PUBLIC

CT-2024-010

THE COMPETITION TRIBUNAL

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

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

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

B E T W E E N:

COMMISSIONER OF COMPETITION

Applicant

and

GOOGLE CANADA CORPORATION AND GOOGLE LLC

Respondents

BOOK OF AUTHORITIES OF GOOGLE CANADA CORPORATION AND GOOGLE LLC
VOLUME 18 OF 20

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v.

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and

Attorney General of Quebec,
Attorney General of British Columbia,
Attorney General of Alberta,
Pivot Legal Society,
John Howard Society of Canada,
Canadian Civil Liberties Association,
British Columbia Civil Liberties Association,
Advocates' Society,
Canadian Bar Association,
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c.

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et

Procureur général du Québec,
procureur général de la Colombie-Britannique,
procureur général de l'Alberta,
Pivot Legal Society,
Société John Howard du Canada,
Association canadienne des libertés civiles,
Association des libertés civiles de la Colombie-Britannique,
Advocates' Society,
Association du Barreau canadien,
Association canadienne pour les armes à feu,
Association canadienne pour l'intégration communautaire et Clinique juridique africaine canadienne *Intervenants*

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and

Attorney General of Quebec, Attorney General of British Columbia, Attorney General of Alberta, Pivot Legal Society, Canadian Civil Liberties Association, British Columbia Civil Liberties Association and Canadian Association for Community Living *Interveners*

Indexed as: R. *v.* Nur

2015 SCC 15

File Nos.: 35678, 35684.

2014: November 7; 2015: April 14.

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

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Constitutional law — Charter of Rights — Cruel and unusual treatment or punishment — Sentencing — Mandatory minimum sentence — Firearms — Accused convicted of possessing loaded prohibited firearms — Accused sentenced to terms longer than mandatory minimum terms of imprisonment provided for in s. 95(2) of Criminal Code — Whether mandatory minimum imprisonment terms result in cruel and unusual punishment on accused — If not, whether s. 95(2)'s reasonably foreseeable applications would impose cruel and unusual punishment on other offenders — If so, whether infringement justifiable — Canadian Charter of Rights and Freedoms, ss. 1, 12 — Criminal Code, R.S.C. 1985, c. C-46, s. 95.

N and C were convicted of possessing loaded prohibited firearms contrary to s. 95(1) of the *Criminal Code*. They were sentenced under s. 95(2)(*a*)(i) and (ii) which provided for three and five year mandatory minimum imprisonment terms, to 40 months and 7 years imprisonment respectively. In N's case, the trial judge

Sidney Charles *Intimé*

et

Procureur général du Québec, procureur général de la Colombie-Britannique, procureur général de l'Alberta, Pivot Legal Society, Association canadienne des libertés civiles, Association des libertés civiles de la Colombie-Britannique et Association canadienne pour l'intégration communautaire *Intervenants*

Répertorié : R. *c.* Nur

2015 CSC 15

N^{os} du greffe : 35678, 35684.

2014 : 7 novembre; 2015 : 14 avril.

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

EN APPEL DE LA COUR D'APPEL DE L'ONTARIO

Droit constitutionnel — Charte des droits — Traitements ou peines cruels et inusités — Détermination de la peine — Peine minimale obligatoire — Armes à feu — Accusés déclarés coupables de possession d'armes à feu prohibées chargées — Accusés condamnés à des peines supérieures aux peines minimales obligatoires d'emprisonnement prévues à l'art. 95(2) du Code criminel — Les peines minimales obligatoires d'emprisonnement emportent-elles l'infliction de peines cruelles et inusitées aux accusés? — Dans la négative, les applications raisonnablement prévisibles de l'art. 95(2) infligeront-elles des peines cruelles et inusitées à d'autres délinquants? — Dans l'affirmative, l'atteinte est-elle justifiable? — Charte canadienne des droits et libertés, art. 1, 12 — Code criminel, L.R.C. 1985, c. C-46, art. 95.

