation appears to me to be somewhat analogous to a case where valid provincial legislation in an otherwise unoccupied field ceases to be operative by reason of conflicting federal legislation.

32 While the Supreme Court of Canada did not, to my knowledge, after Drybones supra, declare any other laws inoperative pursuant to the Bill until the Singh case, the Court nevertheless consistently affirmed the principle of Drybones insofar as the remedy for failure to comply with the provisions of the Bill is concerned.[4] The following quotation from the decision of Laskin J. in Curr v. R., [1972] S.C.R. 889 at 899, 18 C.R.N.S. 281, 7 C.C.C. (2d) 181, 26 D.L.R. (3d) 603, is yet another example of the perspective of the Supreme Court of Canada on the effect of non-compliance with the Bill:

> Compelling reasons ought to be advanced to justify the Court in this case to employ a statutory (as contrasted with a constitutional) jurisdiction to deny *operative* effect to a substantive measure duly enacted by a Parliament constitutionally competent to do so ...

(Emphasis added) In addition to the Singh case, there is at least one other recent decision in Canadian Courts rendering inoperative federal legislation which abrogated rights protected by the Bill. I refer to the Manitoba Court of Appeal decision in R. v. Hayden, [1983] 6 W.W.R. 655, 23 Man. R. (2d) 315, 36 C.R. (3d) 187, 8 C.C.C. (3d) 33, 7 C.R.R. 325, [1984] 1 C.N.L.R. 148, 5 C.H.R.R. D/2121, 3 D.L.R. (4th) 361, where Hall J.A. speaking for the Court, found a section of the Indian Act, R.S.C. 1970, c. I-6, concerning intoxication on a reserve to be inoperative because it offended subs. 1(b) of the Bill. In the Singh case the relief proposed by Beetz J. was stated at pp. 239 to 240 as follows:

> For the purposes of these seven cases, I would declare *inoperative* all of the words of s. 71(1) of the Immigration Act, 1976, following the word: 'Where ...'

(Emphasis added) It is to be noted that notwithstanding the above statement by Mr. Justice Beetz, the word "inoperative" did not appear in the judgment as distinct from the reasons for judgment pronounced by the Supreme Court of Canada. This matter will be discussed later herein.

33 As stated by Ritchie J. in Drybones supra, another characteristic of the relief to be granted under the Bill is that there must be a degree of particularity introduced into a finding that statutory provisions are inoperative. In the second revised edition of Tarnopolsky's The Canadian Bill of Rights (1975), s. 2 and the Drybones case are referred to as follows (pp. 140 and 141):

> It would seem then, that by the opening paragraph of s. 2 Parliament intended what the majority of the Supreme Court said it intended, and that is that courts are to declare 'inoperative' any laws which contravene the Canadian Bill of Rights.
>
> The specific choice of the term 'inoperative' as an alternative, to 'void' or 'Invalid' must have been intended to restrict the effect of these decisions to the particular fact circumstances.

This view of the matter was adhered to by Mr. Justice Beetz in Singh, because his declaration was specifically restricted to the "... seven cases at Bar where Convention refugee claims have been adjudicated upon the merits without the holding of an oral hearing at any stage." (Reasons of Beetz J. at p. 237.)

34 The strictures of the remedies for violations of the Bill as outlined supra, require comparison with the emerging trends respecting remedies under the Charter. In Hunter, Dir. of Investigation & Research, Combines Investigation Branch v. Southam Inc., [1984] 2 S.C.R. 145 at 710, [1984] 6 W.W.R. 577, 33 Alta. L.R. (2d) 193, 27 B.L.R. 297, 41 C.R. (3d) 97, 55 A.R. 291, 14 C.C.C. (3d) 97, 2 C.P.R. (3d) 1, 9 C.R.R. 355 (sub nom. Hunter v. Southam Inc.), 11 D.L.R. (4th) 641, 84 D.T.C. 6467, 55 N.R. 241, the Supreme Court of Canada held that certain subsections of the Combines Investigation Act were inconsistent with the provisions of s. 8 of the Charter and "... therefore of no force and effect". In Singh supra, Madame Justice Wilson, in considering the application of the Charter found that subs. 52(1) thereof required "a declaration that s. 71(1) of the Immigration Act is of no force and effect to the extent it is inconsistent with s. 7". (Reasons p. 221) Additionally and pursuant to the broader provisions of s. 24 of the Charter, she ordered that the decision of this Court and the Immigration Appeal Board be set aside and remanded all seven cases "... for a hearing on the merits by the Board in accordance with the principles of fundamental justice articulated above". (Reasons p. 222)

35 It is interesting in the light of the above discussion to consider the formal pronouncement of the Supreme Court of Canada in the Singh case. After allowing the appeals, setting aside the

decisions of the Court and the Immigration Appeal Board, and remanding the refugee claims to the Board for a hearing on the merits in accordance with the principles of natural justice, the Court further ordered, inter alia:

> The appellants are entitled to a declaration that s. 71(1) of the Immigration Act, 1976 in its present form *has no application* to them.

(Emphasis added) It would be presumptuous of me to attempt to explain or to account for the differences in the terms used ("inoperative"; "of no force and effect"; and "has no application") and, in any event, quite unnecessary in the view I take of this matter. Since it has been consistently stated, as observed supra, that non-compliance with the Bill requires a declaration that the impugned provisions in legislation are inoperative, I propose to follow that approach in prescribing the appropriate remedy in the case at Bar.

The Appropriate Remedy in the Instant Case

36 In my view, the appropriate remedy here is a declaration in favour of MacBain that the provisions of subss. (1) and (5) of s. 39 of the Act are inoperative insofar as the complaint filed against him by the complainant Kristina Potapczyk is concerned. In his action for declaratory relief, MacBain also asked for a declaration that all of Pt. III of the Act is inoperative. Part III contains ss. 31 to 48 inclusive. I am not persuaded that it is necessary or proper to frame this declaration so broadly, having regard to the view expressed by Beetz J. in Singh, at pp. 235 and 236 that:

> There is probably more than one way to remedy the constitutional shortcomings of the Immigration Act, 1976. But is is not the function of this Court to re-write the Act. Nor is it within its power. If the Constitution requires, this and other courts can do some relatively crude surgery on deficient legislative provisions, but not plastic or re-constructive surgery.

37 For the reasons given supra, my conclusion is that the offensive portion of the statutory scheme on these facts, is the appointment of the Tribunal by the Commission since the Commission is also the prosecutor. This undesirable situation is exacerbated by the addition circumstance in this case that the Commission made the appointment of the Tribunal after it had concluded, pursuant to subs. 36(3) that the complaint in issue had been substantiated. As noted earlier, the Commission's original finding that Potapczyk's complaint against MacBain was substantiated, is not properly in question in these proceedings and therefore remains unimpeached. A declaration that subss. (1) and (5) of s. 39 are inoperative insofar as the complaint at Bar is concerned will, in my view, remedy the constitutional shortcomings of the statute *in the circumstances of this case.*

38 It was submitted by counsel for the complainant that a finding of breach of the provisions of subs. 2(e) of the Bill may result in the complainant being deprived of any remedy whatsoever, thereby jeopardizing her right to have the complaint adjudicated upon. The remedy which I propose does not produce such a result. It leaves the complainant with a finding of "substantiation" by

the Commission pursuant to subs. 36(3) of the Act. The matter of remedying the shortcomings in subss. (1) and (5) of s. 39 are matters which should be addressed to Parliament. In fashioning this remedy, I have attempted to restrict the necessary "surgery" to a bare minimum, bearing in mind that it is the function of Parliament, and not the Courts to legislate (except in a case such as this where the provisions of a quasi-constitutional instrument are infringed). On the other side of the ledger, MacBain might complain that while the effect of this decision is to nullify the order made against him by the Tribunal, he is left, nevertheless, with a finding by the Commission that the complaint against him has been substantiated. In answer to such a possible complaint, I would repeat that a s. 28 application could have been made attacking that finding by the Commission but no such proceedings were instituted. Furthermore, I think it unnecessary to declare subs. (3) of s. 36 inoperative in order to impeach that portion of the scheme which offends subs. 2(e) of the Bill on these facts.

39 Likewise, I am cognizant of the fact that this decision may possibly have some effect on other complaints before the Commission where Tribunals have been appointed or are about to be appointed under the present scheme. This consideration fortifies my view that declarations under the Bill should be strictly confined to those portions of otherwise valid leglislation which must necessarily be declared inoperative in order to dispose of the issues in a particular case.

The Doctrine of Necessity

40 As a final matter, I think it necessary to consider whether or not the doctrine of necessity applies so as to prevent the application of the Bill to the situation in this case. This principle is succinctly stated in the memorandum filed by counsel for the complainant as follows (memorandum of respondent Kristina Potapczyk, para. 35, pp. 7-8):

> ... where every eligible member of the tribunal is subject to the same disqualification for bias (that is, the very act of selection), the law must be carried out notwithstanding that potential disqualification. If the Appellant's position were accepted, there would be no person on the panel of prospective tribunal members who could escape disqualification for reasonable apprehension of bias.

41 In support of this submission the decision of this Court in the case of Caccamo v. Min. of Manpower & Immigration, supra, 75 D.L.R. (3d) 720 at 725 and 726, is cited. The Caccamo case was decided on two grounds; firstly, on the doctrine of necessity, and secondly, on the basis that a reasonable apprehension of bias did not exist on the facts of that case. Earlier in these reasons, I distinguished Caccamo from the present case on the issue of reasonable apprehension of bias. I now propose to discuss that case from the perspective of the doctrine of necessity. My initial comment is to the effect that I have considerable doubt that the Caccamo case is persuasive or determinative in light of the decision in Singh. I so conclude because of the characterization of the Bill as a quasi-constitutional instrument by Mr. Justice Beetz in his reasons in Singh at p. 224,

quoted supra, and because of his further view expressed at p. 239 of his reasons in Singh that the Drybones principle is still valid. In Drybones the majority of the Court held that the opening words of s. 2 of the Bill afford the clearest indication that the section is intended to mean and does mean that if a law of Canada cannot be "... sensibly construed and applied" so that it does not abrogate, abridge or infringe one of the rights and freedoms recognized and declared by the Bill, then such law is inoperative "... unless it is expressly declared by an Act of the Parliament of Canada that it shall operate notwithstanding the Canadian Bill of Rights." [5]

42 Given this clear and unambiguous statement as to the paramountcy of rights conferred by the Bill, I doubt the applicability of the Caccamo case in view of the evolution of our jurisprudence since that case was decided.

43 In any event, the Supreme Court of Canada has recently considered the question of necessity in Reference re Language Rights under s. 23 of Manitoba Act, 1870, and s. 133 of Constitution Act, 1867, [1985] 4 W.W.R. 385, 35 Man. R. (2d) 83 (sub nom. Man. Language Rights Reference), 19 D.L.R. (4th) 1, 59 N.R. 321. Section 23 of the Manitoba Act, 1870, R.S.C. 1970, App. II, No. 8, provided that Acts of the Legislature were to be printed and published in both English and French. After Manitoba entered Confederation the statutes of Manitoba were not printed or published in French. In 1890, the Official Language Act was enacted by the Manitoba Legislature, S.M. 1890, c. 14. It made English the official language of Manitoba and provided that Manitoba statutes need only be printed and published in English. In 1979 that statute was declared unconstitutional by the Supreme Court of Canada. The Manitoba Legislature then passed an Act respecting the operation of s. 23 of the "Manitoba Act In Regard to Statutes". That Act was an attempt to circumvent the effect of the 1979 ruling of the Supreme Court of Canada. It left English as the dominant language. The question of whether s. 23 of the Manitoba Act, 1870 was mandatory and, if so, the effect on the validity of the statutes of Manitoba, was referred to the Supreme Court of Canada. The Court held that said s. 23 was mandatory and that all of the statutes of Manitoba since Manitoba entered Confederation, which were not enacted, printed and published in both English and French were invalid. To avoid the resulting disastrous legal vacuum in that Province the Court deemed the statutes temporarily valid for the minimum period of time necessary for their translation, re-enactment, printing and publication. To achieve this result, the Court invoked the "State Necessity Doctrine". After reviewing a number of analogous situations in different countries, the Court, at p. 368, stated the doctrine in the context of the Manitoba language situation as follows:

> A Court may temporarily treat as valid and effective laws which are constitutionally flawed in order to preserve the Rule of Law. ... under conditions of emergency, when it is impossible to comply with the Constitution, the Court may allow the government a temporary reprieve from such compliance in order to preserve society, and maintain, as nearly as possible, normal conditions. The overriding concern is the protection of the Rule of Law.

44 Addressing the question as to whether the decision in the Manitoba Language Rights Reference has any application to the situation in the case at Bar, I would observe that the situation here is dramatically different from that in the Manitoba case. As stated by the Court at p. 372 of that case:

> ... the Province of Manitoba is in a state of emergency: all of the Acts of the Legislature of Manitoba, purportedly repealed, spent and current (with the exception of those recent laws which have been enacted, printed and published in both languages), are and always have been invalid and of no force or effect, and the legislature is unable to immediately re-enact these unilingual laws in both languages.

In the case at Bar, there will be simply a declaration that a portion of the scheme of this particular Act is inoperative insofar as its application to this appellant/applicant is concerned. This is a far cry from the "legal chaos" referred to by the Supreme Court of Canada in the Manitoba case. The proposed declaration at Bar will affect only a portion of one statute. It will affect only the appellant/applicant in this case and possibly several other caases where the fact situation is identical to this case. It wiill not, in my view, affect the validity of the decisions already made by Tribunals appointed under the present scheme. I say this because of the comments at p. 373 [N.R.] in the Manitoba Language Reference where it was said:

> Rights, obligations and any other effects which have arisen under purportedly repealed or spent laws by virtue of reliance on acts of public officials, or on the assumed legal validity of public or private bodies corporate are enforceable and forever beyond challenge under the de facto doctrine. The same is true of those rights, obligations and other effects which have arisen under purportedly repealed or spent laws and are saved by doctrines such as res judicata and mistake of law.

45 For these reasons I conclude that the doctrine of necessity as employed in the Caccamo case cannot be applied to the factual situation here so as to deprive this appellant/applicant of the relief to which he is otherwise entitled under the Bill of Rights.

Conclusion

46 For all of the foregoing reasons, I conclude that the three proceedings in issue should be disposed of as follows:

47 (a) File A-703-84 — Since the subject-matter of this proceeding has become academic, the appeal should be dismissed. I would make no order as to costs in this appeal.

48 (b) File A-996-84 — I would allow the s. 28 application and set aside the decision made by the respondents Lederman, Robson and Cumming, acting as a Human Rights Tribunal appointed under s. 39 of the Act.

49 (c) File A-704-84 — I would allow the appeal with costs both here and in the Trial Division and make a Declaration that the provisions of subss. (1) and (5) of s. 39 of the Canadian Human Rights Act are inoperative insofar as the complaint filed against the appellant/applicant Alistair MacBain by the respondent Kristina Potapczyk is concerned.

Appeal against dismissal of application for prohibition dismissed. Appeal from dismissal of action for a declaration allowed and ss. 39(1) and (5) of the Canadian Human Rights Act declared inoperative in respect of the proceedings before the Court. Decision of Canadian Human Rights Tribunal set aside.

Footnotes

1 2. Committee for Justice & Liberty v. National Energy Bd., [1978] 1 S.C.R. 369 at 394-95, 68 D.L.R. (3d) 716, 9 N.R. 115 (S.C.C.).

2 3. The only exception noted by Chief Justice Deschênes in his study on the independent Judicial Administration of the Courts — September 1981, are the Yukon, Nova Scotia and Newfoundland.

3 4. Compare: Re W.D. Latimer Co. and Bray; Re Onuska and Bray (1974), 6 O.R. (2d) 129 at 137, 52 D.L.R. (3d) 161 per Dubin J.A.

4 5. See for example: Hogan v. R., [1975] 2 S.C.R. 574, 9 N.S.R. (2d) 145, 26 C.R.N.S. 207, 18 C.C.C. (2d) 65, 2 N.R. 343 (S.C.C.); A.G. Can. v. Canard, [1976] 1 S.C.R. 170, [1975] 3 W.W.R. 1, 52 D.L.R. (3d) 548, 4 N.R. 91 (S.C.C.); R. v. Burnshine, [1975] 1 S.C.R. 693, [1974] 4 W.W.R. 94, 25 C.R.N.S. 270, 15 C.C.C. (2d) 505, 44 D.L.R. (3d) 504, 2 N.R. 53 (S.C.C.); A.G. Can. v. Lavell, [1974] S.C.R. 1349, 23 C.R.N.S. 197, 11 R.F.L. (2d) 333, 38 D.L.R. (3d) 481.

5 6. This summary of the ratio in Drybones is taken from the headnote of the report. The full text is to be found in the reasons of Ritchie J. at p. 294 which have been reproduced earlier in these reasons.

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Normand Martineau *Appellant*

v.

Minister of National Revenue *Respondent*

and

Attorney General of Ontario and Attorney General of Quebec *Interveners*

Please see in particular paras. 21-24 and 33-39

c.

Ministre du Revenu national *Intimé*

et

Procureur général de l'Ontario et procureur général du Québec *Intervenants*

INDEXED AS: MARTINEAU *v.* M.N.R.

Neutral citation: 2004 SCC 81.

File No.: 29794.

Hearing and judgment: October 14, 2004.

Reasons delivered: December 16, 2004.

Present: McLachlin C.J. and Major, Bastarache, Binnie, LeBel, Deschamps, Fish, Abella and Charron JJ.

RÉPERTORIÉ : MARTINEAU *c.* M.R.N.

Référence neutre : 2004 CSC 81.

N° du greffe : 29794.

Audition et jugement : 14 octobre 2004.

Motifs déposés : 16 décembre 2004.

Présents : La juge en chef McLachlin et les juges Major, Bastarache, Binnie, LeBel, Deschamps, Fish, Abella et Charron.

ON APPEAL FROM THE FEDERAL COURT OF APPEAL

Constitutional law — Charter of Rights — Self-incrimination — Customs — Notice of ascertained forfeiture — Examination for discovery — Minister of National Revenue upholding decision of customs officer to serve notice of ascertained forfeiture on alleged offender — Offender contesting Minister's decision by way of action pursuant to s. 135 of Customs Act — Motion by Minister to examine offender for discovery allowed — Whether offender may rely on protection against self-incrimination guaranteed by s. 11(c) of Canadian Charter of Rights and Freedoms — Whether offender "person charged with an offence" within meaning of that section — Whether ascertained forfeiture penal in nature — Canadian Charter of Rights and Freedoms, s. 11(c) — Customs Act, R.S.C. 1985, c. 1 (2nd Supp.), ss. 124(1), 135 — Federal Court Rules, 1998, SOR/98-106, r. 236(2).

A customs officer demanded, pursuant to s. 124 of the *Customs Act*, that the appellant pay more than $315,000, that is, the deemed value of goods he allegedly attempted to export by making false statements. The respondent upheld the notice of ascertained forfeiture and the appellant appealed this decision by way of an action

EN APPEL DE LA COUR D'APPEL FÉDÉRALE

Droit constitutionnel — Charte des droits — Auto-incrimination — Douanes — Avis de confiscation compensatoire — Interrogatoire préalable — Ministre du Revenu national confirmant la décision d'un agent de douane de signifier à un présumé contrevenant un avis de confiscation compensatoire — Contrevenant contestant la décision du ministre par voie d'action conformément à l'art. 135 de la Loi sur les douanes — Requête du ministre en vue d'interroger le contrevenant au préalable accordée — Le contrevenant peut-il invoquer la protection contre l'auto-incrimination garantie par l'art. 11c) de la Charte canadienne des droits et libertés? — Le contrevenant est-il un « inculpé » au sens de cet article? — La confiscation compensatoire est-elle une mesure de nature pénale? — Charte canadienne des droits et libertés, art. 11c) — Loi sur les douanes, L.R.C. 1985, ch. 1 (2e suppl.), art. 124(1), 135 — Règles de la Cour fédérale (1998), DORS/98-106, règle 236(2).

Un agent des douanes réclame à l'appelant, en vertu de l'art. 124 de la *Loi sur les douanes*, plus de 315 000 $, soit la valeur présumée des marchandises qu'il aurait tenté d'exporter au moyen de fausses déclarations. L'intimé confirme l'avis de confiscation compensatoire et l'appelant fait appel de cette décision par voie d'action

pursuant to s. 135 of the Act. The respondent filed a notice of motion for the purpose of examining the appellant for discovery pursuant to Rule 236(2) of the *Federal Court Rules, 1998*. The appellant contested the motion on the ground that it would violate his right against self-incrimination under s. 11(*c*) of the *Canadian Charter of Rights and Freedoms*. The prothonotary rejected the appellant's argument and allowed the respondent's motion. This decision was affirmed by the Federal Court and the Federal Court of Appeal. The Federal Court of Appeal concluded that forfeiture proceedings and the other sanctions in customs matters are administrative in nature and that, in respect of the action under s. 135, the appellant was not a "person charged with an offence" but a plaintiff, and the respondent was a defendant.

Held: The appeal should be dismissed.

The appellant is not a "person charged with an offence" within the meaning of s. 11 of the *Charter.* An analysis of s. 124 of the *Customs Act* and its related provisions shows that the ascertained forfeiture process is not penal in nature and that the sanction provided for does not have true penal consequences. Rule 236(2) of the *Federal Court Rules, 1998*, which requires the appellant, as plaintiff in an action under s. 135 of the *Customs Act*, to submit to an examination for discovery, therefore does not violate s. 11(*c*) of the *Charter.*

The objectives of the *Customs Act* are to regulate, oversee and control cross-border movements of people and goods. To enforce the Act and its self-reporting system, Parliament has implemented civil and penal mechanisms. Although the offence imputed to the appellant — that he made false statements — may give rise to criminal prosecution (s. 160), this does not in itself mean that a notice of ascertained forfeiture can properly be characterized as a penal proceeding (s. 124). The question of whether proceedings are criminal in nature is concerned not with the nature of the act which gave rise to the proceedings, but the nature of the proceedings themselves. In principle, ascertained forfeiture is a civil collection mechanism. This mechanism is not designed to punish the offender but is instead intended to provide a timely and effective means of enforcing the *Customs Act* and to produce a deterrent effect. Ascertained forfeiture is an administrative process, and there are many judgments in tax matters that support the conclusion that an administrative sanction is not penal in nature. In the case at bar, the amount demanded pursuant to s. 124, although large, does not constitute a fine that, by its magnitude, is imposed for the purpose of redressing a wrong done to society at large, as opposed to the purpose of

intentée conformément à l'art. 135 de la Loi. L'intimé présente un avis de requête pour interroger l'appelant au préalable en vertu de la règle 236(2) des *Règles de la Cour fédérale (1998)*. L'appelant s'oppose à la requête pour le motif qu'elle irait à l'encontre de la protection contre l'auto-incrimination garantie par l'al. 11*c*) de la *Charte canadienne des droits et libertés*. Le protonotaire rejette la prétention de l'appelant et accueille la requête de l'intimé. Cette décision est confirmée par la Cour fédérale et la Cour d'appel fédérale. Cette dernière conclut que les procédures de confiscation et les autres sanctions en matière douanière sont de nature administrative et que, dans le cadre d'une action en vertu de l'art. 135, l'appelant n'est pas un « inculpé », mais un demandeur, et l'intimé un défendeur.

Arrêt : Le pourvoi est rejeté.

L'appelant n'est pas un « inculpé » au sens de l'art. 11 de la *Charte*. Une analyse de l'art. 124 de la *Loi sur les douanes* et des dispositions connexes révèle que le processus relatif à la confiscation compensatoire n'est pas de nature pénale et que la sanction qu'il prévoit n'entraîne pas de véritables conséquences pénales. Le paragraphe 236(2) des *Règles de la Cour fédérale (1998)* qui oblige l'appelant, en sa qualité de demandeur dans une action fondée sur l'art. 135 de la Loi, à subir un interrogatoire préalable, ne porte donc pas atteinte à l'al. 11*c*) de la *Charte*.

La *Loi sur les douanes* a pour objectifs de régir, d'encadrer et de contrôler la circulation transfrontalière des personnes et des marchandises. Pour assurer le respect de la Loi et de son système d'autodéclaration, le législateur a mis en place des mécanismes civils et pénaux. Bien que l'infraction reprochée à l'appelant — celle d'avoir fait de fausses déclarations — puisse donner lieu à une poursuite criminelle (art. 160), cela ne permet pas, en soi, de qualifier de recours pénal le mécanisme d'avis de confiscation compensatoire (art. 124). La détermination du caractère criminel des procédures dépend non pas de la nature de l'acte qui est à l'origine des procédures, mais de la nature des procédures elles-mêmes. Or, en principe, la confiscation compensatoire est un mécanisme de recouvrement civil. Ce mécanisme n'a pas pour objet de punir le contrevenant mais vise plutôt à assurer le respect de la *Loi sur les douanes* de façon rapide et efficace et à produire un effet dissuasif. La confiscation compensatoire est un processus administratif et de nombreux jugements rendus en matière fiscale appuient la conclusion qu'une sanction administrative n'est pas de nature pénale. En l'espèce, bien qu'élevé, le montant exigé en vertu de l'art. 124 ne constitue pas une amende qui, par son importance, est infligée dans le but de réparer le tort causé à la société

maintaining the effectiveness of customs requirements. The fines provided for in s. 160, which vary from $50,000 to $500,000, and ascertained forfeiture are two distinct consequences that are completely independent of each other. A fine, which is clearly penal in nature, takes into account the relevant factors and principles governing sentencing, while ascertained forfeiture, which is civil in nature and purely economic, is instead arrived at by a simple mathematical calculation.

Even though the appellant is not a "person charged with an offence" within the meaning of s. 11 of the *Charter*, it is necessary to determine the scope of s. 11(*c*) in light of the Federal Court of Appeal's interpretation, which would unduly restrict its purpose. Three conditions must be met for a person charged with an offence to benefit from the protection against self-incrimination under s. 11(*c*): (1) the person must be compelled to be a witness (2) in proceedings against that person (3) in respect of the offence. The first condition presents no difficulties. As for the second condition, although the appellant is designated a "plaintiff" in the Federal Court, it is the respondent who initiated the "proceedings" (*poursuite* in the French version of s. 11(*c*)) against the appellant. The service of the notice of ascertained forfeiture by the customs officer constituted a "proceeding", and the appellant defended himself in that proceeding. The procedure provided for in s. 135 of the *Customs Act* does not alter the actual relationship between the parties. As for the third condition, the offence imputed to the appellant consists in having made false statements. This offence gave rise to the respondent's "proceeding". There is no doubt that both the "proceeding" against the appellant and the appellant's appeal from the respondent's decision are connected with the offence.

Cases Cited

Applied: *R. v. Wigglesworth*, [1987] 2 S.C.R. 541, aff'g (1984), 31 Sask. R. 153; **distinguished:** *Canada v. Amway of Canada Ltd.*, [1987] 2 F.C. 131, rev'd [1989] 1 S.C.R. 21; **referred to:** *R. v. Simmons*, [1988] 2 S.C.R. 495; *R. v. Shubley*, [1990] 1 S.C.R. 3; *R. v. Yes Holdings Ltd.* (1987), 48 D.L.R. (4th) 642; *R. v. Luchuk* (1987), 18 B.C.L.R. (2d) 301; *Lavers v. British Columbia (Minister of Finance)* (1989), 41 B.C.L.R. (2d) 307; *Time Data Recorder International Ltd. v. Canada (Minister of National Revenue)*, [1997] F.C.J. No. 475 (QL); *Helvering v. Mitchell*, 303 U.S. 391 (1938); *Markevich v. Canada*, [2003] 1 S.C.R. 94, 2003 SCC 9; *Nowegijick v. The Queen*, [1983] 1 S.C.R. 29; *Canada v. Schmidt*, [1987] 1 S.C.R. 500.

en général plutôt que dans celui de maintenir l'efficacité des exigences douanières. Les amendes prévues à l'art. 160, qui varient entre 50 000 $ et 500 000 $, et la confiscation compensatoire sont deux conséquences distinctes dont l'une ne dépend aucunement de l'autre. L'amende, qui est manifestement pénale, tient compte des facteurs et des principes pertinents en matière de détermination de la peine, alors que la confiscation compensatoire, de nature civile et purement économique, est plutôt déterminée par un simple calcul mathématique.

Bien que l'appelant ne soit pas un « inculpé » au sens de l'art. 11 de la *Charte*, il est nécessaire de préciser la portée de l'al. 11*c*) vu l'interprétation de la Cour d'appel fédérale qui a pour effet d'en réduire indûment la mission. Trois conditions doivent être remplies pour qu'un inculpé puisse bénéficier de la protection contre l'auto-incrimination garantie à l'al. 11*c*) : (1) il doit être contraint de témoigner contre lui, (2) dans une poursuite intentée contre lui, (3) pour l'infraction qu'on lui reproche. La première condition ne pose aucune difficulté. En ce qui concerne la deuxième, bien que l'appelant soit désigné comme le « demandeur » devant la Cour fédérale, c'est l'intimé qui est à l'origine de la « poursuite » (*proceedings* dans la version anglaise de l'al. 11*c*)) contre l'appelant. La signification de l'avis de confiscation compensatoire par l'agent des douanes constituait une « poursuite » et l'appelant a opposé une défense à cette poursuite. Le moyen procédural prévu par l'art. 135 de la *Loi sur les douanes* n'a pas pour effet de modifier les rapports réels entre les parties. Quant à la troisième condition, l'infraction reprochée à l'appelant consiste à avoir fait de fausses déclarations. Cette infraction est à l'origine de la « poursuite » de l'intimé. Il ne fait aucun doute que tant la « poursuite » intentée contre l'appelant que son appel interjeté contre la décision de l'intimé sont liés à l'infraction reprochée.

Jurisprudence

Arrêt appliqué : *R. c. Wigglesworth*, [1987] 2 R.C.S. 541, conf. (1984), 31 Sask. R. 153; **distinction d'avec l'arrêt :** *Canada c. Amway of Canada Ltd.*, [1987] 2 C.F. 131, inf. par [1989] 1 R.C.S. 21; **arrêts mentionnés :** *R. c. Simmons*, [1988] 2 R.C.S. 495; *R. c. Shubley*, [1990] 1 R.C.S. 3; *R. c. Yes Holdings Ltd.* (1987), 48 D.L.R. (4th) 642; *R. c. Luchuk* (1987), 18 B.C.L.R. (2d) 301; *Lavers c. British Columbia (Minister of Finance)* (1989), 41 B.C.L.R. (2d) 307; *Time Data Recorder International Ltd. c. Canada (Ministre du Revenu national)*, [1997] A.C.F. nº 475 (QL); *Helvering c. Mitchell*, 303 U.S. 391 (1938); *Markevich c. Canada*, [2003] 1 R.C.S. 94, 2003 CSC 9; *Nowegijick c. La Reine*, [1983] 1 R.C.S. 29; *Canada c. Schmidt*, [1987] 1 R.C.S. 500.

Statutes and Regulations Cited

Canadian Charter of Rights and Freedoms, ss. 11(*c*), 13, 14, 24(2).
Criminal Code, R.S.C. 1985, c. C-46.
Customs Act, R.S.C. 1970, c. C-40, s. 180(2).
Customs Act, R.S.C. 1985, c. 1 (2nd Supp.), ss. 95, 109.1-109.5, 110, 124-126, 124(1), 129, 130, 131, 135 [am. 1990, c. 8, s. 49], 153(*a*), (*c*), 160 [am. 1993, c. 25, s. 88; c. 44, s. 107], 161.
Federal Court Rules, 1998, SOR/98-106, rr. 236(2), 288.

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Petit Robert 1: Dictionnaire alphabétique et analogique de la langue française. Paris: Le Robert, 1990, "*poursuite*".

APPEAL from a judgment of the Federal Court of Appeal (2003), 310 N.R. 235, [2003] F.C.J. No. 557 (QL), 2003 FCA 176, affirming a decision of the Trial Division (2002), 216 F.T.R. 218, [2002] F.C.J. No. 111 (QL), 2002 FCT 85, affirming a decision of a prothonotary, [2001] F.C.J. No. 1865 (QL), 2001 FCT 1361. Appeal dismissed.

Frédéric Hivon and *Jacques Waite*, for the appellant.

Pierre Cossette and *Yvan Poulin*, for the respondent.

Michel Y. Hélie, for the intervener the Attorney General of Ontario.

Richard Dubois and *Gilles Laporte*, for the intervener the Attorney General of Quebec.

English version of the judgment of the Court delivered by

FISH J. —

I

Introduction

1 The issue in this case is whether the appellant may, in the course of an action under s. 135 of the *Customs Act*, R.S.C. 1985, c. 1 (2nd Supp.) ("*CA*"), avail himself of the right against self-incrimination

Lois et règlements cités

Charte canadienne des droits et libertés, art. 11*c*), 13, 14, 24(2).
Code criminel, L.R.C. 1985, ch. C-46.
Loi sur les douanes, L.R.C. 1985, ch. 1 (2e suppl.), art. 95, 109.1-109.5, 110, 124-126, 124(1), 129, 130, 131, 135 [mod. 1990, ch. 8, art. 49], 153*a*), *c*), 160 [mod. 1993, ch. 25, art. 88; ch. 44, art. 107], 161.
Loi sur les douanes, S.R.C. 1970, ch. C-40, art. 180(2).
Règles de la Cour fédérale (1998), DORS/98-106, règles 236(2), 288.

Doctrine citée

Oxford English Dictionary, 2nd ed., vol. XII. Oxford : Clarendon Press, 1989, « *proceeding* ».
Petit Robert 1 : Dictionnaire alphabétique et analogique de la langue française. Paris : Le Robert, 1990, « poursuite ».

POURVOI contre un arrêt de la Cour d'appel fédérale (2003), 310 N.R. 235, [2003] A.C.F. no 557 (QL), 2003 CAF 176, qui a confirmé une décision de la Section de première instance (2002), 216 F.T.R. 218, [2002] A.C.F. no 111 (QL), 2002 CFPI 85, confirmant une décision d'un protonotaire, [2001] A.C.F. no 1865 (QL), 2001 CFPI 1361. Pourvoi rejeté.

Frédéric Hivon et *Jacques Waite*, pour l'appelant.

Pierre Cossette et *Yvan Poulin*, pour l'intimé.

Michel Y. Hélie, pour l'intervenant le procureur général de l'Ontario.

Richard Dubois et *Gilles Laporte*, pour l'intervenant le procureur général du Québec.

Le jugement de la Cour a été rendu par

LE JUGE FISH —

I

Introduction

Il s'agit de savoir en l'espèce si l'appelant peut invoquer, dans le cadre d'une action fondée sur l'art. 135 de la *Loi sur les douanes*, L.R.C. 1985, ch. 1 (2e suppl.) (« *LD* »), la protection contre l'auto-

guaranteed by s. 11(*c*) of the *Canadian Charter of Rights and Freedoms*.

Section 11(*c*) provides that a "person charged with an offence" cannot be compelled to be a witness "in proceedings against that person in respect of the offence". At the conclusion of the hearing, we were all of the opinion that the appellant in this case is not a "person charged with an offence" within the meaning of s. 11 of the *Charter*. The Court therefore dismissed his appeal, stating that the reasons would follow at a later date. Here are those reasons.

II

Facts and Judicial History

On June 25, 1996, a customs officer demanded, by way of a written notice served pursuant to s. 124 of the *CA*, that the appellant pay $315,458, that is, the deemed value of the goods he allegedly attempted to export by making false statements. This set in motion the process commonly referred to as "ascertained forfeiture".

The appellant subsequently exercised the recourse provided for in s. 129 of the *CA*, requesting that the respondent review the customs officer's decision. He submitted his representations to the respondent. The respondent upheld the demand for payment on the ground that the goods had not been reported in accordance with ss. 95 and 153(*a*) and (*c*) of the *CA*. According to the respondent, the goods in question were stolen automobiles.

On September 25, 2001, the appellant appealed the respondent's decision by way of an action, pursuant to s. 135 of the *CA*. He asked that the respondent's decision be varied and replaced by a judgment cancelling the notice demanding payment. He also contested the constitutional validity of a number of provisions of the *CA*.