N et C ont été déclarés coupables de possession d'armes à feu prohibées chargées, une infraction prévue au par. 95(1) du *Code criminel*. Condamnés en application des sous-al. 95(2)*a*)(i) et (ii), lesquels prévoient des peines minimales obligatoires de trois et cinq ans, les deux accusés ont reçu respectivement des peines de held that the three-year minimum sentence imposed by s. 95(2)(*a*)(i) did not offend either s. 12 or s. 15 of the *Charter*. However, he concluded that the two-year gap between the one-year maximum sentence if the Crown proceeded summarily and the three-year minimum sentence if the Crown proceeded on indictment offended s. 7 because it was arbitrary and was not justified under s. 1. Nevertheless, the trial judge held that N was not personally affected by the gap, and therefore dismissed the s. 7 claim.

In C's case, the judge also dismissed the s. 12 challenge. She held that the five-year mandatory minimum sentence imposed by s. 95(2)(*a*)(ii) was not grossly disproportionate for C, in light of the gravity of his crimes. She also held that C had failed to put forward any reasonable hypothetical cases in which the application of the five-year mandatory minimum sentence would be grossly disproportionate.

The Court of Appeal held that the mandatory minimum terms of imprisonment in s. 95(2)(*a*) resulted in grossly disproportionate sentences in reasonable hypothetical cases at the licensing end of the s. 95 spectrum, and therefore held that they violate s. 12 of the *Charter*. However, the Court of Appeal held that the sentences imposed on N and C were appropriate and should be upheld.

Held (Rothstein, Moldaver and Wagner JJ. dissenting): The appeals should be dismissed.

Per McLachlin C.J. and LeBel, Abella, Cromwell, Karakatsanis and Gascon JJ.: The mandatory minimum sentences imposed by s. 95(2)(*a*)(i) and (ii) of the *Criminal Code* violate s. 12 of the *Charter* and are null and void under s. 52 of the *Constitution Act, 1982*. However, N and C's sentences were appropriate and are upheld. In most cases, including those of N and C, the mandatory minimum sentences of three and five years do not constitute cruel and unusual punishment. But in some reasonably foreseeable cases, they may do so.

When a mandatory minimum sentencing provision is challenged under s. 12, two questions arise. The first is whether the provision imposes cruel and unusual punishment (i.e. a grossly disproportionate sentence) on the particular individual before the court. If the answer is no, the second question is whether the provision's reasonably

40 mois et 7 ans d'emprisonnement. Dans le dossier de N, le juge du procès a conclu que la peine minimale obligatoire de trois ans prévue au sous-al. 95(2)*a*)(i) ne contrevient ni à l'art. 12 ni à l'art. 15 de la *Charte*. Toutefois, l'écart de deux ans entre la peine maximale d'un an — sur procédure sommaire — et la peine minimale de trois ans — sur mise en accusation — ne respecte pas selon lui l'art. 7 parce qu'il est arbitraire et qu'il ne peut se justifier par application de l'article premier. Le juge est néanmoins arrivé à la conclusion que cet écart ne pénalise pas N, de sorte qu'il a rejeté la prétention fondée sur l'art. 7.

Dans le dossier de C, la juge du procès a également rejeté la contestation fondée sur l'art. 12. À son avis, la peine minimale obligatoire de cinq ans d'emprisonnement prévue au sous-al. 95(2)*a*)(ii) n'est pas totalement disproportionnée dans le cas de C étant donné la gravité de ses crimes. Ce dernier n'a d'ailleurs invoqué aucune situation hypothétique raisonnable où il aurait été totalement disproportionné d'infliger la peine minimale obligatoire de cinq ans.

La Cour d'appel a opiné que les peines minimales obligatoires d'emprisonnement prévues au sous-al. 95(2)*a*) se traduisent par des peines totalement disproportionnées dans des situations hypothétiques raisonnables où l'infraction commise se situe à l'extrémité du continuum d'application de l'art. 95 correspondant aux infractions réglementaires, et qu'elles violent donc l'art. 12 de la *Charte*. Elle a toutefois conclu que les peines imposées à N et à C sont appropriées et doivent être confirmées.

Arrêt (les juges Rothstein, Moldaver et Wagner sont dissidents) : Les pourvois sont rejetés.

La juge en chef McLachlin et les juges LeBel, Abella, Cromwell, Karakatsanis et Gascon : Les peines minimales obligatoires prévues aux sous-al. 95(2)*a*)(i) et (ii) du *Code criminel* contreviennent à l'art. 12 de la *Charte* et sont donc inopérantes par application de l'art. 52 de la *Loi constitutionnelle de 1982*. Les peines infligées à N et à C sont toutefois appropriées et doivent être confirmées. Dans la plupart des cas — dont ceux de N et de C —, les peines minimales obligatoires de trois et cinq ans ne constituent pas des peines cruelles et inusitées. Mais, dans certaines situations raisonnablement prévisibles, elles le peuvent.

Lorsque la constitutionnalité d'une disposition prévoyant une peine minimale obligatoire est contestée au regard de l'art. 12, deux questions se posent. Premièrement, la disposition inflige-t-elle une peine cruelle et inusitée (c.-à-d. une peine totalement disproportionnée) à l'accusé? Si la réponse est négative, il faut se demander foreseeable applications would impose cruel and unusual punishment on other offenders. This approach is consistent with the long and settled jurisprudence of this Court relating to *Charter* review generally and to s. 12 review in particular, is workable, and provides sufficient certainty. There is no reason to overrule this jurisprudence, especially as the effect would be to diminish *Charter* protection.

en deuxième lieu si les applications raisonnablement prévisibles de la disposition infligeront à d'autres délinquants des peines cruelles et inusitées. La démarche s'harmonise avec la jurisprudence de la Cour, établie de longue date, concernant le contrôle constitutionnel au regard de la *Charte* en général et de son art. 12 en particulier, elle est applicable et elle assure une certitude suffisante. Il n'existe aucune raison de revenir sur cette jurisprudence, d'autant plus qu'un tel revirement aurait pour effet d'affaiblir une protection offerte par la *Charte*.

Where mandatory minimum sentencing laws are challenged under s. 12 on the basis of their reasonably foreseeable application to others, the question is what situations may reasonably arise, not whether such situations are likely to arise in the general day-to-day application of the law. Only situations that are remote or far-fetched are excluded.

Lorsque la constitutionnalité d'une disposition prévoyant une peine minimale obligatoire est contestée au regard de l'art. 12 et en fonction de son application raisonnablement prévisible à d'autres personnes, on doit se demander quelles situations sont raisonnablement susceptibles de se présenter, et non pas si une situation se présentera vraisemblablement dans le cadre de l'application générale et habituelle de la loi. Seules sont écartées les situations invraisemblables ou n'ayant qu'un faible rapport avec l'espèce.

In this case, N and C do not argue that the mandatory minimum terms of imprisonment in s. 95(2) are grossly disproportionate as applied to them. Rather, they argue that those mandatory minimum terms of imprisonment are grossly disproportionate as they apply to other offenders.

Dans la présente affaire, N et C font valoir non pas que les peines minimales obligatoires d'emprisonnement prévues au par. 95(2) sont totalement disproportionnées dans leurs cas, mais bien qu'elles le sont lorsqu'elles s'appliquent à d'autres délinquants.

Turning first to s. 95(2)(*a*)(i), the question is whether the three-year minimum term of imprisonment would result in grossly disproportionate sentences in reasonably foreseeable cases. The answer to this question is yes.

Pour ce qui est d'abord du sous-al. 95(2)*a*)(i), la question qui se pose est celle de savoir si la peine minimale de trois ans d'emprisonnement emportera l'infliction de peines totalement disproportionnées dans des situations raisonnablement prévisibles. La réponse est oui.

Section 95(1) casts its net over a wide range of potential conduct. Most cases within the range may well merit a sentence of three years or more, but conduct at the far end of the range may not. At that far end stands, for example, the licensed and responsible gun owner who stores his unloaded firearm safely with ammunition nearby, but makes a mistake as to where it can be stored. Given the minimal blameworthiness of this offender and the absence of any harm or real risk of harm flowing from the conduct, a three-year sentence would be disproportionate. Similar examples can be envisaged. The bottom line is that s. 95(1) foreseeably catches licensing offences that involve little or no moral fault and little or no danger to the public.