Before filing a defence, the respondent filed a notice of motion for the purpose of examining the appellant for discovery pursuant to Rule 236(2) of the *Federal Court Rules, 1998*, SOR/98-106 ("*FCR*"). The appellant contested the motion on the ground that it would violate his right against self-incrimination under s. 11(*c*) of the *Charter*.

incrimination que lui garantit l'al. 11*c*) de la *Charte canadienne des droits et libertés*.

L'alinéa 11*c*) prévoit qu'un « inculpé » ne peut pas être contraint de témoigner contre lui-même « dans toute poursuite intentée contre lui pour l'infraction qu'on lui reproche ». Au terme de l'audience, nous étions tous d'avis que l'appelant n'est pas, dans l'action ici en cause, un « inculpé » au sens de l'art. 11 de la *Charte*. La Cour a donc rejeté son pourvoi en précisant que les motifs seraient déposés ultérieurement. Voici ces motifs.

II

Faits et historique judiciaire

Le 25 juin 1996, un agent des douanes réclame à l'appelant, par avis écrit conformément à l'art. 124 de la *LD*, la somme de 315 458 $, soit la valeur présumée des marchandises qu'il aurait tenté d'exporter au moyen de fausses déclarations. S'enclenche par le fait même le processus communément qualifié de « confiscation compensatoire ».

L'appelant exerce ensuite le recours prévu par l'art. 129 de la *LD* et demande à l'intimé de réviser la décision de l'agent des douanes. Il fait parvenir ses prétentions à l'intimé. Ce dernier confirme alors la réclamation pour le motif que les marchandises n'ont pas été déclarées conformément à l'art. 95 et aux al. 153*a*) et *c*) de la *LD*. Il s'agissait, selon l'intimé, d'automobiles volées.

Le 25 septembre 2001, l'appelant fait appel de la décision de l'intimé par voie d'action intentée en vertu de l'art. 135 de la *LD*. Il demande ainsi que la décision de l'intimé soit modifiée et remplacée par un jugement annulant l'avis de réclamation. De même, il conteste la constitutionnalité de plusieurs dispositions de la *LD*.

Avant de déposer sa défense, l'intimé présente un avis de requête pour interroger l'appelant au préalable en vertu du par. 236(2) des *Règles de la Cour fédérale (1998)*, DORS/98-106 (« *RCF* »). L'appelant s'oppose à la requête pour le motif qu'elle irait à l'encontre de la protection contre l'auto-incrimination garantie par l'al. 11*c*) de la *Charte*.

7 In an interlocutory judgment dated December 11, 2001, Prothonotary Morneau allowed the respondent's motion ([2001] F.C.J. No. 1865 (QL), 2001 FCT 1361). In his view, the appellant could not rely on the protection afforded by s. 11(*c*) of the *Charter* because the appellant was not a person charged with an offence in a penal proceeding. On the contrary, the appellant was a plaintiff in a civil action and could hardly be characterized as a "person charged with an offence". The prothonotary also found it inconceivable that a plaintiff such as the appellant could avoid submitting to an examination for discovery when the adverse party demanded one.

Le 11 décembre 2001, dans un jugement interlocutoire, le protonotaire Morneau accueille la requête de l'intimé ([2001] A.C.F. nº 1865 (QL), 2001 CFPI 1361). Selon lui, l'appelant ne peut pas invoquer la protection de l'al. 11*c*) de la *Charte*. Il n'est pas accusé d'une infraction dans le cadre d'une instance pénale. Au contraire, il est demandeur dans une action civile. Il ne peut guère être qualifié d'« inculpé ». Le protonotaire estime en outre qu'il est inconcevable qu'un demandeur, tel que l'appelant, puisse se soustraire à un interrogatoire préalable lorsque la partie adverse l'exige.

8 On January 28, 2002, Blais J. of the Federal Court dismissed the appeal and affirmed the prothonotary's decision ((2002), 216 F.T.R. 218, 2002 FCT 85). He agreed with the prothonotary that a notice of ascertained forfeiture is not penal in nature and held that the appellant could not benefit from the protection of s. 11(*c*) of the *Charter*. However, Blais J. did mention that he found it strange that an appeal from a Minister's decision should be by way of an action.

Le 28 janvier 2002, le juge Blais de la Cour fédérale rejette l'appel et confirme la décision du protonotaire ((2002), 216 F.T.R. 218, 2002 CFPI 85). Tout comme ce dernier, le juge Blais estime que l'avis de confiscation compensatoire n'est pas une mesure de nature pénale. Ainsi, l'appelant ne peut pas bénéficier de la protection de l'al. 11*c*) de la *Charte*. Le juge Blais mentionne toutefois qu'il lui semble étrange que l'appel de la décision ministérielle se fasse par voie d'action.

9 On April 3, 2003, the Federal Court of Appeal affirmed Blais J.'s decision ((2003), 310 N.R. 235, 2003 FCA 176). Létourneau J.A., writing for the court, concluded that the forfeiture of property pursuant to the *CA* is not equivalent to a "charge" that would attract the application of s. 11 of the *Charter.*

Le 3 avril 2003, la Cour d'appel fédérale confirme la décision du juge Blais ((2003), 310 N.R. 235, 2003 CAF 176). S'exprimant au nom de la Cour, le juge Létourneau conclut que la confiscation de biens en vertu de la *LD* n'équivaut pas à une inculpation qui donne ouverture à l'application de l'art. 11 de la *Charte*.

10 Létourneau J.A. considered that, in a voluntary reporting system in taxation and customs matters, the purpose of seizure and forfeiture proceedings and the other sanctions is to regulate the conduct of taxpayers with a view to preventively ensuring compliance with tax legislation. These proceedings are thus administrative in nature.

Le juge Létourneau estime que les procédures de saisie et de confiscation et les autres sanctions en matières fiscale et douanière sont, dans un système de déclaration volontaire, destinées à régir le comportement des contribuables en vue d'assurer, d'une manière préventive, le respect des lois fiscales. Ces procédures sont donc de nature administrative.

11 Létourneau J.A. acknowledged the severity of the sanction. However, it was his opinion that the forfeiture of property, or of an amount equal to its value, in response to a contravention of the *CA*,

Le juge Létourneau reconnaît le sérieux de la sanction. Il considère, cependant, que la confiscation d'un bien ou de sa valeur à la suite d'une infraction à la *LD* ne constitue pas une

does not constitute a true penal consequence within the meaning of s. 11 of the *Charter.* Létourneau J.A. relied on *R. v. Wigglesworth*, [1987] 2 S.C.R. 541, in this regard.

Létourneau J.A. found it "surprising" and "puzzling" that an appeal from a Minister's decision must be by way of an action. Nevertheless, since this was the procedure established by Parliament, he maintained that the *FCR*'s provisions pertaining to ordinary actions applied.

Adopting a text-based approach here, Létourneau J.A. regarded the appellant as a plaintiff in an action in which the respondent was the defendant. The appellant was therefore not a "person charged with an offence" in this proceeding. He was not being sued, nor was he being prosecuted. In fact, he himself was the "*poursuivant*" ("prosecutor", or plaintiff) in the civil law sense of the word.

Létourneau J.A. thus concluded that the proceeding initiated by the appellant could not result in any conviction, fine or penal consequence that would make him a "person charged with an offence" within the meaning of s. 11 of the *Charter.*

The Court of Appeal therefore dismissed the appellant's appeal, but without prejudice to his right to contest the constitutional validity of the legal process for reviewing and appealing the Minister's decision in his main action.

III

Relevant Constitutional and Legislative Provisions

Canadian Charter of Rights and Freedoms

11. Any person charged with an offence has the right

. . .

(*c*) not to be compelled to be a witness in proceedings against that person in respect of the offence;

. . .

véritable conséquence pénale au sens de l'art. 11 de la *Charte*. À ce sujet, le juge Létourneau s'appuie sur l'arrêt *R. c. Wigglesworth*, [1987] 2 R.C.S. 541.

12 Enfin, le juge Létourneau trouve « surprenant » et « déroutant » que l'appel d'une décision ministérielle se fasse par voie d'action. Néanmoins, comme c'est la procédure établie par le législateur, il soutient que les *RCF* relatives aux actions ordinaires s'appliquent.

13 Adoptant ici une approche textuelle, le juge Létourneau estime que l'appelant est un demandeur dans une action où l'intimé est le défendeur. L'appelant ne serait donc pas « inculpé » dans cette procédure. Il ne serait poursuivi ni civilement, ni pénalement. En fait, il serait lui-même le poursuivant au sens civil du terme.

14 Le juge Létourneau conclut ainsi que la procédure entreprise par l'appelant ne peut déboucher sur aucune condamnation, amende ou conséquence pénale faisant de lui un « inculpé » au sens de l'art. 11 de la *Charte*.

15 La Cour d'appel rejette donc le pourvoi de l'appelant, mais lui réserve toutefois le droit de contester la constitutionnalité du processus légal de révision et d'appel de la décision du ministre dans le cadre de son action principale.

III

Dispositions constitutionnelles et législatives pertinentes

Charte canadienne des droits et libertés

16 **11.** Tout inculpé a le droit :

. . .

c) de ne pas être contraint de témoigner contre lui-même dans toute poursuite intentée contre lui pour l'infraction qu'on lui reproche;

. . .

Customs Act, R.S.C. 1985, c. 1 (2nd Supp.)

124. (1) Where an officer believes on reasonable grounds that a person has contravened any of the provisions of this Act or the regulations in respect of any goods or conveyance, the officer may, if the goods or conveyance is not found or if the seizure thereof would be impractical, serve a written notice on that person demanding payment of

(*a*) an amount of money determined under subsection (2) or (3), as the case may be; or

(*b*) such lesser amount as the Minister may direct.

. . .

135. (1) A person who requests a decision of the Minister under section 131 may, within ninety days after being notified of the decision, appeal the decision by way of an action in the Federal Court in which that person is the plaintiff and the Minister is the defendant.

(2) The *Federal Court Act* and the *Federal Court Rules* applicable to ordinary actions apply in respect of actions instituted under subsection (1) except as varied by special rules made in respect of such actions.

160. Every person who contravenes section 12, 13, 15 or 16, subsection 20(1), section 31 or 40, subsection 43(2), 95(1) or (3), 103(3) or 107(1) or section 153, 155 or 156 or commits an offence under section 159 or 159.1

(*a*) is guilty of an offence punishable on summary conviction and liable to a fine of not more than fifty thousand dollars or to imprisonment for a term not exceeding six months or to both that fine and that imprisonment; or

(*b*) is guilty of an indictable offence and liable to a fine of not more than five hundred thousand dollars or to imprisonment for a term not exceeding five years or to both that fine and that imprisonment.

. . .

Federal Court Rules, 1998, SOR/98-106

236. . . .

(2) Subject to subsection (3), a defendant may examine a plaintiff at any time after the statement of claim is filed.

Loi sur les douanes, L.R.C. 1985, ch. 1 (2e suppl.)

124. (1) L'agent qui croit, pour des motifs raisonnables, à une infraction à la présente loi ou à ses règlements du fait de marchandises ou de moyens de transport peut, si on ne les trouve pas ou si leur saisie est problématique, réclamer par avis écrit au contrevenant :

a) soit le paiement du montant déterminé conformément au paragraphe (2) ou (3), selon le cas;

b) soit le paiement du montant inférieur ordonné par le ministre.

. . .

135. (1) Toute personne qui a demandé que soit rendue une décision en vertu de l'article 131 peut, dans les quatre-vingt-dix jours suivant la communication de cette décision, en appeler par voie d'action devant la Cour fédérale, à titre de demandeur, le ministre étant le défendeur.

(2) La *Loi sur la Cour fédérale* et les *Règles de la Cour fédérale* applicables aux actions ordinaires s'appliquent aux actions intentées en vertu du paragraphe (1), sous réserve des adaptations occasionnées par les règles particulières à ces actions.

160. Toute personne qui contrevient à l'article 12, 13, 15 ou 16, au paragraphe 20(1), à l'article 31 ou 40, au paragraphe 43(2), 95(1) ou (3), 103(3) ou 107(1) ou à l'article 153, 155 ou 156 ou commet l'infraction prévue à l'article 159 ou 159.1, encourt, sur déclaration de culpabilité :

a) par procédure sommaire, une amende maximale de cinquante mille dollars et un emprisonnement maximal de six mois, ou l'une de ces peines;

b) par mise en accusation, une amende maximale de cinq cent mille dollars et un emprisonnement maximal de cinq ans, ou l'une de ces peines.

. . .

Règles de la Cour fédérale (1998), DORS/98-106

236. . . .

(2) Sous réserve du paragraphe (3), un défendeur peut interroger le demandeur à tout moment après le dépôt de la déclaration.

IV

Issue

The issue in this case is whether Rule 236(2) of the *FCR* violates s. 11(*c*) of the *Charter* by requiring a plaintiff in an action under s. 135 of the *CA* to submit to an examination for discovery.

V

Analysis

A. *Is the Appellant a "Person Charged With an Offence" Within the Meaning of Section 11 of the Charter?*

Section 11(*c*) of the *Charter* reads as follows:

11. Any person charged with an offence has the right

. . .

(*c*) not to be compelled to be a witness in proceedings against that person in respect of the offence;

11. Tout inculpé a le droit :

. . .

c) de ne pas être contraint de témoigner contre lui-même dans toute poursuite intentée contre lui pour l'infraction qu'on lui reproche;

In *Wigglesworth*, *supra*, at p. 554, Wilson J., writing for the majority, interpreted the expression "person charged with an offence" to limit its application to "public offences involving punitive sanctions, i.e., criminal, quasi-criminal and regulatory offences". She stated that a matter falls within s. 11 of the *Charter* where, first, by its very nature it is a criminal proceeding or, second, a conviction in respect of the offence may lead to a true penal consequence (*Wigglesworth*, at p. 559).

Section 124 of the *CA* must therefore be considered in light of these two tests.

IV

Question en litige

17 Il s'agit de déterminer en l'espèce si la règle 236(2) des *RCF* viole l'al. 11*c*) de la *Charte* dans la mesure où elle oblige un demandeur dans une action fondée sur l'art. 135 de la *LD* à subir un interrogatoire préalable.

V

Analyse

A. *L'appelant est-il un « inculpé » au sens de l'art. 11 de la Charte?*

18 L'alinéa 11*c*) de la *Charte* dispose :

11. Tout inculpé a le droit :

. . .

c) de ne pas être contraint de témoigner contre lui-même dans toute poursuite intentée contre lui pour l'infraction qu'on lui reproche;

11. Any person charged with an offence has the right

. . .

(*c*) not to be compelled to be a witness in proceedings against that person in respect of the offence;

19 Dans l'arrêt *Wigglesworth*, précité, p. 554, la juge Wilson, écrivant au nom des juges majoritaires, a interprété la notion d'« inculpé » de façon à en limiter l'application aux « infractions publiques comportant des sanctions punitives, c.-à-d. des infractions criminelles, quasi criminelles et de nature réglementaire ». Elle a précisé qu'une affaire relève de l'art. 11 de la *Charte* lorsque, premièrement, de par sa nature même, il s'agit d'une procédure criminelle ou, deuxièmement, une déclaration de culpabilité relativement à l'infraction est susceptible d'entraîner une véritable conséquence pénale (*Wigglesworth*, p. 559).

20 Il y a donc lieu d'examiner, en fonction de ces deux critères, l'art. 124 de la *LD*.

(1) Does Section 124 of the *CA* Provide for a Penal Proceeding?

21 When a matter is of a public nature, intended to promote public order and welfare within a public sphere of activity, it falls, by its very nature, within s. 11 of the *Charter*. This is clearly true of federal prosecutions under the *Criminal Code*, R.S.C. 1985, c. C-46, and of prosecutions of quasi-criminal offences under provincial legislation.

22 By contrast, proceedings of an administrative — private, internal or disciplinary — nature instituted for the protection of the public in accordance with the policy of a statute are not penal in nature (*Wigglesworth*, *supra*, at p. 560).

23 A distinction must therefore be drawn between penal proceedings on the one hand and administrative proceedings on the other. Only penal proceedings attract the application of s. 11 of the *Charter*.

24 To determine the nature of the proceeding, the case law must be reviewed in light of the following criteria: (1) the objectives of the *CA* and of s. 124 thereof; (2) the purpose of the sanction; and (3) the process leading to imposition of the sanction.

(i) *Objectives of the CA and of Section 124*

25 The objectives of the *CA* are to regulate, oversee and control cross-border movements of people and goods. As Dickson C.J. stated in *R. v. Simmons*, [1988] 2 S.C.R. 495, at p. 528: "It is commonly accepted that sovereign states have the right to control both who and what enters their boundaries. For the general welfare of the nation the state is expected to perform this role." To this end, the *CA* provides for the collection of duties and taxes on imported goods.

26 The attainment of these objectives depends on the effectiveness of the voluntary or self-reporting system provided for in the *CA*. To enforce the *CA*,

(1) L'article 124 de la *LD* prescrit-il une procédure de nature pénale?

Lorsqu'une affaire est de nature publique et vise à promouvoir l'ordre et le bien-être publics dans une sphère d'activité publique, alors, de par sa nature même, elle relève de l'art. 11 de la *Charte*. Manifestement, il en est ainsi des poursuites fédérales régies par le *Code criminel*, L.R.C. 1985, ch. C-46, et de celles pour les infractions quasi criminelles créées par les lois provinciales.

Par contre, les procédures de nature administrative — privées, internes ou disciplinaires — engagées pour protéger le public conformément à la politique générale d'une loi ne sont pas de nature pénale (*Wigglesworth*, précité, p. 560).

Il convient donc de distinguer, d'une part, les procédures pénales et, d'autre part, les procédures administratives. Seules les procédures pénales entraînent l'application de l'art. 11 de la *Charte*.

Pour déterminer la nature de la procédure, un examen de la jurisprudence sous l'éclairage des critères suivants s'impose : (1) les objectifs de la *LD* et de son art. 124; (2) le but visé par la sanction; (3) le processus menant à la sanction.

(i) *Les objectifs de la LD et de son art. 124*

La *LD* a pour objectifs de régir, d'encadrer et de contrôler la circulation transfrontalière des personnes et des marchandises. En effet, comme l'a indiqué le juge en chef Dickson dans l'arrêt *R. c. Simmons*, [1988] 2 R.C.S. 495, p. 528 : « Il est communément reconnu que les États souverains ont le droit de contrôler à la fois les personnes et les effets qui entrent dans leur territoire. On s'attend à ce que l'État joue ce rôle pour le bien-être général de la nation. » La *LD* prévoit à cette fin la perception de droits et de taxes sur les marchandises importées.