Le paragraphe 95(1) vise une vaste gamme de comportements potentiels dont la plupart peuvent fort bien justifier l'infliction d'une peine de trois ans ou plus, mais peut-être pas ceux qui se situent à une extrémité du continuum d'application. À cette extrémité correspond par exemple le cas du propriétaire responsable d'une arme, titulaire d'un permis, qui entrepose son arme à feu non chargée de façon sécuritaire avec des munitions à proximité, mais qui se méprend sur le lieu d'entreposage autorisé. Vu la faible culpabilité morale de ce délinquant et l'absence de préjudice ou de risque réel qu'un préjudice découle de son comportement, une peine carcérale de trois ans serait disproportionnée. D'autres cas semblables peuvent être envisagés. Essentiellement, on peut prévoir que le par. 95(1) s'applique à des infractions réglementaires qui comportent une culpabilité morale minime, voire nulle, et qui n'exposent le public à aucun danger ou presque.

Firearms are inherently dangerous and the state is entitled to use sanctions to signal its disapproval of careless practices and to discourage gun-owners from making

Certes, les armes à feu sont foncièrement dangereuses, et l'État peut recourir à des sanctions pour signaler sa désapprobation des pratiques négligentes et décourager la mistakes, to be sure. But a three-year term of imprisonment for a person who has essentially committed a licensing infraction is totally out of sync with the norms of criminal sentencing set out in the s. 718 of the *Criminal Code* and legitimate expectations in a free and democratic society. As the Court of Appeal concluded, there exists a cavernous disconnect between the severity of the licensing-type offence and the mandatory minimum three-year term of imprisonment. Consequently, s. 95(2)(*a*)(i) breaches s. 12 of the *Charter*.

As for s. 95(2)(*a*)(ii), there is little doubt that in many cases those who commit second or subsequent offences should be sentenced to terms of imprisonment, and some for lengthy terms. The seven-year term of imprisonment imposed on C is an example. But the five-year mandatory minimum term of imprisonment would be grossly disproportionate for less serious offenders. For them, the five-year term goes far beyond what is necessary in order to protect the public, to express moral condemnation of the offenders, and to discourage others from engaging in such conduct. Therefore, s. 95(2)(*a*)(ii) violates s. 12 of the *Charter*.

These s. 12 *Charter* violations are not justified under s. 1. Although the government has not established that mandatory minimum terms of imprisonment act as a deterrent, a rational connection exists between mandatory minimums and the goals of denunciation and retribution. However, the government has not met the minimal impairment requirement under s. 1, as there are less harmful means of achieving its legislative goal. In addition, given the conclusion that the mandatory minimum terms of imprisonment in s. 95(2) when the Crown proceeds by indictment are grossly disproportionate, the limits are not a proportionate justification under s. 1. It follows that the mandatory minimum terms of imprisonment imposed by s. 95(2) are unconstitutional.

This conclusion makes it unnecessary to consider N and C's arguments that s. 95(2) violates s. 7 of the *Charter*.

Per Rothstein, Moldaver and Wagner JJ. (dissenting): The reasonable hypothetical approach under s. 12 of the *Charter* does not justify striking down s. 95(2) of the *Criminal Code*. The hypothetical licensing-type cases relied upon by the majority are not grounded in experience or common sense. First, experience shows that there is not a single licensing-type case over the entire

méprise chez les propriétaires d'armes à feu. Or, infliger une peine de trois ans d'emprisonnement à une personne qui a essentiellement commis une infraction réglementaire déroge totalement aux normes de détermination de la peine énoncées à l'art. 718 du *Code criminel* et aux attentes légitimes des citoyens dans une société libre et démocratique. Comme l'a conclu la Cour d'appel, il y a discordance totale entre la gravité de l'infraction réglementaire et la peine minimale obligatoire de trois ans d'emprisonnement. Par conséquent, le sous-al. 95(2)*a*)(i) contrevient à l'art. 12 de la *Charte*.