La réalisation de ces objectifs dépend de l'efficacité du système d'autodéclaration ou de déclaration volontaire prévu par la *LD*. Pour assurer le respect

Parliament has implemented civil and penal mechanisms.

The civil mechanisms include the seizure as forfeit of goods and conveyances (s. 110 of the *CA*), the demand by written notice or "ascertained forfeiture" (ss. 124 to 126 of the *CA*), and the imposition of administrative penalties (ss. 109.1 to 109.5 of the *CA*). The penal mechanisms, properly so called, are provided for in ss. 160 and 161 of the *CA*.

The offence imputed to the appellant, that he made false statements (ss. 95 and 153(*a*) and (*c*) of the *CA*), may give rise to a notice demanding payment (s. 124 of the *CA*), to criminal prosecution by way of summary conviction or indictment (s. 160 of the *CA*), or to both a demand for payment and criminal prosecution. On this basis, the appellant argues that a distinction as regards the nature of the imputed offence cannot be drawn based solely on the respondent's choice of proceeding (civil or penal). Thus, since the offence may have penal consequences, it must be considered penal in nature.

This argument must be rejected.

As stated by McLachlin J. (as she then was) in *R. v. Shubley*, [1990] 1 S.C.R. 3, at pp. 18-19: "The question of whether proceedings are criminal in nature is concerned not with the nature of the act which gave rise to the proceedings, but the nature of the proceedings themselves" (emphasis added).

In the case at bar, the fact that the false statements could result in criminal prosecution does not in itself mean that a notice of ascertained forfeiture can properly be characterized as a penal proceeding. The fact that a single violation can give rise to both a notice of ascertained forfeiture and a criminal prosecution is irrelevant. The appropriate test is the nature of the proceedings, not the nature of the act.

Cameron J.A. of the Saskatchewan Court of Appeal stated the following (quoted with approval in *Wigglesworth*, *supra*, at p. 566):

de la *LD*, le législateur a mis en place des mécanismes civils et pénaux.

27 Les mécanismes civils comprennent la saisie à titre de confiscation de marchandises et de moyens de transport (art. 110 de la *LD*), la réclamation par avis écrit ou « confiscation compensatoire » (art. 124 à 126 de la *LD*) et l'infliction de pénalités administratives (art. 109.1 à 109.5 de la *LD*). Pour leur part, les mécanismes pénaux, proprement dits, sont prévus aux art. 160 et 161 de la *LD*.

28 L'infraction reprochée à l'appelant, celle d'avoir fait de fausses déclarations (art. 95 et al. 153*a*) et *c*) de la *LD*), peut donner lieu à un avis de réclamation (art. 124 de la *LD*) ou à une poursuite criminelle par voie sommaire ou par voie de mise en accusation (art. 160 de la *LD*), ou encore, à une réclamation et à une poursuite criminelle. Fort de ce fait, l'appelant soutient qu'on ne peut distinguer la nature de l'infraction reprochée uniquement en raison du choix du mode de poursuite (civil ou pénal) de l'intimé. Ainsi, du fait qu'elle peut entraîner des conséquences pénales, l'infraction doit être considérée comme étant de nature pénale.

29 Cet argument doit être rejeté.

30 Comme l'indique la juge McLachlin (maintenant Juge en chef) dans l'arrêt *R. c. Shubley*, [1990] 1 R.C.S. 3, p. 18-19 : « La détermination du caractère criminel des procédures dépend non pas de la nature de l'acte qui est à l'origine de ces procédures, mais de la nature des procédures elles-mêmes » (je souligne).

31 Dans la présente affaire, le risque que les fausses déclarations entraînent des poursuites criminelles ne permet pas, en soi, de qualifier de recours pénal le mécanisme d'avis de confiscation compensatoire. La possibilité que la même infraction donne lieu à la fois à un avis de confiscation compensatoire et à une poursuite criminelle n'est pas pertinente. Le critère approprié est celui de la nature des procédures et non celui de la nature de l'acte.

32 En effet, comme l'a indiqué le juge Cameron de la Cour d'appel de la Saskatchewan (cité avec approbation dans l'arrêt *Wigglesworth*, précité, p. 566) :

A single act may have more than one aspect, and it may give rise to more than one legal consequence. It may, if it constitutes a breach of the duty a person owes to society, amount to a crime, for which the actor must answer to the public. At the same time, the act may, if it involves injury and a breach of one's duty to another, constitute a private cause of action for damages for which the actor must answer to the person he injured. And that same act may have still another aspect to it: it may also involve a breach of the duties of one's office or calling, in which event the actor must account to his professional peers.

(*R. v. Wigglesworth* (1984), 31 Sask. R. 153, at para. 11)

(ii) *Purpose of the Notice of Ascertained Forfeiture*

33 In principle, ascertained forfeiture is a civil collection mechanism. It is used where it would be difficult or even impossible to seize goods in respect of which a customs officer believes on reasonable grounds that an offence has been committed. In such cases, rather than seizing the goods as forfeit (an *in rem* proceeding), the officer may demand payment of an amount of money that is determined according to the value of the goods in question.

34 In the instant case, the appellant submits that the purpose of ascertained forfeiture, like that of a criminal prosecution, is to punish the offender in order to produce a deterrent effect and redress a wrong done to society.

35 This argument must fail for three reasons.

36 First, the purpose of a forfeiture mechanism is to ensure compliance with the *CA* by giving customs officers a timely and effective means of enforcing it. This mechanism is not designed to punish the offender. If the offender were not the actual owner of the seized property, he or she would not, in principle, be punished by the forfeiture thereof.

37 A notice of ascertained forfeiture is served only where the property cannot be seized because, for example, it has already been exported. Only then

[TRADUCTION] Il est possible qu'un acte unique comporte plus d'un aspect et entraîne plus d'une conséquence juridique. S'il constitue un manquement à une obligation envers la société, il peut équivaloir à un crime dont l'auteur est responsable envers le public. S'il y a eu blessure et manquement à une obligation envers autrui, le même acte peut donner lieu à une action en dommages-intérêts intentée par la personne à qui l'auteur de l'acte a causé un préjudice. Le même acte peut comporter un autre aspect, c'est-à-dire le manquement aux obligations découlant de l'exercice d'une fonction ou d'une profession, auquel cas l'auteur doit s'expliquer devant ses pairs.

(*R. c. Wigglesworth* (1984), 31 Sask. R. 153, par. 11)

(ii) *Le but visé par l'avis de confiscation compensatoire*

En principe, la confiscation compensatoire est un mécanisme de recouvrement civil. Elle a lieu lorsqu'il est difficile ou impossible de saisir les marchandises à l'égard desquelles un agent des douanes a des motifs raisonnables de croire qu'une infraction a été commise. Le cas échéant, l'agent peut réclamer, en lieu et place de la saisie à titre de confiscation (une procédure *in rem*), le paiement d'une somme d'argent dont le montant est établi en fonction de la valeur des marchandises en question.

En l'espèce, l'appelant soutient que le but de la confiscation compensatoire, tout comme celui de la poursuite criminelle, est de punir le contrevenant afin de produire un effet dissuasif et de réparer un tort causé à la société.

Cet argument échoue, et ce, pour trois raisons.

Premièrement, le but des mécanismes de confiscation est d'assurer le respect de la *LD* en dotant les agents des douanes de moyens rapides et efficaces d'en assurer l'application. Ce mécanisme n'a pas pour objet de punir le contrevenant. En effet, si le contrevenant n'était pas lui-même propriétaire des biens saisis, il ne serait pas, en principe, puni par leur confiscation.

L'avis de confiscation compensatoire n'est signifié que dans les cas où les biens ne peuvent pas être saisis, par exemple, lorsqu'ils ont déjà été exportés.

is the offender, who is not necessarily the owner of the property, directly exposed to civil consequences. Thus, although ascertained forfeiture may in some cases have the effect of "punishing" the offender, that is not its purpose.

Second, it is true that ascertained forfeiture is intended to produce a deterrent effect. This is completely understandable in a self-reporting system. Fraud must be discouraged, and offences punished severely, for the system to be viable. However, actions in civil liability and disciplinary proceedings, which are also aimed at deterring potential offenders, nevertheless do not constitute criminal proceedings.

Third, there is nothing that would indicate that the objective of ascertained forfeiture is to redress a wrong done to society. For example, s. 124 of the *CA* does not in any way take into account the principles of criminal liability or sentencing. I will address this point in greater detail in the next section.

(iii) *The Ascertained Forfeiture Process*

Ascertained forfeiture involves a four-step administrative process.

First, under s. 124 of the *CA*, a customs officer must have reasonable grounds to believe that a provision of the *CA* has been contravened. Once this precondition has been met, and once it has been established that it would be difficult to seize the goods and conveyances related to the customs offence, the officer may demand that the offender pay an amount of money equal to the value of the goods.

Second, the person to whom a notice of ascertained forfeiture applies has 90 days to ask the Minister to review the customs officer's decision (s. 129(1)(*d*) of the *CA*). The Minister then serves notice of the reasons in support of the imposed sanction (s. 130(1) of the *CA*). Within 30 days after notice of the reasons is served, the alleged offender may make submissions and give evidence,

Ce n'est qu'à ce moment que le contrevenant, qui n'est pas nécessairement le propriétaire des biens, s'expose directement à des conséquences civiles. Ainsi, bien que la confiscation compensatoire puisse parfois avoir pour effet de punir en quelque sorte le contrevenant, tel n'est pas son objet.

38 Deuxièmement, il est exact d'affirmer que la confiscation compensatoire vise à produire un effet dissuasif. Cela est tout à fait compréhensible dans un système d'autodéclaration. La fraude doit être découragée et les infractions sévèrement punies pour assurer la viabilité du régime. Toutefois, les poursuites en responsabilité civile et les instances disciplinaires visent aussi à dissuader d'éventuels contrevenants. Elles ne constituent pas pour autant des procédures criminelles.

39 Troisièmement, rien n'indique que la confiscation compensatoire a pour objet de réparer un tort causé à la société. En effet, à titre d'exemple, l'art. 124 de la *LD* ne tient aucunement compte des principes de responsabilité pénale et des principes de détermination de la peine. Je traiterai davantage de ce dernier point dans la prochaine section.

(iii) *Le processus de confiscation compensatoire*

40 Le processus administratif de confiscation compensatoire comporte quatre étapes.

41 En premier lieu, en vertu de l'art. 124 de la *LD*, l'agent des douanes doit avoir des motifs raisonnables de croire qu'une infraction à la *LD* a été commise. Cette condition préliminaire remplie, et après avoir constaté la difficulté de saisir les marchandises et les moyens de transport liés à l'infraction douanière, l'agent peut exiger du contrevenant un montant égal à la valeur de ces biens.

42 En deuxième lieu, la personne visée par un avis de confiscation compensatoire peut, dans un délai de 90 jours, demander au ministre de réviser la décision de l'agent des douanes (al. 129(1)*d*) de la *LD*). Le ministre communique alors les motifs qui appuient la sanction appliquée (par. 130(1) de la *LD*). Dans les 30 jours suivant la communication des motifs, le présumé contrevenant peut faire valoir ses

in writing, to the Minister (ss. 130(2) and 130(3) of the *CA*).

43 Third, the Minister decides whether the ascertained forfeiture is valid (s. 131 of the *CA*). This decision "is not subject to review or to be . . . otherwise dealt with except to the extent and in the manner provided by subsection 135(1)" (s. 131(3) of the *CA*).

44 Fourth, and finally, the person who requested the Minister's decision may, within 90 days after being notified of the decision, appeal by way of an action in the Federal Court (s. 135(1) of the *CA*).

45 This process thus has little in common with penal proceedings. No one is charged in the context of an ascertained forfeiture. No information is laid against anyone. No one is arrested. No one is summoned to appear before a court of criminal jurisdiction. No criminal record will result from the proceedings. At worst, once the administrative proceeding is complete and all appeals are exhausted, if the notice of ascertained forfeiture is upheld and the person liable to pay still refuses to do so, he or she risks being forced to pay by way of a civil action.

(iv) *Case Law*

46 Section 124 of the *CA* has not yet been interpreted by the courts. It will therefore be necessary to review similar cases in tax and customs matters to characterize the sanction provided for in this provision.

47 First of all, in *Canada v. Amway of Canada Ltd.*, [1987] 2 F.C. 131 (C.A.), the Minister of National Revenue instituted proceedings against the Amway corporation under s. 180(2) of the former *Customs Act*, R.S.C. 1970, c. C-40. That provision, like s. 124 of the current Act, authorized the Minister to demand payment of an amount equal to the value of the exported property where the Act had been contravened.

48 In that case too, the Minister wanted to examine the offender for discovery. The Federal Court of Appeal refused to authorize this, because the action to collect a fine in a civil proceeding constituted a

prétentions et présenter sa preuve, par écrit, au ministre (par. 130(2) et (3) de la *LD*).

En troisième lieu, le ministre rend sa décision sur la validité de la confiscation compensatoire (art. 131 de la *LD*). Cette décision « n'est susceptible d'appel [. . .] ou de toute autre forme d'intervention que dans la mesure et selon les modalités prévues au paragraphe 135(1) » (par. 131(3) de la *LD*).

Enfin, en quatrième lieu, dans un délai de 90 jours suivant la communication de la décision du ministre, la personne qui l'a demandée peut porter l'affaire en appel, par voie d'action, devant la Cour fédérale (par. 135(1) de la *LD*).

Ce processus a donc peu en commun avec la procédure pénale. En effet, la confiscation compensatoire n'inculpe personne. Aucune dénonciation n'est déposée contre qui que ce soit. Personne n'est arrêté. Personne n'est sommé de comparaître devant une cour de juridiction pénale. Aucun casier judiciaire n'en résulte. Au pire des cas, une fois la procédure administrative et les appels épuisés, si l'avis de confiscation compensatoire est maintenu et que la personne redevable refuse toujours de payer, cette dernière risque d'être contrainte civilement de le faire.

(iv) *La jurisprudence*

L'article 124 de la *LD* n'a pas encore fait l'objet d'une interprétation judiciaire. Il convient donc d'examiner la jurisprudence connexe en matières fiscale et douanière pour qualifier la sanction prévue par cette disposition.

D'abord, dans l'affaire *Canada c. Amway of Canada Ltd.*, [1987] 2 C.F. 131 (C.A.), le ministre du Revenu national a poursuivi la compagnie Amway en vertu du par. 180(2) de l'ancienne *Loi sur les douanes*, S.R.C. 1970, ch. C-40. Cette disposition, tout comme l'art. 124 actuel, lui permettait d'exiger un montant égal à la valeur des biens exportés lorsqu'une infraction à la loi était commise.

Dans cette affaire, le ministre souhaitait également interroger au préalable le contrevenant. La Cour d'appel fédérale lui a refusé cette permission au motif que l'action en recouvrement d'une

penal action in which the defendant was a person charged with an offence. Consequently, Amway had the status of a "person charged with an offence" and was protected by s. 11(*c*) of the *Charter.*

amende, dans le cadre d'une instance civile, constituait une action de nature pénale dans laquelle le défendeur était une personne accusée d'une infraction. Par conséquent, Amway bénéficiait du statut d'« inculpé » et de la protection de l'al. 11*c*) de la *Charte*.

The decision was appealed to this Court, which reversed the decision of the Federal Court of Appeal on another ground. The Court ruled that a corporation cannot as such be a witness and therefore does not come within s. 11(*c*) of the *Charter.* On the nature of proceedings under s. 180(2) of the former *CA*, Sopinka J., writing for the Court, said he was prepared to assume, "without deciding", that the proceedings in question were such that Amway had the status of a "person charged with an offence" (*R. v. Amway Corp.*, [1989] 1 S.C.R. 21, at p. 37).

49 Cette décision a fait l'objet d'un appel devant notre Cour, qui a infirmé pour un autre motif l'arrêt de la Cour d'appel fédérale. La Cour a décidé qu'en soi une société ne peut pas être un témoin et n'est donc pas visée par l'al. 11*c*) de la *Charte*. Au sujet de la nature des procédures fondées sur le par. 180(2) de l'ancienne *LD*, le juge Sopinka, écrivant au nom de la Cour, s'est dit prêt à tenir pour acquis, « sans toutefois le décider », que la nature de la poursuite en question était telle qu'Amway bénéficiait du statut d'« inculpé » (*R. c. Amway Corp.*, [1989] 1 R.C.S. 21, p. 37).

Accordingly, the appellant cannot rely on *Amway* in support of the conclusion that s. 124 of the current *CA* is penal in nature. First, s. 180(2) of the former *CA* dealt in a single provision with the Minister's authority to require payment of a fine equal to the value of the unlawfully imported property and with the penal consequence of such an offence, that is, summary prosecution or prosecution on indictment.

50 C'est donc à tort que l'appelant s'appuie sur l'arrêt *Amway* pour soutenir la conclusion que l'art. 124 de la *LD* actuelle est de nature pénale. D'abord, le par. 180(2) de l'ancienne *LD* traitait, dans une seule et même disposition, du pouvoir du ministre d'exiger une amende égale à la valeur des biens illégalement importés ainsi que la conséquence pénale d'une telle infraction, c'est-à-dire une poursuite par voie sommaire ou par voie de mise en accusation.

Civil and penal remedies were in a way intermingled in a single subsection. This inevitably gave the civil sanction a penal dimension. Unlike its predecessor, the new *CA* draws a clear distinction between seizure as forfeit (s. 124) and penal sanctions (s. 160). Moreover, in the case at bar, no criminal proceedings have been brought against the appellant.

51 Les recours civils et pénaux se confondaient en quelque sorte à l'intérieur d'un même paragraphe. Cela avait inévitablement pour effet de conférer à la sanction civile une dimension pénale. Contrairement à son prédécesseur, la nouvelle *LD* distingue nettement la saisie compensatoire (art. 124) des sanctions pénales (art. 160). De plus, en l'espèce, l'appelant n'a fait l'objet d'aucune poursuite criminelle.

Next, the sanction provided for in s. 180(2) of the former *CA* was explicitly characterized as a "fine". This term is more closely associated with the terminology used in penal matters. Section 124 of the current *CA* instead uses the more neutral expression "amount of money".