Pour ce qui est du sous-al. 95(2)*a*)(ii), il ne fait aucun doute que, dans bien des cas, le délinquant qui récidive doit être condamné à une peine carcérale et que, parfois, il faut lui infliger une peine de longue durée. La peine de sept ans d'emprisonnement infligée à C constitue un bon exemple. Toutefois, il serait totalement disproportionné d'infliger une peine minimale obligatoire de cinq ans d'emprisonnement à l'auteur d'une infraction de moindre gravité. Dans ce cas, la peine de cinq ans d'emprisonnement dépasse largement ce qu'exigent la protection du public, la réprobation morale du délinquant et la dissuasion d'autrui de faire de même. En conséquence, le sous-al. 95(2)*a*)(ii) viole l'art. 12 de la *Charte*.

Ces violations de l'art. 12 de la *Charte* ne peuvent se justifier par application de l'article premier. L'État n'a pas établi que les peines minimales obligatoires d'emprisonnement avaient un effet dissuasif, mais il existe un lien rationnel entre ces peines et les objectifs de dénonciation et de châtiment. Toutefois, l'État n'a pas satisfait à l'exigence de l'atteinte minimale, car il existe des moyens moins préjudiciables d'atteindre l'objectif législatif. En outre, vu la conclusion selon laquelle les peines minimales obligatoires d'emprisonnement que prévoit le par. 95(2) lorsque le ministère public opte pour la mise en accusation sont totalement disproportionnées, la restriction ne peut se justifier sur le fondement de la proportionnalité pour les besoins de l'article premier. Les peines minimales obligatoires d'emprisonnement prévues au par. 95(2) sont donc inconstitutionnelles.

Cette conclusion dispense de l'examen des prétentions de N et de C selon lesquelles le par. 95(2) contrevient à l'art. 7 de la *Charte*.

Les juges Rothstein, Moldaver et Wagner (dissidents) : La démarche axée sur les situations hypothétiques raisonnables ne justifie pas l'invalidation du par. 95(2) du *Code criminel* sur le fondement de l'art. 12 de la *Charte*. Les situations hypothétiques d'infraction de type réglementaire qu'invoquent les juges majoritaires ne s'appuient ni sur l'expérience ni sur le bon sens. Premièrement, depuis history of s. 95(2) where the imposition of a mandatory minimum could be regarded as grossly disproportionate. Moreover, the parties cannot identify a single case where an offender who has committed a licensing-type offence has been prosecuted by indictment, thus attracting a mandatory minimum. In fact, in the only licensing-type case raised by the parties, the Crown proceeded summarily.

l'entrée en vigueur du par. 95(2), il appert de l'expérience que, dans aucune affaire d'infraction de type réglementaire, la peine minimale obligatoire infligée a pu être tenue pour totalement disproportionnée. Qui plus est, les parties ne peuvent citer un seul cas où l'auteur d'une telle infraction a été poursuivi par voie de mise en accusation, encourant ainsi une peine minimale obligatoire. En fait, dans la seule décision relative à une infraction de ce type et invoquée par les parties, le poursuivant a opté pour la procédure sommaire.

Second, an application of the reasonable hypothetical approach which assumes that the Crown will elect to proceed by indictment when the fair, just, and appropriate election would be to proceed summarily does not accord with common sense. The Crown election has been purposely integrated into the legislative scheme and is a clear expression of Parliament's intent to confer on prosecutors the ability to divert the least serious licensing-type cases into summary proceedings. It is a mistake to shunt this factor aside when crafting reasonable hypotheticals.

Deuxièmement, l'application de la démarche axée sur les situations hypothétiques raisonnables, qui suppose que le ministère public optera pour la mise en accusation, alors qu'il serait juste, équitable et approprié qu'il opte pour la procédure sommaire, va à l'encontre du bon sens. Le choix du mode de poursuite a délibérément été intégré au régime législatif et traduit clairement l'intention du législateur de permettre au poursuivant de soumettre les cas les moins graves — les infractions de type réglementaire — à la procédure sommaire. Il est erroné d'écarter cette réalité au moment de concevoir des situations hypothétiques raisonnables.

Parliament's choice to raise the mandatory minimums in s. 95 reflects valid and pressing objectives, and it is not for this Court to frustrate the policy goals of our elected representatives based on questionable assumptions or loose conjecture. This Court has warned against the use of hypotheticals that are "far-fetched or only marginally imaginable". The hypothetical scenario advanced by the majority stretches the bounds of credulity. It is not a sound basis on which to nullify Parliament's considered response to a serious and complex issue.

La décision du législateur de relever les peines minimales obligatoires prévues à l'art. 95 est motivée par des objectifs valables et urgents, et il n'appartient pas à la Cour de contrecarrer les objectifs de politique générale de nos élus sur la foi d'hypothèses discutables ou de vagues conjectures. La Cour a mis les tribunaux en garde contre la prise en compte de situations hypothétiques qui sont « invraisemblables ou difficilement imaginables ». Le scénario hypothétique évoqué par les juges majoritaires est peu crédible. Il ne s'agit pas d'une assise valable pour réduire à néant la solution réfléchie apportée par le législateur à un problème à la fois grave et complexe.

The majority identifies an alternative scheme that, in its view, would accomplish Parliament's goals without offending s. 12 of the *Charter*. Under this scheme, the impugned mandatory minimums could be enacted as part of a revised offence containing an additional element beyond the existing elements of s. 95(1). For example, the offence could be limited to "those engaged in criminal activity" or to "conduct that poses a danger to others". The problem with this suggestion is two-fold.

Les juges majoritaires avancent une solution de rechange qui, selon eux, permettrait de réaliser les objectifs du législateur sans contrevenir à l'art. 12 de la *Charte*. Selon la solution qu'ils proposent, le législateur pourrait établir les peines minimales obligatoires dans le cadre d'une infraction révisée qui comporterait un élément en sus de ceux qui sont déjà présents au par. 95(1). Par exemple, seul le comportement qui constituerait un « acte criminel » ou qui « présente[rait] un danger pour autrui » tomberait sous le coup de la disposition. La solution avancée présente deux difficultés.

First, it is discordant with Parliament's true objective in creating mandatory minimums for the unlawful *possession* of a loaded or readily loaded prohibited or restricted firearm. Section 95 targets the simple possession of guns that are frequently used in gang-related or other criminal

Premièrement, elle va à l'encontre du véritable objectif de l'établissement de peines minimales obligatoires pour la *possession* illégale d'une arme à feu prohibée ou à autorisation restreinte, chargée ou prête à l'être. L'article 95 criminalise la simple possession d'armes à feu qui activity. Parliament has concentrated on simple possession for a reason: firearms — and particularly the firearms caught by s. 95 — are inherently dangerous. Outside of law enforcement, prohibited and restricted firearms are primarily found in the hands of criminals who use them to intimidate, wound, maim, and kill. Given the inherent danger associated with these guns, it was open to Parliament to conclude that their simple possession should attract a significant mandatory custodial sentence.

sont fréquemment employées par des gangs ou d'autres délinquants dans leurs activités criminelles. Le législateur s'en prend à la simple possession pour une raison : les armes à feu — en particulier celles que vise l'art. 95 — sont dangereuses en soi. Exception faite des responsables de l'application de la loi, ce sont surtout des criminels qui se servent des armes à feu prohibées ou à autorisation restreinte et qui intimident, blessent, mutilent et tuent. Étant donné le danger que présentent ces armes, le législateur pouvait fort bien conclure que leur simple possession devait emporter l'infliction d'une longue peine minimale obligatoire d'emprisonnement.

Second, adding new elements to the offence would render the mandatory minimums under-inclusive. Limiting the offence to "those engaged in criminal activity" could exclude cases where the imposition of a mandatory minimum is uncontroversial. Likewise, limiting the offence to "conduct that poses a danger to others" could exclude certain situations to which the mandatory minimums in s. 95 are intended to apply.

Deuxièmement, l'ajout de nouveaux éléments à l'infraction ferait indûment en sorte que les peines minimales obligatoires ne s'appliquent pas dans tous les cas voulus par le législateur. Préciser que l'infraction s'entend seulement « [du] comportement ou [de] l'acte criminel » pourrait soustraire certaines situations à l'application de ces peines même lorsque leur imposition n'est pas contestée. De même, préciser que seul est visé le comportement ou l'acte criminel « qui présente un danger pour autrui » pourrait exclure certaines situations auxquelles les peines minimales obligatoires prévues à l'art. 95 sont censées s'appliquer.