52 Ensuite, la sanction prévue au par. 180(2) de l'ancienne *LD* était explicitement qualifiée d'« amende ». Ce terme s'apparente davantage à la terminologie employée en matière pénale. L'article 124 de la *LD* actuelle utilise plutôt le terme « montant » qui, en soi, est plus neutre.

Finally, the remarks of Sopinka J. in *Amway* must not be taken out of context. Given his conclusion that a corporation cannot be a witness, his comments on

53 Enfin, les propos du juge Sopinka dans l'arrêt *Amway* doivent s'interpréter dans leur contexte. En effet, vu sa conclusion qu'une société ne pouvait pas

the nature of the sanction imposed on Amway are necessarily restricted in scope.

54 A number of judgments in tax matters support the conclusion that an administrative sanction is not penal in nature: see, *inter alia*, *R. v. Yes Holdings Ltd.* (1987), 48 D.L.R. (4th) 642 (Alta. C.A.); *R. v. Luchuk* (1987), 18 B.C.L.R. (2d) 301 (C.A.); *Lavers v. British Columbia (Minister of Finance)* (1989), 41 B.C.L.R. (2d) 307 (C.A.). In *Time Data Recorder International Ltd. v. Canada (Minister of National Revenue)*, [1997] F.C.J. No. 475 (QL) (C.A.), at para. 12, Pratte J.A. correctly summarized the Canadian case law on the subject as follows: "It is common ground that seizures and forfeitures under the Customs Act are not criminal but civil proceedings and penalties."

55 The case law of the United States Supreme Court has for quite some time been to the same effect. According to Brandeis J. in *Helvering v. Mitchell*, 303 U.S. 391 (1938), at p. 400, the forfeiture of goods or their value and any other monetary sanctions provided for under tax legislation are civil in nature, regardless of their severity:

> Forfeiture of goods or their value and the payment of fixed or variable sums of money are other sanctions which have been recognized as enforcible by civil proceedings since the original revenue law of 1789. . . . In spite of their comparative severity, such sanctions have been upheld against the contention that they are essentially criminal and subject to the procedural rules governing criminal prosecutions.

56 For these reasons, I find that the notice of ascertained forfeiture is not penal in nature, but is rather an administrative measure intended to provide a timely and effective means of enforcing the *CA*.

(2) Does the Written Notice Demanding Payment Under Section 124 of the *CA* Constitute a True Penal Consequence?

57 In *Wigglesworth*, *supra*, at p. 561, Wilson J. wrote that "a true penal consequence which would attract the application of s. 11 [of the *Charter*] is

être un témoin, ses commentaires sur la nature de la sanction infligée à Amway ont forcément une portée restreinte.

Nombre de jugements rendus en matière fiscale étayent la conclusion qu'une sanction administrative n'est pas de nature pénale : voir, par exemple, *R. c. Yes Holdings Ltd.* (1987), 48 D.L.R. (4th) 642 (C.A. Alb.); *R. c. Luchuk* (1987), 18 B.C.L.R. (2d) 301 (C.A.); *Lavers c. British Columbia (Minister of Finance)* (1989), 41 B.C.L.R. (2d) 307 (C.A.). Dans l'arrêt *Time Data Recorder International Ltd. c. Canada (Ministre du Revenu national)*, [1997] A.C.F. nº 475 (QL) (C.A.), par. 12, le juge Pratte résume bien la jurisprudence canadienne à ce sujet : « Il est constant que les saisies et confiscations opérées sous le régime de la Loi sur les douanes ne sont pas de nature pénale, mais civile. »

La jurisprudence de la Cour suprême des États-Unis va dans le même sens, et ce, depuis fort longtemps. Il ressort de l'opinion du juge Brandeis, dans l'arrêt *Helvering c. Mitchell*, 303 U.S. 391 (1938), p. 400, que la confiscation de biens ou de leur valeur ainsi que les autres sanctions financières prévues par les lois fiscales sont de nature civile, et ce, malgré leur sévérité :

> [TRADUCTION] La confiscation de biens ou de leur valeur et le paiement de sommes fixes ou variables sont d'autres sanctions reconnues, depuis la première loi fiscale de 1789, comme des sanctions dont l'exécution relève de la procédure civile. [. . .] Malgré leur sévérité relative, ces sanctions ont résisté à l'argument voulant qu'elles soient essentiellement de nature criminelle et assujetties aux règles de procédure applicables aux poursuites criminelles.

Pour tous ces motifs, j'estime que l'avis de confiscation compensatoire est non pas un mécanisme de nature pénale, mais plutôt une mesure administrative visant à assurer le respect de la *LD* de façon rapide et efficace.

(2) La réclamation par avis écrit prévue à l'art. 124 de la *LD* constitue-t-elle une véritable conséquence pénale?

Dans l'arrêt *Wigglesworth*, précité, p. 561, la juge Wilson a écrit : « une véritable conséquence pénale qui entraînerait l'application de l'art. 11 [de

imprisonment or 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". In her view, in the rare cases where the two tests conflict, the "by nature" test must give way to the "true penal consequence" test (*Wigglesworth*, *supra*, at p. 561).

Wigglesworth is one example of this sort of unusual situation. In that case, the Court held that proceedings before the Royal Canadian Mounted Police Service Court failed the "by nature" test. However, since the accused was liable to imprisonment for a term of one year, he faced a true penal consequence.

In the case at bar, the appellant, unlike Mr. Wigglesworth, does not face imprisonment should he be found to have contravened the *CA*.

It remains to be determined whether the payment of $315,458 demanded pursuant to s. 124 of the *CA* constitutes a fine that, by its magnitude, is imposed for the purpose of redressing a wrong done to society at large, as opposed to the purpose of maintaining the effectiveness of customs requirements.

(i) *Magnitude of the Fine*

The appellant's main argument in this regard is based on the magnitude of the amount claimed. He contends that $315,458 is six times greater than the maximum fine that could be imposed on him upon summary conviction under s. 160(*a*) of the *CA* and that it accordingly constitutes a true penal consequence.

This argument is based on a false premise. There can be no doubt that the amount of $315,458 demanded from the appellant is greater than the sanction he would face in a summary conviction prosecution. However, if the appellant had been proceeded against by way of indictment, the maximum fine would have been $500,000 (s. 160(*b*) of the *CA*). In either case, moreover, the fine does not

la *Charte*] est l'emprisonnement ou une amende qui par son importance semblerait imposée dans le but de réparer le tort causé à la société en général plutôt que pour maintenir la discipline à l'intérieur d'une sphère d'activité limitée ». Selon la juge Wilson, dans les rares cas où il y a conflit entre les deux critères, le critère de la « nature même » doit céder le pas à celui de la « véritable conséquence pénale » (*Wigglesworth*, précité, p. 561-562).

58 L'arrêt *Wigglesworth* nous fournit un exemple de ce type de situation inusitée. En effet, dans cette affaire, la Cour a jugé que les procédures engagées devant le tribunal du service de la Gendarmerie royale du Canada ne satisfaisaient pas au critère de la « nature même ». Néanmoins, vu qu'il était passible d'un an d'emprisonnement, l'accusé était tout de même exposé à une véritable conséquence pénale.

59 Dans le cas présent, contrairement à celui de M. Wigglesworth, l'appelant ne risque pas d'être emprisonné s'il s'avère qu'il a effectivement contrevenu à la *LD*.

60 Reste donc la question de savoir si le paiement de 315 458 $ exigé en vertu de l'art. 124 de la *LD* constitue une amende qui, par son importance, est infligée dans le but de réparer le tort causé à la société en général plutôt que dans celui de maintenir l'efficacité des exigences douanières.

(i) *L'importance de l'amende*

61 L'argument principal de l'appelant à cet égard est fondé sur l'importance du montant réclamé. En effet, il soutient que la somme de 315 458 $ est six fois plus élevée que l'amende maximale qui pourrait lui être infligée à l'issue d'une poursuite sommaire fondée sur l'al. 160*a*) de la *LD*. Il s'agirait donc d'une véritable conséquence pénale.

62 Cet argument repose sur une fausse prémisse. Il est certes vrai que la somme de 315 458 $ réclamée à l'appelant est supérieure à la sanction à laquelle l'exposerait une poursuite par voie sommaire. Toutefois, si l'appelant était poursuivi par voie de mise en accusation, l'amende maximale serait de 500 000 $ (al. 160*b*) de la *LD*). Qui plus est, dans un cas comme dans l'autre, l'amende ne remplace pas la

replace the ascertained forfeiture. These are two distinct consequences that are completely independent of each other. One of them, the fine, is clearly penal in nature and thus takes into account the relevant factors and principles governing sentencing; the other, being civil in nature and purely economic, is instead arrived at by a simple mathematical calculation.

63 In addition, forfeiture is an *in rem* proceeding in which the subject is the thing itself. In such a proceeding, the guilt or innocence of the owner of the forfeited property is irrelevant. The notice of ascertained forfeiture, the amount of which is established based on the estimated value of the property, is the necessary counterpart of this *in rem* proceeding. If the property is subsequently seized, the notice will be immediately cancelled (s. 125 of the *CA*).

(ii) *Redressing a Wrong Done to Society*

64 Unlike a criminal conviction, the demand by written notice stigmatizes no one.

65 As has just been seen, the principles of criminal liability and sentencing are totally irrelevant when fixing the amount to be demanded. Such a notice does not result in a criminal record for either the offender or the owner of the property. Its purpose is neither to punish the offender nor to elicit societal condemnation. In short, the notice of ascertained forfeiture has neither the appearance nor the distinctive characteristics of a sanction intended to "redress a wrong done to society".

66 To sum up, the notice of ascertained forfeiture does not lead to true penal consequences for the appellant. He cannot be characterized as a "person charged with an offence" within the meaning of s. 11(*c*) of the *Charter* and therefore cannot benefit from its protection in this case.

B. *Is the Appellant Compelled to Be a Witness in Proceedings Against Him in Respect of an Offence With Which He Is Charged, Contrary to Section 11(c) of the Charter?*

67 As the appellant is not a "person charged with an offence" within the meaning of s. 11 of the *Charter*, there is in principle no need to consider the scope of

confiscation compensatoire : il s'agit de deux conséquences distinctes dont l'une ne dépend aucunement de l'autre. L'une, l'amende, est manifestement pénale et tient donc compte des facteurs et des principes pertinents en matière de détermination de la peine; l'autre, de nature civile et purement économique, est plutôt déterminée par un simple calcul mathématique.

En outre, la confiscation est une procédure *in rem* qui vise la « chose elle-même ». Une telle procédure n'a rien à voir avec la culpabilité ou l'innocence du propriétaire des biens confisqués. L'avis de confiscation compensatoire, dont le montant est établi en fonction de la valeur estimée de ces biens, est le pendant nécessaire de cette procédure *in rem*. De plus, si les biens sont par la suite saisis, l'avis sera dès lors annulé (art. 125 de la *LD*).

(ii) *La réparation d'un tort causé à la société*

Contrairement à une condamnation criminelle, la réclamation par avis écrit ne stigmatise personne.

Comme nous venons de le voir, les principes de responsabilité pénale et de détermination de la peine n'entrent nullement en jeu pour fixer le montant réclamé. Un tel avis ne crée aucun casier judiciaire ni pour le contrevenant, ni pour le propriétaire des biens. Il n'a pas pour but de punir le contrevenant ou de susciter la réprobation sociale. Bref, l'avis de confiscation compensatoire n'a ni l'apparence ni les caractéristiques distinctives de la « réparation d'un tort causé à la société ».

Somme toute, l'avis de confiscation compensatoire n'entraîne pas de véritables conséquences pénales pour l'appelant. Ce dernier ne peut pas être qualifié d'« inculpé » au sens de l'al. 11*c*) de la *Charte* et ne peut donc pas bénéficier de la protection en l'espèce.

B. *L'appelant est-il contraint de témoigner contre lui-même dans une poursuite intentée contre lui pour une infraction qu'on lui reproche, en contravention de l'al. 11c) de la Charte?*

L'appelant n'étant pas un « inculpé » au sens de l'art. 11 de la *Charte*, il ne serait pas nécessaire, en principe, de se pencher sur la portée de l'al. 11*c*). Il

s. 11(*c*). Nevertheless, it seems appropriate to do so, since the Federal Court of Appeal's interpretation of this provision would unduly restrict its purpose.

Three conditions must be met for a person charged with an offence to benefit from the protection against self-incrimination under s. 11(*c*) of the *Charter*: (1) the person must be compelled to be a witness (2) in proceedings against that person (3) in respect of the offence.

In this regard, the key passage from the Federal Court of Appeal's decision reads as follows (at para. 10):

> In this case, the appellant is a plaintiff in an action in which, as section 135 requires, the Minister is the defendant. He is not a person charged with an offence in this proceeding. Nor is he being prosecuted or sued. In fact, he is the prosecutor in the civil law sense of the word. The proceeding he has initiated himself cannot result in any conviction, fine or penal consequence in the criminal or penal sense of the word, making him a person charged with an offence under the *Charter*'s paragraph 11(c). The decision to carry out an ascertained forfeiture is already made and upheld by the Minister. The proceeding brought by the appellant to challenge the Minister's decision is, when all is said and done, a proceeding to have the respondent's claim and the action to collect this claim, the ascertained forfeiture, vacated.

The first condition presents no difficulties. It seems obvious that examining someone for discovery amounts to compelling that person to be a witness in proceedings against him or her. Rule 288 of the *FCR* provides that any part of an examination for discovery of an adverse party may be introduced into evidence at trial.

As for the other two conditions, the decision of the Federal Court of Appeal, which is essentially based on the wording of the French version of s. 11(*c*), can be summarized as follows: since the appellant is a plaintiff, there is no *poursuite* (proceeding) against him. Thus, the appellant himself is the *poursuivant* ("prosecutor", or plaintiff) and the proceeding was not brought in respect of the offence with which the appellant is charged, as the respondent had already made a decision. The purpose of the proceeding is, rather, to have the appellant's debt to the respondent cancelled.

convient néanmoins de le faire, car l'interprétation de cette disposition par la Cour d'appel fédérale a pour effet d'en restreindre indûment la mission.

68 Trois conditions doivent être remplies pour qu'un inculpé puisse bénéficier de la protection contre l'auto-incrimination garantie à l'al. 11*c*) de la *Charte* : (1) il doit être contraint de témoigner contre lui-même, (2) dans une poursuite intentée contre lui, (3) pour l'infraction qu'on lui reproche.

69 À cet égard, le passage clé de l'arrêt de la Cour d'appel fédérale se lit comme suit (par. 10) :

> En l'instance, l'appelant est un demandeur dans une action où, comme l'exige l'article 135, le ministre est le défendeur. Il n'est pas un inculpé dans cette procédure. Il n'est poursuivi ni civilement, ni pénalement. En fait, il est lui-même le poursuivant au sens civil du terme. La procédure qu'il a entreprise lui-même ne peut déboucher sur aucune condamnation, amende ou conséquence pénale au sens pénal du terme, faisant de lui un inculpé en vertu de l'alinéa 11c) de la *Charte*. La décision de procéder à une confiscation compensatoire est déjà prise et confirmée par le ministre. La procédure intentée par l'appelant pour contester la décision du ministre est, en somme, une procédure pour faire annuler la créance de l'intimé ainsi que la mesure de recouvrement de cette créance que constitue la confiscation compensatoire.

70 La première condition ne pose aucune difficulté. Il semble évident que le fait d'interroger au préalable une personne revient, en fait, à la contraindre à témoigner contre elle-même. En effet, la règle 288 des *RCF* prévoit que tout extrait des dépositions d'une partie adverse recueillies lors de l'interrogatoire préalable peut être présenté en preuve lors de l'instruction.

71 En ce qui a trait aux deux autres conditions, la décision de la Cour d'appel fédérale, fondée essentiellement sur le libellé de la version française de l'al. 11*c*), se résume ainsi : puisque l'appelant est le demandeur, aucune poursuite n'est intentée contre lui. L'appelant est donc lui-même le poursuivant et la poursuite n'est pas engagée pour l'infraction reprochée à l'appelant, la décision de l'intimé ayant déjà été prise. La poursuite vise plutôt à faire annuler la créance de l'intimé contre l'appelant.

72 With respect, this interpretation of s. 11(*c*) of the *Charter* risks being perceived as overly formalistic. I accordingly believe it would be preferable to address this aspect of the appeal as follows.

(1) "Proceedings Against That Person"

73 The purpose of s. 11(*c*) is to protect a person charged with an offence against self-incrimination. This protection should not depend solely on the terminology associated with the procedure established by Parliament.

74 In the instant case, Parliament decided that an appeal from a decision of the Minister must be made by way of an action in the Federal Court (s. 135 of the *CA*). However, this choice of procedure does not alter the actual relationship between the parties.

75 The *Petit Robert* (1990) defines the word "*poursuite*" as follows: [TRANSLATION] "legal action taken against someone who has violated a law . . ." (p. 1501). In the case at bar, the customs officer, a representative of the state, served a notice of ascertained forfeiture on the appellant. There can therefore be no doubt that the service of the notice of ascertained forfeiture by the customs officer, who had reasonable grounds to believe that a provision of the *CA* had been contravened, constituted a "*poursuite*" against the appellant.

76 From that moment, the appellant was required to follow the path set out by Parliament for contesting the proceeding against him. To this end, he asked the Minister to review the officer's decision (ss. 129 and 131 of the *CA*) and he subsequently appealed the Minister's decision to the Federal Court. Thus, although the appellant is designated a "plaintiff", it is not he who actually initiated the "*poursuite*". On the contrary, he is simply defending himself in a proceeding against him that was initiated by the respondent.

77 In the English version of s. 11(*c*) of the *Charter*, the term "*poursuite*" is rendered as "proceedings". The *Oxford English Dictionary* (2nd ed. 1989) defines "proceeding" as follows, at p. 545: "The instituting or carrying on of an action at law; a

En toute déférence, cette interprétation de l'al. 11*c*) de la *Charte* risque d'être perçue comme étant trop formaliste. Il m'apparaît donc préférable d'aborder comme suit cet aspect du pourvoi.

(1) « Poursuite intentée contre lui »

L'alinéa 11*c*) a pour objet de garantir à un inculpé la protection contre l'auto-incrimination. Cette protection ne devrait pas dépendre uniquement de la terminologie découlant de la procédure établie par le législateur.