In sum, the reasonable hypothetical approach does not justify striking down the impugned mandatory minimums. In any event, a different analytical framework is required here. To date, this Court's s. 12 jurisprudence has only considered the constitutionality of mandatory minimum sentences in the context of straight indictable offences. This is the first time it has examined their constitutionality in a hybrid scheme, which calls for a different analytical framework under s. 12.

En somme, la démarche axée sur les situations hypothétiques raisonnables ne justifie pas l'invalidation des peines minimales obligatoires contestées. Quoi qu'il en soit, un cadre d'analyse différent s'impose en l'espèce. À ce jour, dans ses décisions relatives à l'art. 12, la Cour ne s'est penchée que sur la constitutionnalité de peines minimales obligatoires dans le contexte d'infractions qui ne se prêtaient qu'à la poursuite sur mise en accusation. C'est la première fois qu'elle est appelée à examiner la constitutionnalité de telles peines dans le cadre d'un régime mixte, ce qui commande un cadre d'analyse différent pour l'application de l'art. 12.

The proper analytical framework has two stages. First, the court must determine whether the hybrid scheme adequately protects against the imposition of grossly disproportionate sentences *in general*. Second, the court must determine whether the Crown has exercised its discretion in a manner that results in a grossly disproportionate sentence *for a particular offender*. This two-stage approach offers a more compelling framework than the use of reasonable hypotheticals to resolve a s. 12 constitutional challenge to a mandatory minimum sentence in a hybrid scheme.

L'analyse qui convient comporte deux étapes. Premièrement, le tribunal doit se demander si le régime mixte en question assure *de façon générale* une protection adéquate contre l'imposition de peines totalement disproportionnées. Deuxièmement, il doit se demander si le ministère public a exercé son pouvoir discrétionnaire de manière qu'une peine totalement disproportionnée soit infligée *à un délinquant en particulier*. Cette démarche en deux étapes offre un cadre d'analyse plus convaincant que la démarche axée sur les situations hypothétiques raisonnables lorsqu'il s'agit de statuer sur une contestation constitutionnelle qui se fonde sur l'art. 12 et qui vise une peine minimale obligatoire applicable dans le cadre d'un régime mixte.

The first stage of the analysis has two parts. First, the court must determine the sentencing range for indictable convictions under the sentencing regime that existed prior to the enactment of the impugned mandatory minimum. This is done with reference to actual sentences found in reported cases. The court must then isolate the low end of that sentencing range. This low end serves as an objective indicator of appropriate sentences for the least serious instances of the offence that would realistically be prosecuted by indictment.

La première étape de l'analyse comporte deux volets. Le tribunal doit d'abord établir la fourchette des peines infligées sur déclaration de culpabilité à l'issue d'une mise en accusation suivant le régime de détermination de la peine qui existait avant l'adoption de la peine minimale obligatoire contestée. Pour le faire, il s'en remet aux peines effectivement imposées dans les cas répertoriés. Il circonscrit ensuite l'extrémité inférieure de cette fourchette. Cette extrémité inférieure constitue un indicateur objectif des peines qui conviennent dans les cas les moins graves de perpétration de l'infraction où il serait réaliste que le poursuivant opte pour la mise en accusation.

Second, the court must compare the impugned mandatory minimum with the low end of the prior range. If the mandatory minimum is grossly disproportionate to sentences at the low end, then the scheme does not adequately protect against the imposition of grossly disproportionate sentences *in general*. On the contrary, it puts an identifiable set of offenders directly at risk of cruel and unusual punishment in violation of s. 12. The proper remedy here lies under s. 52(1) of the *Constitution Act, 1982*, and the mandatory minimum must be struck down.