Dans le cas qui nous occupe, le législateur a décidé que l'appel d'une décision du ministre devait obligatoirement se faire par voie d'action devant la Cour fédérale (art. 135 de la *LD*). Néanmoins, ce moyen procédural n'a pas pour effet de modifier les rapports réels entre les parties.

Le *Petit Robert* (1990) définit ainsi le terme « poursuite » : « [a]cte juridique dirigé contre quelqu'un qui a enfreint une loi . . . » (p. 1501). En l'espèce, l'agent des douanes, un représentant de l'État, a signifié à l'appelant un avis de confiscation compensatoire. Nul doute donc que la signification de l'avis de confiscation compensatoire par l'agent des douanes, qui avait des motifs raisonnables de croire qu'une infraction à la *LD* avait été commise, constituait une « poursuite » contre l'appelant.

De plus, à partir de ce moment, l'appelant était tenu de suivre la voie tracée par le législateur pour contester la poursuite intentée contre lui. Ce faisant, il a demandé au ministre de réviser la décision de l'agent (art. 129 et 131 de la *LD*) et il a par la suite porté la décision du ministre en appel devant la Cour fédérale. Ainsi, bien qu'il porte le titre de « demandeur », l'appelant n'est pas en réalité l'instigateur de la « poursuite ». Au contraire, il ne fait qu'opposer une défense à la poursuite intentée contre lui par l'intimé.

Dans la version anglaise de l'al. 11*c*) de la *Charte*, le terme « *proceedings* » remplace le terme « poursuite ». « *Proceeding* » signifie, selon l'*Oxford English Dictionary* (2e éd. 1989), p. 545 : [TRADUCTION] « L'introduction ou la poursuite

legal action or process; any act done by authority of a court of law; any step taken in a cause by either party" (emphasis added). It should be added that, in ss. 13 and 14 of the *Charter*, the word "proceedings" is rendered as "*procédures*" in the French version. In s. 24(2) of the *Charter*, "proceedings" is rendered as "*instance*".

This shows that the word "proceedings" has a much broader meaning than "*poursuite*" (see, for example, *Markevich v. Canada*, [2003] 1 S.C.R. 94, 2003 SCC 9, at paras. 23-37), and it applies regardless of whether the individual seeking the protection of s. 11(*c*) of the *Charter* is a "plaintiff" or a "defendant".

Thus, although the appellant is designated a "plaintiff" in the Federal Court, it is nonetheless the respondent who initiated the proceeding (*poursuite*, *procédure* or *instance*) against the appellant.

(2) "In Respect of the Offence"

A literal interpretation of this expression implies that the proceeding must be in respect of the offence with which the appellant is charged. Relying on this assertion, the Federal Court of Appeal stated that the Minister's decision was a thing of the past and that the purpose of the current proceeding was instead to release the appellant from his debt.

For this expression also, to understand its real meaning, the English and French versions of s. 11(*c*) of the *Charter* must be read together. The expression "*pour l'infraction qu'on lui reproche*" is rendered in English as "in respect of the offence". The key element of this provision is the existence of "some link" between the offence and the proceedings (see *Markevich*, *supra*, at para. 26).

Dickson J. (as he then was) stated the following in *Nowegijick v. The Queen*, [1983] 1 S.C.R. 29, at p. 39:

The words "in respect of" are, in my opinion, words of the widest possible scope. They import such meanings

d'une instance; une action en justice ou une procédure judiciaire; tout acte accompli sous l'autorité d'un tribunal; toute mesure prise dans une affaire par l'une des parties » (je souligne). De plus, dans les art. 13 et 14 de la *Charte*, le terme « *proceedings* » est rendu en français par le terme « procédures ». Enfin, dans le par. 24(2) de la *Charte*, « *proceedings* » est traduit par « instance ».

78 Tout cela démontre que le terme « *proceedings* » a un sens beaucoup plus large que le terme « poursuite » (voir, par exemple, *Markevich c. Canada*, [2003] 1 R.C.S. 94, 2003 CSC 9, par. 23-37) et s'applique sans égard à la qualité de « demandeur » ou de « défendeur » de l'individu recherchant la protection de l'al. 11*c*) de la *Charte*.

79 Ainsi, bien que l'appelant soit désigné comme étant le « demandeur » devant la Cour fédérale, il n'en demeure pas moins que c'est l'intimé qui est à l'origine de la « poursuite », de la « procédure » ou de « l'instance » contre l'appelant.

(2) « Pour l'infraction qu'on lui reproche »

80 Une interprétation littérale de cette expression laisse entendre que la poursuite intentée devrait être pour l'infraction reprochée à l'appelant. Forte de cette assertion, la Cour d'appel fédérale affirme que la décision du ministre est chose du passé et que la présente poursuite visait plutôt à libérer l'appelant de sa dette.

81 Là encore, pour comprendre le sens véritable de cette expression, il est nécessaire d'interpréter conjointement les versions française et anglaise de l'al. 11*c*) de la *Charte*. L'expression « pour l'infraction qu'on lui reproche » est rendue en anglais par l'expression « *in respect of the offence* ». Ainsi, l'élément clé de cette disposition est la présence d'un « lien quelconque » entre l'infraction reprochée et la procédure engagée (voir *Markevich*, précité, par. 26).

82 En effet, comme l'a indiqué le juge Dickson (plus tard Juge en chef) dans l'arrêt *Nowegijick c. La Reine*, [1983] 1 R.C.S. 29, p. 39 :

À mon avis, les mots « quant à » [« *in respect of* »] ont la portée la plus large possible. Ils signifient, entre autres,

as "in relation to", "with reference to" or "in connection with". The phrase "in respect of" is probably the widest of any expression intended to convey some connection between two related subject matters.

83 In the case at bar, the offence imputed to the appellant consists in having made false statements contrary to ss. 95 and 153(*a*) and (*c*) of the *CA*. The offence gave rise to a proceeding (*poursuite*, *procédure* or *instance*) initiated by the respondent against the appellant. The respondent used a notice of ascertained forfeiture to demand payment of an amount of $315,458. There is accordingly no doubt that both the "proceeding" against the appellant and the appeal from the respondent's decision are connected with the offence.

84 In *Canada v. Schmidt*, [1987] 1 S.C.R. 500, at p. 519, this Court stated that the expression "person charged with an offence" must be interpreted consistently in relation to all the paragraphs of s. 11 of the *Charter*.

85 The Federal Court of Appeal's interpretation would unduly reduce the scope of s. 11(*c*). This would be true where a "person charged with an offence" was compelled to be a witness in proceedings against him or her simply because Parliament required the person to bring an action to contest a decision. The person's status as a "plaintiff" would deprive the person of his or her constitutional rights.

86 This interpretation must therefore be rejected.

VI

Conclusion

87 To characterize the appellant as a "person charged with an offence" would have a significant impact on the entire body of legislation whose purpose is taxation and economic regulation. To recognize an alleged offender in these spheres as a "person charged with an offence", even where he or she is not in fact charged, would undermine the effectiveness of the system and substantially increase the cost of administering it.

« concernant », « relativement à » ou « par rapport à ». Parmi toutes les expressions qui servent à exprimer un lien quelconque entre deux sujets connexes, c'est probablement l'expression « quant à » [« *in respect of* »] qui est la plus large.

En l'espèce, l'infraction reprochée à l'appelant consiste à avoir fait de fausses déclarations en contravention de l'art. 95 et des al. 153*a*) et *c*) de la *LD*. Cette infraction est à l'origine du déclenchement par l'intimé d'une « poursuite », d'une « procédure » ou d'une « instance » contre l'appelant. L'intimé se sert de l'avis de confiscation compensatoire pour réclamer le paiement d'une somme de 315 458 $. Il ne fait donc aucun doute que tant la « poursuite » intentée contre l'appelant que l'appel interjeté contre la décision de l'intimé sont liés à l'infraction reprochée.

Dans l'arrêt *Canada c. Schmidt*, [1987] 1 R.C.S. 500, p. 519, notre Cour a affirmé qu'il est important que la notion d'« inculpé » reçoive une interprétation uniforme dans tous les alinéas de l'art. 11 de la *Charte*.

L'interprétation de la Cour d'appel fédérale aurait pour effet de réduire indûment la portée de l'al. 11*c*). Il en serait ainsi lorsqu'un « inculpé » serait contraint de témoigner contre lui-même simplement parce que le législateur l'oblige à intenter une action pour contester une décision. Sa qualité de « demandeur » lui ferait donc perdre ses droits constitutionnels.

Cette interprétation doit donc être rejetée.

VI

Conclusion

Qualifier l'appelant d'« inculpé » aurait un impact considérable sur un ensemble de législation fiscale et de réglementation économique. Reconnaître le statut d'« inculpé » aux présumés contrevenants dans ces domaines, lorsqu'ils ne sont pas de fait inculpés, minerait l'efficacité du système et augmenterait substantiellement les coûts de son administration.

In this context, an analysis of s. 124 of the *CA* and its related provisions shows that the process they establish is not penal in nature and that the sanction provided for does not have true penal consequences within the meaning of *Wigglesworth*.

Therefore, Rule 236(2) of the *FCR* does not violate s. 11(*c*) of the *Charter* by requiring the appellant, as plaintiff in an action under s. 135 of the *CA*, to submit to an examination for discovery.

For these reasons, the Court dismissed the appeal from the bench. The respondent shall have his costs in this Court.

Appeal dismissed with costs.

Solicitors for the appellant: Hivon et Beaulac, Montréal.

Solicitor for the respondent: Deputy Attorney General of Canada, Montréal.

Solicitor for the intervener the Attorney General of Ontario: Attorney General of Ontario, Toronto.

Solicitor for the intervener the Attorney General of Quebec: Department of Justice, Sainte-Foy.

88 Dans ce contexte, une étude de l'art. 124 de la *LD* et des dispositions connexes révèle que le processus ainsi établi n'est pas de nature pénale et que la sanction qu'il prévoit n'entraîne pas de véritables conséquences pénales au sens de l'arrêt *Wigglesworth*.

89 Il s'ensuit que la règle 236(2) des *RCF* ne porte pas atteinte à l'al. 11*c*) de la *Charte* du fait qu'elle oblige l'appelant, en sa qualité de demandeur dans une action fondée sur l'art. 135 de la *LD*, à subir un interrogatoire préalable.

90 Pour ces motifs, la Cour a rejeté le pourvoi séance tenante. L'intimé a droit à ses dépens devant notre Cour.

Pourvoi rejeté avec dépens.

Procureurs de l'appelant : Hivon et Beaulac, Montréal.

Procureur de l'intimé : Sous-procureur général du Canada, Montréal.

Procureur de l'intervenant le procureur général de l'Ontario : Procureur général de l'Ontario, Toronto.

Procureur de l'intervenant le procureur général du Québec : Ministère de la Justice, Sainte-Foy.

1984 CarswellNat 66
Federal Court of Canada — Appeal Division

Please see in particular para. 31

New Brunswick Broadcasting Co. v. Canadian Radio-Television & Telecommunications Commission

1984 CarswellNat 66, 1984 CarswellNat 66F, [1984] 2 F.C. 410, 12 C.R.R. 249, 13 D.L.R. (4th) 77, 2 C.P.R. (3d) 433, 55 N.R. 143

New Brunswick Broadcasting Co., Limited (Appellant) v. Canadian Radio-television and Telecommunications Commission (Respondent)

Thurlow C.J., Pratte and Ryan JJ.

Toronto: May 23 1984
Ottawa: July 27, 1984
Docket: A-1879-83

Counsel: *J. Edgar Sexton, Q.C.* and *Ronald G. Atkey, Q.C.* for appellant.
Jean L. Doucet for respondent.
Derek H. Aylen, Q.C. and *David Sgayias* for Attorney General of Canada.

Subject: Intellectual Property; Property; Public

Headnote

Communications Law --- Regulation of radio and television — Broadcasting licence — Renewal of licence

Statutes --- Interpretation — Extrinsic aids — Legislative record — Commissions and reports

Statutes --- Statutory instruments — Grounds for invalidating — Inconsistent with enabling statute

Broadcasting — CRTC limiting renewal of newspaper owner's broadcasting licences — Decision based on direction given by Order in Council pursuant to ss. 27(1) and 22(1)(a)(iii) of Act restricting CRTC's authority to issue or renew licences to owners of newspapers circulated in broadcasting area — Whether direction illegal as made for purpose other than those in s. 3 of Act — Broadcasting policy in s. 3 not exhaustive of purposes of Act — S. 27(1) power exercisable for any valid reason of public policy whether or not expressed in s. 3 — Purpose of direction not to regulate concentration of newspaper ownership — To determine classes of persons entitled to use of radio frequencies is to "regulate and supervise all aspects of the Canadian broadcasting system" — Broadcasting Act, R.S.C. 1970, c. B-11, ss. 3(a), (b), 15, 17, 22(1)(a)(iii), 26, (as am. by R.S.C. 1970 (2nd Supp.), c. 10, s. 65), 27(1), (2) — Direction to the CRTC on Issue and Renewal of Broadcasting Licences to Daily Newspaper Proprietors, SOR/82-746.

Judicial review — Applications to review — Broadcasting — Renewal of appellant's broadcasting licences limited pursuant to direction to CRTC prohibiting newspaper owners from controlling broadcasting undertakings in same market area — Appellant's right to enjoyment of property and right not to be deprived thereof without due process of law allegedly violated — Whether appellant entitled to hearing as to direction — No vested or other property right in renewal of licences — Expectation of longer renewal, not right to renewal, adversely affected — Direction general in scope and application, not specifically aimed at appellant — Authority of Governor in Council under ss. 27(1) and 22(1)(a)(iii) of Broadcasting Act legislative in nature — Courts not giving persons likely to be adversely affected by exercise of legislative authority right to be heard — No opportunity to be heard afforded in s. 27 — Canadian Bill of Rights, R.S.C. 1970, Appendix III, ss. 1(a), 2(e) — Federal Court Act, R.S.C. 1970 (2nd Supp.), c. 10, s. 28.

Constitutional law — Charter of Rights — Freedom of expression — CRTC limiting renewal of appellant's broadcasting licences — Decision based on direction by Governor in Council prohibiting person or group of persons from control ling several forms of media in same market area — Whether appellant and public deprived of right to freedom of expression under s. 2(b) of Charter — Freedom to communicate ideas without restraint excluding freedom to use private or public property to do so — Radio frequencies declared public property — Appellant's freedom to broadcast not denied as it may purchase time on licensed station to air information — Public not entitled to appellant's broadcasting service — No need to resort to Charter limitation clause to justify licensing system — Canadian Charter of Rights and Freedoms, being Part I of the Constitution Act, 1982, Schedule B, Canada Act 1982, 1982, c. 11 (U.K.), ss. 1, 2(b).

Evidence — Admissibility — Newspaper proprietor attacking CRTC decision to limit renewal of television broadcasting licences — Decision based on direction issued to CRTC by Governor in Council — Direction made following release of Royal Commission report on daily newspaper industry — Legality of direction at issue — Report admissible as evidence of context in which Order in Council passed — Speech delivered to students by Minister responsible for Government response also admissible — Better exposing motivation of Governor in Council — Admissible on same basis as government pamphlet considered in Reference re Upper Churchill Water Rights Reversion Act, [1984] 1 S.C.R. 297.

The appellant attacks, by way of an appeal under section 26 of the *Broadcasting Act* and of an application for judicial review, a decision of the Canadian Radio-television and Telecommunications Commission (CRTC) which limited the renewal of its television broadcasting licences. The appellant is a wholly-owned subsidiary of New Brunswick Publishing Company, Limited, an Irving interest which publishes two daily newspapers in Saint John, New Brunswick. The appellant is also the owner of a television-broadcasting station in Saint John. In reaching its decision, the CRTC took into account a direction given to it by an Order in Council made pursuant to subsection 27(1) and subparagraph 22(1)(*a*)(iii) of the *Broadcasting Act*. The direction restricts the authority of the CRTC to issue or renew broadcasting licences to persons who own or control newspapers circulated in the broadcasting area. Tendered as evidence was a report, released following the establishment of a Royal Commission to inquire generally into the daily

newspaper industry and specifically into the concentration of the ownership and control of that industry. A further item of evidence was a speech delivered by the Minister responsible for the Government's response to the Royal Commission's report, to University of Western Ontario students. The appellant argues that the direction was illegal on the grounds (1) it was made for a purpose other than one authorized by section 3 of the *Broadcasting Act* and thus made for an improper purpose; (2) it deprived the appellant and the public of the right under paragraph 2(*b*) of the Charter to freedom of expression including freedom of the press and other media of communication; (3) it deprived the appellant of its right under paragraph 1(*a*) of the Bill of Rights to the enjoyment of its property and its right not to be deprived thereof without due process of law. *Held*, the appeal and the review application should be dismissed.

(1) Admissibility as evidence of the Royal Commission report and of the ministerial speech

In view of the appellant's objections to the direction, the report is admissible as evidence of the situation and context in which the Order in Council was passed.

As to the speech, the respondent's attempt to classify it among the speeches made by members of legislative bodies and thus not reliable as evidence of the intent of legislation, fails. The speech comes much closer to exposing the motivation of the Governor in Council in passing the Order in Council and is therefore akin to and admissible as evidence on the same basis as the government pamphlet titled "The Energy Priority of Newfoundland and Labrador" considered by the Supreme Court of Canada in the *Reference re Upper Churchill Water Rights Reversion Act*.

(2) The improper purpose point

While the policy stated in section 3 of the *Broadcasting Act* appears to govern and limit the objects to be implemented by the CRTC, that policy is not exhaustive of the purposes of the Act. The power conferred by subsection 27(1) to issue directions pursuant to subparagraph 22(1)(*a*)(iii) precluding the issue or the renewal of licences to particular classes of persons is exercisable by the Governor in Council for any valid reason of public policy whether or not it is one expressed in section 3. To deny that power scope for differentiating on grounds of public policy between particular classes of Canadians is to deny it all practical scope. Therefore, it cannot be affirmed that the direction was not made in furtherance of a purpose of the Act.

It cannot be affirmed either that the direction was made solely for the purpose of regulating ownership and control of newspapers. On its face, the direction relates to those persons who may not hold broadcasting licences. In fact what it does is to restrict the classes of persons who may hold such licences. It says nothing and does nothing to regulate either the concentration of ownership of newspapers or the owners of newspapers.

Even if this interpretation were incorrect, the appellant's objection would still fail because such a direction falls within the policy set out in section 3 and thus within the purposes of the Act. The authority conferred on the Governor in Council by subsection 27(1) and subparagraph 22(1)(*a*)(iii) is broad enough to enable the Governor in Council to decide who or what classes of persons or corporations should be licensed to make use of the radio frequencies that are declared by paragraph 3(*a*) to be public property. To exercise that authority is to "regulate and supervise all aspects

of the Canadian broadcasting system" of which broadcasting undertakings in Canada are, under paragraph 3(*a*), a part.

(3) The Charter of Rights point

The appellant's argument based on an alleged violation of paragraph 2(*b*) of the Charter confuses the freedom guaranteed by the Charter with a right to the use of property. The freedom guaranteed by the Charter is a freedom to express and communicate ideas without restraint, whether orally or in print or by other means of communication. It is not a freedom to use someone else's property to do so. It does not give anyone the right to use the radio frequencies which, before the enactment of the Charter, had been declared by Parliament to be and had become public property subject to the licensing provisions of the *Broadcasting Act*. The appellant's freedom to broadcast what it wishes to communicate would not be denied by the refusal of a licence: it would have the same freedom as anyone else to air its information by purchasing time on a licensed station. Nor does the Charter confer on the rest of the public a right to a broadcasting service to be provided by the appellant. Moreover, since the freedom guaranteed by paragraph 2(*b*) does not include a right for anyone to use the property of another or a public property, the use of which is governed by statute, there is no need to resort to the limitation clause in section 1 of the Charter to justify the licensing system established by the Act.

(4) The Canadian Bill of Rights point

The first issue is whether the appellant may properly invoke the Bill of Rights.

Although the word "individual" in section 1 of the Bill does not include a corporation, there is no reason to conclude that a corporation is not entitled at common law to the enjoyment of property and the right not to be deprived thereof without due process of law. Similarly, there is no reason to conclude that the word "person" in paragraph 2(*e*) of the Bill, which deals with the right to a fair hearing, cannot refer to a corporation whenever the subject-matter of a provision in which it is found can have application to corporations.

In view of the above, was the appellant entitled to a hearing as to why the direction should not have been made? The answer must be negative. The appellant had no vested or other property right to have its licences renewed. What was adversely affected by the direction was nothing but an expectation: the expectation that the appellant had of a longer renewal than was in fact granted. The appellant's argument that it was forced to sell its broadcasting station is not warranted on the record before the Court. On its face, the direction is not aimed at anyone in particular but is general in scope and in application, and there is nothing in the record establishing that it is applicable only to the appellant's situation or that it has only been applied to the appellant.

The authority conferred on the Governor in Council by subsection 27(1) and subparagraph 22(1)(*a*)(iii) is neither judicial nor quasi-judicial nor administrative in nature. It is legislative in character. It authorizes the making of orders to the CRTC respecting classes of applicants to whom licences may not be granted, and it is not restricted by wording dealing with the grounds on which particular classes may be disqualified. Furthermore, subsection 27(2) requires that any order made under subsection 27(1) be published forthwith in the *Canada Gazette* and laid before Parliament. This affords Parliament the opportunity to consider the direction, and revoke or alter it if it sees fit to do

so. Courts have not heretofore conferred on persons likely to be adversely affected by the exercise of legislative authority a right to be heard. Finally, there is no provision in section 27 affording to a member of a class or a class as a whole an opportunity to be heard.

Table of Authorities

CASES JUDICIALLY CONSIDERED

FOLLOWED:

Reference re Upper Churchill Water Rights Reversion Act, [1984] 1 S.C.R. 297

Attorney General of Canada v. Inuit Tapirisat of Canada et al., [1980] 2 S.C.R. 735.

APPLIED:

Bates v. Lord Hailsham of St. Marylebone, et al., [1972] 1 W.L.R. 1373 (Ch.D.).

REFERRED TO:

Thorne's Hardware Ltd. et al. v. The Queen et al., [1983] 1 S.C.R. 106

Regina v. Colgate Palmolive Ltd. (1971), 5 C.P.R. (2d) 179 (G.S.P. Ct.).

Words and phrases considered:

FREEDOM OF EXPRESSION

The freedom [of expression] guaranteed by the *Charter* [s. 2] is a freedom to express and communicate ideas without restraint, whether orally or in print or by other means of communication. It is not a freedom to use someone else's property to do so. It gives no right to anyone to use someone else's land or platform to make a speech, or someone else's printing press to publish his ideas. It gives no right to anyone to enter and use a public building for such purposes. And it gives no right to anyone to use the radio frequencies which, before the enactment of the *Charter*, had been declared by Parliament to be and had become public property and subject to the licensing and other provisions of the *Broadcasting Act* [R.S.C. 1970, c. B-11].

FREEDOM OF THE PRESS AND OTHER MEDIA OF COMMUNICATIONS

. . . the argument [of the appellant broadcaster] confuses the freedom guaranteed by [s. 2(b) of] the *Charter* [namely, freedom of the press and other media of communications] with a right to the use of property and is not sustainable. The freedom guaranteed by the *Charter* is a freedom to express and communicate ideas without restraint, whether orally or in print or by other means of communication. It is not a freedom to use someone else's property to do so. It gives no right to anyone to use someone else's land or platform to make a speech, or someone else's printing press to publish his ideas. It gives no right to anyone to enter and use a public building for such purposes. And it gives no right to anyone to use the radio frequencies which, before the enactment of the *Charter*, had been declared by Parliament to be and had become public property and subject to the licensing and other provisions of the [*Broadcasting Act*, R.S.C. 1970, c. B-11]. The appellant's freedom to broadcast what it wishes to communicate would not be denied by the refusal of a licence to operate a broadcasting undertaking. It would have the same freedom as anyone else to air its

information by purchasing time on a licensed station. Nor does the *Charter* confer on the rest of the public a right to a broadcasting service to be provided by the appellant.

INDIVIDUAL

. . . the word "individual" in s. 1 of the *Canadian Bill of Rights* [R.S.C. 1985, App. III] does not include a corporation: see *R. v. Colgate Palmolive Ltd.* (1971), 8 C.C.C. (2d) 40 . . .

PERSON

In [s. 2(e) of the *Canadian Bill of Rights* S.C. 1960, c. 44, reprinted in R.S.C. 1985, App. III] the word "person" is used in contexts which suggest that it is concerned with natural persons but I see no compelling reason why the word should not be interpreted as referring as well to corporations wherever the subject-matter of a provision in which it is found can have application to corporations. Section 2(e) is, in my view, such a provision.

The following are the reasons for judgment rendered in English by *Thurlow C.J.*:

1 This is a joint proceeding consisting of an appeal under section 26 of the *Broadcasting Act* [R.S.C. 1970, c. B-11 (as am. by R.S.C. 1970 (2nd Supp.), c. 10, s. 65)] and an application under section 28 of the *Federal Court Act* [R.S.C. 1970 (2nd Supp.), c. 10]. What is attacked by both the appeal and the review application is a decision of the Canadian Radio-television and Telecommunications Commission [CRTC] dated August 11, 1983, which limited the renewal of the television broadcasting licences of the appellant and its rebroadcasters to a term expiring on January 1, 1986. It is common ground that but for a direction to the Commission given by Order in Council dated July 29, 1982, and purporting to be made pursuant to section 22 [1] of the *Broadcasting Act*, which the Commission took into account in reaching its decision, the period for which the renewal of the licences was granted by the Commission would have been at least somewhat longer, though, for reasons appearing in the decision, it would not have been for the full five-year period for which the Commission has, under section 17, authority to grant or renew broadcasting licences.

2 The appellant's case is that the direction was illegal and void and should not have been taken into account by the Commission because:

> (1) it was made for a purpose other than one authorized by the *Broadcasting Act* and thus for an improper purpose;
>
> (2) it deprived the appellant and the public of the right under paragraph 2(*b*) of the *Canadian Charter of Rights and Freedoms* [being Part I of the *Constitution Act, 1982*, Schedule B, *Canada Act 1982*, 1982, c. 11 (U.K.)], to freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication;

(3) it deprived the appellant of its rights under paragraph 1(*a*) of the *Canadian Bill of Rights* [R.S.C. 1970, Appendix III] to the enjoyment of its property and not to be deprived of its property without due process of law.

3 At the centre of the situation from which the problem arises is the fact that the appellant is a wholly-owned subsidiary of New Brunswick Publishing Company, Limited, a company which is owned by James K. Irving, Arthur L. Irving and K.C. Irving Limited and which publishes two daily newspapers in Saint John, New Brunswick. The direction, the text of which is cited later [at page 420], restricts the authority of the Commission to issue broadcasting licences to persons who own or control newspapers circulated in the broadcasting area.

4 The appellant's broadcasting station, CJCH-TV, began television-broadcasting on March 22, 1954. It was the second privately-owned English-language television broadcaster to receive a television-broadcasting licence and its television licences have been successively renewed ever since, permitting it to provide some 30 years of uninterrupted television-broadcasting service. It employs some 104 persons and through its CHSJ-TV station at Saint John, which is a CBC affiliate, and its rebroadcasters it extends the English-language CBC television network throughout the Province of New Brunswick and parts of Nova Scotia and Prince Edward Island. The viewing audience of CHSJ-TV and the rebroadcasters is approximately 100,000 persons. The CBC reserves approximately half of CHSJ-TV's broadcasting time for CBC programs and produces the majority of the news and public affairs programming offered by CHSJ-TV. The appellant has a very substantial investment in transmission and ancillary broadcasting equipment and in premises used to house the equipment and offices required for the operation.

5 The appellant's owners do not want to discontinue the television-broadcasting operation. Nor do they want to dispose of their newspaper-publishing operations. On the other hand, it is apparent from the historical facts appearing in the record as well as the opposition mounted by the Consumers' Association of Canada and others to the renewal of the appellant's television-broadcasting licences that not everyone is persuaded that it is a good thing to have several forms of media communica tion in the same market controlled by a single person or group of persons.

6 As a result of the simultaneous closing on August 27, 1980, of the *Ottawa Journal* and the *Winnipeg Tribune*, a Royal Commission was established to inquire generally into the daily newspaper industry in Canada and specifically into the concentration of the ownership and control of that industry. The Commission and its report take their name from the Chairman, Mr. Tom Kent. The report was tendered by counsel for the appellant at the hearing and was, without objection by the respondent as to its reception or to the timeliness of its being tendered, added to the case on which the proceeding is to be determined.

7 The report proposed that a Canada Newspaper Act be enacted to secure for the press of Canada "the freedom that is essential to a democratic society". The main features of the proposed legislation included:

> (1) It would prohibit significant further concentration of the ownership and control of daily newspapers and of the common ownership of these newspapers and other media. (2) It would correct the very worst cases of concentration that now exist.

8 The report also included the following:

> In New Brunswick, the principle to be expressed in our proposed Newspaper Act requires that the Irving interests divest themselves of either their two-in-one papers in Saint John or their similar Moncton papers. They would also have to decide, under the rules against cross-media ownership, whether to keep the Saint John papers or their television and radio stations.

9 Having regard to the objections of the appellant to the direction, the Commission's report is, in my opinion, admissible as evidence of the situation and context in which the Order in Council was passed.

10 A further item of evidence tendered by the appellant was a printed copy of a speech delivered on May 25, 1982, by the Honourable Jim Fleming, the Minister responsible for the Government's response to the Royal Commission on Newspapers, to the Graduate School of Journalism at the University of Western Ontario. The speech is entitled "Government Proposals on Freedom of the Press in Relation to the Canadian Daily Newspaper Industry". It was received over the objection of the respondent and added to the case for whatever weight, if any, might properly be attributed to it.

11 The speech, which runs for some eight printed pages, includes the following:

> During my consideration of the Canadian newspaper industry I have endeavoured to address three fundamental premises:
>
> — First, newspapers are a special business. They are the printed record. Unlike other media, they provide daily, in-depth coverage of events.
>
> — Secondly, diversity of information sources is a cornerstone of democracy.
>
> — Thirdly, concentration of control by any power, private or public, over the press is an issue of great import and concern.
>
> Having considered the current state of the Canadian newspaper industry in the light of these basic ideas, the Cabinet has concluded that certain governmental actions must be taken to control potential interference with or infringement of freedom of the press in Canada.

> The argument has come from certain quarters that any action by the Government would threaten freedom of the press. I certainly agree that the Government must at all costs avoid intruding or appearing to intrude in a manner intimidating to editorial freedom. On the other hand, for a government to remain passive while concentration or conglomerate ownership can endanger a free press is equally wrong. There arrives thus a point at which failure by the Government to intervene makes the Government an accomplice against a free press through dereliction.
>
> The proposals I shall set forth today are an effort to see the Government take up its responsibilities through the legislative process and then step back. Our goal is to protect a free press by ensuring diversity and avoiding intimidation through public or private power.
>
> . . . . .
>
> Parliament will be asked to pass a Canadian newspaper act and amendments to other acts, which will prohibit any one owner from gaining control, through acquisition or merger, of newspapers whose total circulation would exceed 20 per cent of the average Canadian circulation of daily newspapers. This limit will not be retroactive for the two owners who now exceed the limit but it will not allow them to acquire any additional papers so long as they are in excess of the 20 per cent level. This legislative action will not prohibit an increase in circulation of newspapers already owned.

12 After describing further features of the proposed legislation and the system to be established under it, the Minister proceeded:

> Beyond these legislative initiatives, the Cabinet agreed that the Governor in Council direct the Canadian Radio-television and Telecommunications Commission (CRTC) when considering licence renewals or applications to prohibit newspapers as a class of applicants from holding controlling interest in companies holding federal broadcasting licences in the same market area.
>
> This would be subject only to overriding public interest considerations and/or consequences that would create exceptional and unreasonable hardship. The strictures on cross-media ownership in a particular market would also take into consideration existing competition and dominance by a corporate owner in that area, the decision resting with the CRTC.
>
> In simple language, this decision means that, with clear exceptions, a company will not be allowed to control a newspaper and a television or radio station in the same locale. Given the nature of the marketplace, of course, there may be cities where there is so much cross-media competition that the CRTC would have no justifiable reason to prohibit specific instances of cross-ownership; the directive will take account of this reality. Moreover, there may be very unusual local situations where the CRTC feels that a divestiture would create exceptional

hardship upon an owner; the directive also will take account of this reality but in such a case would insist on clear proof of independent and competitive news services.

13 In my opinion this speech would serve at the least to show that what was being dealt with by the Governor in Council when giving the impugned direction was a matter of general broadcasting policy [2] rather than a measure aimed specifically at the appellant and its ownership of newspapers or generally at the concentration of newspaper ownership. Further, while counsel for the respondent sought to class it with the parliamentary and other speeches made by members of legislative bodies and thus not reliable as evidence of the intent of legislation, this particular speech, having been made by the responsible Minister and purporting as it does to announce policy decided upon by the Cabinet, comes much closer to exposing the motivation of the Governor in Council in passing the Order in Council and appears to me to be akin to and admissible on the same basis as the government pamphlet entitled "The Energy Priority of Newfoundland and Labrador" considered in *Reference re Upper Churchill Water Rights Reversion Act*, [1984] 1 S.C.R. 297. There McIntyre J., for the Supreme Court, said [at page 319]:

> I am also of the view that the government pamphlet entitled, "*The Energy Priority of Newfoundland and Labrador*", may be considered. The purpose of this pamphlet, explained in the pamphlet itself, is to inform the financial community of the Government's reasons for enacting the *Reversion Act*. It was published by the Government less than one month before the *Reversion Act* was given Royal Assent, and actually includes a copy of the Act. It is my opinion that this pamphlet comes within the categorization of materials which are "not inherently unreliable or offending against public policy", to use the words of Dickson J. quoted above, and are receivable as evidence of the intent and purpose of the Legislature of Newfoundland in enacting the *Reversion Act*.

14 The speech, however, appears to me to add little if anything to what becomes apparent from the record, the Kent report and the explanatory note which is appended to the direction itself.

15 The direction and the explanatory note follow:

> Registration
>
> SOR/82-746 29 July, 1982
>
> **BROADCASTING ACT**
>
> **Direction to the CRTC on Issue and Renewal of Broadcasting Licences to Daily Newspaper Proprietors**
>
> P.C. 1982-2294 29 July, 1982

His Excellency the Governor General in Council, on the recommendation of the Minister of Communications, pursuant to subparagraph 22(1)(*a*)(iii) and section 27 of the Broadcasting Act, is pleased hereby to issue the annexed Direction to the Canadian Radio-television and Telecommunications Commission respecting the issue and renewal of broadcasting licences to daily newspaper proprietors.

DIRECTION TO THE CANADIAN RADIO-TELEVISION AND TELECOMMUNICATIONS COMMISSION RESPECTING THE ISSUE AND RENEWAL OF BROADCASTING LICENCES TO DAILY NEWSPAPER PROPRIETORS

Short Title

1. This Direction may be cited as the *Direction to the CRTC on Issue and Renewal of Broadcasting Licences to Daily Newspaper Proprietors*.

Definitions

2. For the purposes of this Direction, "daily newspaper" means a newspaper that is generally published and circulated five or more days per week; and "proprietor of a daily newspaper" means a person who, in the opinion of the Commission, alone or jointly or in concert with one or more other persons, effectively owns or controls or is in a position to effectively own or control directly or indirectly an enterprise engaged in the publication of a daily newspaper and includes, where the enterprise is a corporation having share capital, a person who, in the opinion of the Commission, alone or jointly or in concert with one or more other persons, effectively owns or controls or is in a position to effectively own or control the corporation, whether directly through the ownership of shares of the corporation or indirectly through a trust, a contract, the ownership of shares of any other corporation, the holding of a significant portion of the outstanding debt of the corporation or by any other manner whatever.

Direction

3. The Canadian Radio-television and Telecommunications Commission is hereby directed that, on and after July 29, 1982, broadcasting licences may not be issued and renewals of broadcasting licences may not be granted to an applicant who is a member of the class described in section 4.

4. The class of applicants referred to in section 3 consists of

(*a*) the proprietors of daily newspapers, and

(*b*) the applicants who, in the opinion of the Commission, are effectively owned or controlled, or are in a position to be effectively owned or controlled directly or indirectly, by the proprietor of a daily newspaper

where the major circulation area of the daily newspaper substantially encompasses the major market area served or to be served by the broadcasting undertaking.

5. Where the Commission is satisfied that a refusal to grant a broadcasting licence or renewal applied for by an applicant of the class described in section 4 would be contrary to overriding public interest considerations taking into consideration all relevant factors including consequences that would adversely affect service to the public or create exceptional or unreasonable hardship to the applicant and the level of existing competition in the area served or to be served under the broadcasting licence, the Commission may, notwithstanding section 3, grant a licence or a renewal thereof.

6. Nothing in this Direction shall be construed as limiting the power of the Governor in Council to direct that broadcasting licences may not be issued and amendments or renewals thereof may not be granted to applicants of classes other than the class described in section 4 or as limiting the power of the Commission, in carrying out its objects, to refuse to issue a broadcasting licence to or to grant an amendment or renewal thereof to an applicant of a class other than the class described in section 4.

EXPLANATORY NOTE

(This note is not part of the Direction, but is intended only for information purposes.)

This Direction is to ensure that, with certain exceptions, enterprises engaged in the publication of daily newspapers shall be prohibited from owning or controlling broadcasting undertakings operating in the same market area for the general purpose of fostering independent, competitive and diverse sources of news and viewpoints within Canada.

16 That the appellant fell within the definition of "proprietor of a daily newspaper" in section 2 and the prohibition of sections 3 and 4 of this direction was not a subject of argument on the appeal. The Commission found the prohibition applicable but went on to hold, under section 5, that:

While the Commission acknowledges that there may be some hardship for the licensee, as well as other potential adverse consequences if the licences issued to NB Broadcasting were not renewed, the Commission is not satisfied that a refusal to grant renewal would be contrary to the overriding public interest considerations contemplated under section 5 of the Direction, *but for the fact* that the licences in question all expire on 30 September 1983 with the result that there would be a sudden cessation of the only source of CBC English-language television service in New Brunswick. Such a cessation of service would be contrary to overriding public interest considerations in that it would adversely affect service to the public. Accordingly, the Commission renews the licences for CHSJ-TV Saint John and its rebroadcasters in New Brunswick for a term expiring 1 January 1986. This term will provide sufficient time for NB Broadcasting to rearrange its affairs or for other arrangements to be made which will

ensure that the people of New Brunswick are not deprived of the CBC network service. The Commission intends, at this time, to call the licensee to a public hearing early in 1985 to review the overall situation.

The improper purpose point

17 The appellant's submissions on its first point were:

(1) that the Kent Commission report and the Fleming speech show that the direction was not issued in furtherance of the purposes of the *Broadcasting Act* as enumerated in section 3 thereof, but rather was issued for the extraneous purpose of regulating concentration of ownership in the Canadian newspaper industry, that in object, purpose and effect it was not aimed at broadcasting, but rather newspapers; and further,

(2) that in the result the Governor in Council, which had no statutory or other authority to give directions in regard to the ownership of newspapers exceeded its jurisdiction in issuing the direction because it was not issued in furtherance of the purposes of the *Broadcasting Act* as set out in section 3 thereof, but rather was issued for the extraneous and improper purpose of regulating concentration of ownership in the Canadian newspaper industry.

18 While the policy stated in section 3 of the *Broadcasting Act* appears to govern and limit the objects to be implemented by the CRTC, I do not think what is set out in that policy is exhaustive of the purposes of the Act or that it limits the purposes or reasons for which the powers of the Governor in Council to prescribe classes of persons to whom broadcasting licences may not be granted. As I see it the power conferred by subsection 27(1) to issue directions precluding the issue of licences to particular classes of persons is exercisable by the Governor in Council for any valid reason of public policy whether or not it is one expressed in section 3. I may add that I do not regard the reference to section 3 in subparagraph 22(1)(*a*)(iii), which permits an exception in respect of persons who held a licence on April 1, 1968, from a general prohibition of a particular class, as having any restrictive effect on the otherwise broad power conferred on the Governor in Council. Since the only reference in section 3 to ownership and control of broadcasting undertakings is that in paragraph (*b*) stipulating that the broadcasting system should be effectively owned and controlled by Canadians, there would be little point in conferring a power to give directions on the subject if all that could be done under it were to direct that licences be not issued to persons who were not Canadians. To deny it scope for differentiating on grounds of public policy between particular classes of Canadians is to deny the power any practical scope at all.

19 It seems to me to follow from this interpretation of subsection 27(1) and subparagraph 22(1)(*a*)(iii) that even if it can be said that the direction was not issued in furtherance of a purpose of the Act set out in section 3 and even if it can be said that the direction was issued for a purpose concerned with a problem of public policy relating not merely to the concentration of ownership of newspapers, which is regarded as a problem in itself, but relating to a broader problem of

concentration of ownership and control of both newspapers and broadcasting operations, as in my view it was, it cannot be affirmed either that the direction was not made in furtherance of a purpose of the *Broadcasting Act* or that it was made solely for the purpose of regulating ownership and control of newspapers. On its face it is a direction relating to who may not hold broadcasting licences. In fact what it does is to restrict the classes of who may hold broadcasting licences. It says nothing and does nothing to regulate either the concentration of ownership of newspapers or the owners of newspapers. They are as free as ever to own and control newspapers. But if they own newspapers it is not regarded as appropriate for them to hold broadcasting licences as well for the areas where these newspapers circulate.

20 On this view the appellant's objection would fail. But even if the interpretation so put on the statute is incorrect, the objection, in my opinion, would fail as well because such a direction falls within the policy set out in section 3 and thus within the purposes of the Act. The section reads in part:

> *3.* It is hereby declared that
>
> > (*a*) broadcasting undertakings in Canada make use of radio frequencies that are public property and such undertakings constitute a single system, herein referred to as the Canadian broadcasting system, comprising public and private elements;
> >
> > . . . . .
>
> and that the objectives of the broadcasting policy for Canada enunciated in this section can best be achieved by providing for the regulation and supervision of the Canadian broadcasting system by a single independent public authority.

21 What the section does is to declare a policy and how it can best be achieved.

22 Coming next to section 15, it is provided that:

> *15.* Subject to this Act and the *Radio Act* and any directions to the Commission issued from time to time by the Governor in Council under the authority of this Act, the Commission shall regulate and supervise all aspects of the Canadian broadcasting system with a view to implementing the broadcasting policy enunciated in section 3 of this Act.

23 Notwithstanding what is declared at the end of section 3, the opening words of this provision subtract from and restrict what the Commission is to regulate and supervise with a view to implementing the policy enunciated in section 3. Assuming that the power under subsection 27(1) and subparagraph 22(1)(*a*)(iii) is one of the powers that would otherwise be included in the general power to "regulate and supervise all aspects of the Canadian broadcasting system with a view to implementing the broadcasting policy enunciated in section 3" and is thus exercisable only to implement policies so enunciated, it seems to me that the authority conferred on the Governor in Council by subsection 27(1) and subparagraph 22(1)(*a*)(iii) is broad enough to enable the Governor

in Council to decide who or what classes of persons or corporations should be licensed to make use of the radio frequencies that are declared by paragraph 3(*a*) to be public property. To do that seems to me to fall easily within the meaning of "regulation and supervision of all aspects of the Canadian broadcasting system" of which system broadcasting undertakings in Canada are, under paragraph 3(*a*), a part.

24 Accordingly, I would reject the appellant's first point.

The Charter of Rights point

25 The appellant's submission on the Charter proceeds thus:

> (1) since freedom of the press and other media of communication is constitutionally guaranteed, the requirement of a licence for the operation of a broadcasting undertaking is in breach of paragraph 2(*b*) of the Charter;
>
> (2) it is acknowledged, however, that the requirement of a licence is a limit which can be demonstrably justified in a free and democratic society because:
>
> > (a) as set out in section 3 of the *Broadcasting Act* radio frequencies are a public property which have to be allotted according to agreement in order to ensure a fair allocation of available frequencies, and
> >
> > (b) there has to be an individual (company) responsible for civil and criminal liability;
>
> (3) however, the direction, in so far as it denies broadcasting licences to "newspaper proprietors", is inconsistent with and in violation of the appellant's right of freedom of the press and other media of communication guaranteed to everyone by paragraph 2(*b*) of the Charter. Further, in so far as the direction denies to the public broadcasting service because a newspaper proprietor controls a broadcasting undertaking, it is inconsistent with and in violation of the rights and freedoms guaranteed to everyone by paragraph 2(*b*) of the Charter.

26 In my opinion, the argument confuses the freedom guaranteed by the Charter with a right to the use of property and is not sustainable. The freedom guaranteed by the Charter is a freedom to express and communicate ideas without restraint, whether orally or in print or by other means of communication. It is not a freedom to use someone else's property to do so. It gives no right to anyone to use someone else's land or platform to make a speech, or someone else's printing press to publish his ideas. It gives no right to anyone to enter and use a public building for such purposes. And it gives no right to anyone to use the radio frequencies which, before the enactment of the Charter, had been declared by Parliament to be and had become public property and subject to the licensing and other provisions of the *Broadcasting Act*. The appellant's freedom to broadcast what it wishes to communicate would not be denied by the refusal of a licence to operate a broadcasting undertaking. It would have the same freedom as anyone else to air its information by purchasing

time on a licensed station. Nor does the Charter confer on the rest of the public a right to a broadcasting service to be provided by the appellant. Moreover, since the freedom guaranteed by paragraph 2(*b*) does not include a right for anyone to use the property of another or public property, the use of which was subject to and governed by the provisions of a statute, there is, in my opinion, no occasion or need to resort to section 1 of the Charter to justify the licensing system established by the *Broadcasting Act*.

27 Accordingly, I would reject the appellant's submission.

The Canadian Bill of Rights point

28 The appellant's submission on this point invoked that part of paragraph 1(*a*)[3] of the *Canadian Bill of Rights* which recognizes and declares as existing human rights and fundamental freedoms the right of the individual to enjoyment of property, and the right not to be deprived thereof except by due process of law. The submission was that the principal purpose of the direction was to force the appellant to sell its broadcasting station and rebroadcasters to the CBC, that the word "law" in the expression "due process of law" means not only statutory law but includes what are known as the principles of natural justice, that the direction was issued without notice thereof being given to the appellant, with the result that the appellant was denied the opportunity to make representations or be otherwise heard with respect to the issuance and content of the direction and that the appellant was thereby denied its rights, as protected by paragraph 1(*a*) of the *Canadian Bill of Rights*, to due process of law.

29 I am of the opinion that the word "individual" in section 1 of the *Canadian Bill of Rights* does not include a corporation[4] and that the text of section 1 of the statute does not apply or secure rights to the appellant. However, what is recognized and declared by the statute are existing fundamental legal rights and I know of no reason for concluding that a corporation is not entitled at common law to the same rights as a natural person to the enjoyment of property and the right not to be deprived thereof except by due process of law.

30 Section 2 of the Bill goes on to provide that:

> *2.* Every law of Canada shall, unless it is expressly declared by an Act of the Parliament of Canada that it shall operate notwithstanding the *Canadian Bill of Rights*, be so construed and applied as not to abrogate, abridge or infringe or to authorize the abrogation, abridgment or infringement of any of the rights or freedoms herein recognized and declared, and in particular, no law of Canada shall be construed or applied so as to
>
> . . . . .
>
> (*e*) deprive a person of the right to a fair hearing in accordance with the principles of fundamental justice for the determination of his rights and obligations;

31 In this section the word "person" is used in contexts which suggest that it is concerned with natural persons but I see no compelling reason why the word should not be interpreted as referring as well to corporations wherever the subject-matter of a provision in which it is found can have application to corporations. Paragraph 2(*e*) is, in my view, such a provision.

32 Assuming then that paragraph 2(*e*) would apply, a question that arises is what were the "rights" of the appellant for the determination of which the appellant was entitled to a fair hearing in accordance with the principles of fundamental justice.

33 It appears to me that what the appellant had at the time the direction was issued was:

> (1) a television broadcasting licence or licences issued under the *Broadcasting Act* authorizing the carrying on of a television broadcasting operation for a period terminating on September 30, 1983;
>
> (2) a pending application before the CRTC for renewal of the licences for a further period of five years; and
>
> (3) a reasonable expectation, arising from its having had licences and renewals of licences over a period of 28 years, from its record of broadcasting services provided over that period and from its having a considerable investment in equipment and facilities, that, on the basis of the authority of the Commission a month earlier when the application for renewal was initiated, renewals would be granted for some portion, if not for the whole, of the five-year period.

34 The appellant had, however, no vested or other property right to have its licences renewed or to have the authority of the Commission maintained either until the disposition of its application or for the future.

35 It is, I think, in this context that the alleged entitlement of the appellant to an opportunity to make representations or be otherwise heard before the direction was made, must be considered. The direction in no way affected the existing licence referred to above as (1). Nor did it put an end to the application for renewal referred to as (2). That is evident from the fact that the application succeeded in part. What the direction did was to affect adversely the expectation referred to as (3) which the appellant had of a longer renewal than was in fact granted.

36 Was the appellant then entitled to a hearing, whether by an opportunity to present representations or to be otherwise heard, as to why the direction should not be made? I have had some doubts on this point because of the fact that the direction was made at a time when the appellant's application for renewal had been initiated and was pending before the CRTC, but on reflection I think that for several reasons the answer must be negative.

37 First, what was adversely affected by the direction was nothing but an expectation. It was not something recognizable as a property right.

38 Second, while there seems to be no reason to doubt that the direction profoundly affected the appellant's prospects for continuing indefinitely to own and operate in the same market area both its broadcasting and its newspaper publishing enterprises or that the direction in fact poses for the appellant the prospect that at some future time it may not succeed in obtaining a renewal of its broadcasting licences if it continues to carry on its newspaper operations and while it may also be, because of what is in the Kent report, that the appellant's situation was one that was in contemplation when the direction was made, to say that the principal purpose of the direction was to force the appellant to sell its television station and rebroadcasters to the CBC and that in that regard the direction was specifically aimed at the appellant is, in my opinion, not warranted on the record before the Court. On its face the direction is not aimed at anyone in particular but is general in scope and in application and there is nothing in the record which establishes that it is applicable only to the appellant's situation or that it has only been applied to the appellant.

39 Next, the authority conferred on the Governor in Council by subsection 27(1) and subparagraph 22(1)(*a*)(iii) of the *Broadcasting Act*, in my opinion, is neither judicial nor quasi-judicial nor administrative in nature. It is, in my view, legislative in character. It authorizes the making of orders to the CRTC respecting *inter alia* the classes of applicants, not individual applicants, to whom broadcasting licences or renewals thereof may not be granted. The authority is not restricted by wording dealing with bases on which particular classes may be disqualified. That is left for determination by the Governor in Council for such reasons of public policy as the Governor in Council may adopt. It is also not without significance on this point that subsection 27(2) requires that any order made under subsection 27(1) be not only published forthwith in the *Canada Gazette* but be laid before Parliament within fifteen days if Parliament is then sitting and if Parliament is not then sitting on any of the first fifteen days next thereafter that Parliament is sitting. This affords Parliament itself the opportunity to consider what has been done and to revoke or alter the direction if it sees fit to do so. In my view these features of the statute tend to show the legislative character of the direction and of the authority to make it.

40 In the absence of specific requirements prescribed by statute authorities to legislate have not heretofore been considered to give rise to a right to be heard for persons likely to be adversely affected by the exercise of the authority. Thus in *Attorney General of Canada v. Inuit Tapirisat of Canada et al.*, [1980] 2 S.C.R. 735, Estey J., in delivering the judgment of the Supreme Court, said [at page 758]:

> It is clear that the orders in question in *Bates* and the case at bar were legislative in nature and I adopt the reasoning of Megarry J. to the effect that no hearing is required in such cases. I

realize, however, that the dividing line between legislative and administrative functions is not always easy to draw: see *Essex County Council v. Minister of Housing* ((1967), 66 L.G.R. 23).

Earlier the learned Judge had cited the following passage from the judgment of Megarry J., in *Bates v. Lord Hailsham of St. Marylebone, et al.*, [1972] 1 W.L.R. 1373 (Ch.D.) [at page 1378]: [5]

> Let me accept that in the sphere of the so-called quasi-judicial the rules of natural justice run, and that in the administrative or executive field there is a general duty of fairness. Nevertheless, these considerations do not seem to me to affect the process of legislation, whether primary or delegated. Many of those affected by delegated legislation, and affected very substantially, are never consulted in the process of enacting that legislation, and yet they have no remedy ... I do not know of any implied right to be consulted or make objections, or any principle upon which the courts may enjoin the legislative process at the suit of those who contend that insufficient time for consultation and consideration has been given.

41 Finally, the procedure prescribed by section 27, that is to say, by order, such order to be published in the *Canada Gazette* and laid before Parliament, nowhere provides for affording any member of a class or the class as a whole an opportunity to make representations or to be otherwise heard before such an order is made.

42 Accordingly I would reject the appellant's submission.

43 The appeal and the review application therefore fail and should be dismissed.

***Pratte J.*:**

44 I agree.

***Ryan J.*:**

45 I concur.

Solicitors of record:
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Deputy Attorney General of Canada for respondent.

Footnotes

1 *22.*(1) No broadcasting licence shall be issued, amended or renewed pursuant to this Part
(*a*) in contravention of any direction to the Commission issued by the Governor in Council under the authority of this Act respecting

. . . . .

(iii) the classes of applicants to whom broadcasting licences may not be issued or to whom amendments or renewals thereof may not be granted and any such class may, notwithstanding section 3, be limited so as not to preclude the amendment or renewal of a broadcasting licence that is outstanding on the 1st day of April 1968; and

. . . . .

27.(1) The Governor in Council may by order from time to time issue directions to the Commission as provided for by subsection 18(2) and paragraph 22(1)(*a*).

2 See *Thorne's Hardware Ltd. et al. v. The Queen et al.*, [1983] 1 S.C.R. 106, *per* Dickson J., (as he then was), at p. 115.

3 *1*. It is hereby recognized and declared that in Canada there have existed and shall continue to exist without discrimination by reason of race, national origin, colour, religion or sex, the following human rights and fundamental freedoms, namely,
(*a*) the right of the individual to life, liberty, security of the person and enjoyment of property, and the right not to be deprived thereof except by due process of law;

4 See *Regina v. Colgate Palmolive Ltd.* (1971), 5 C.P.R. (2d) 179 (G.S.P. Ct.).

5 [1980] 2 S.C.R. 735, at p. 757.