En deuxième lieu, le tribunal compare la peine minimale obligatoire contestée et l'extrémité inférieure de la fourchette antérieure. Si la peine minimale obligatoire est totalement disproportionnée aux peines de l'extrémité inférieure, le régime n'assure pas *de façon générale* une protection adéquate contre l'infliction de peines totalement disproportionnées. Au contraire, il expose directement un groupe déterminable de délinquants au risque de se voir infliger une peine cruelle et inusitée en violation de l'art. 12. La réparation qui s'impose alors relève du par. 52(1) de la *Loi constitutionnelle de 1982*, et la peine minimale obligatoire doit être invalidée.

If the scheme itself is upheld, the court must move on to the second stage and determine whether the Crown has exercised its discretion in a manner that results in a grossly disproportionate sentence for the particular before the court. In those rare cases where the Crown's decision to proceed by indictment leads to a grossly disproportionate sentence, a remedy will lie under s. 24(1) of the *Charter*. The focus here is on the constitutionality of state action, and not the law itself. Specifically, the state action at issue is the Crown election, which is a matter of core prosecutorial discretion reviewable only for abuse of process.

S'il tient le régime pour valide, le tribunal passe à la deuxième étape de l'analyse et se demande si le poursuivant a exercé son pouvoir discrétionnaire de manière qu'une peine totalement disproportionnée soit infligée au délinquant en cause. Dans les rares cas où la décision d'opter pour la mise en accusation mènera à l'imposition d'une peine totalement disproportionnée, une réparation pourra être obtenue sur le fondement du par. 24(1) de la *Charte*. Ainsi, l'accent est mis sur la constitutionnalité non pas de la loi comme telle, mais bien de l'acte de l'État, à savoir le choix du mode de poursuite, lequel relève du pouvoir discrétionnaire essentiel du poursuivant en matière de poursuites — un pouvoir dont l'exercice est susceptible de contrôle uniquement en cas d'abus de procédure.

A decision to prosecute by indictment that would give rise to a grossly disproportionate sentence represents a *per se* abuse of process in violation of s. 12. Imposing such a sentence would "undermine society's expectations of fairness in the administration of justice". Grossly disproportionate sentences are "so excessive as to outrage standards of decency" and are "abhorrent or intolerable" to society. They constitute a breach of an accused's fundamental right to be free from cruel and unusual punishment, and are incompatible with the integrity of our justice

Lorsque le choix de la mise en accusation entraînerait l'imposition d'une peine totalement disproportionnée, il y a abus de procédure en soi contrairement à l'art. 12. Imposer une telle peine « miner[ait] les attentes de la société sur le plan de l'équité en matière d'administration de la justice ». La peine totalement disproportionnée est « excessi[ve] au point de ne pas être compatible avec la dignité humaine » et elle est « odieuse ou intolérable » pour la société. Elle porte atteinte au droit fondamental de l'accusé à la protection contre les peines cruelles et system. An exercise of prosecutorial discretion — be it by design or effect — that leads to such an outcome must be regarded as a *per se* abuse of process.

inusitées et elle est incompatible avec l'intégrité de notre système de justice. Si, par son objet ou son effet, l'exercice du pouvoir discrétionnaire en matière de poursuites mène à un tel résultat, il faut y voir un abus de procédure en soi.

The offender bears the burden of proof to show an abuse of process at the sentencing phase. If the offender discharges this burden of proof, he or she is entitled to a remedy under s. 24(1). In most cases, the appropriate and just remedy would be a sentence reduction below the mandatory minimum.

Il incombe au délinquant de prouver l'abus de procédure à l'étape de la détermination de la peine. Le délinquant qui s'acquitte de ce fardeau de preuve a droit à une réparation en vertu du par. 24(1). Dans la plupart des cas, la réparation convenable et juste consiste à réduire la peine de façon qu'elle soit inférieure à la peine minimale obligatoire.

The responsibility to ensure constitutional compliance under the proposed framework rests with judges, and not with prosecutors. The framework includes two checks to ensure compliance with s. 12, neither of which relies on prosecutorial discretion. First, if the sentencing scheme itself is challenged, the judge may strike it down as unconstitutional. Second, if an offender argues that the mandatory minimum would be grossly disproportionate in his or her case, the judge may find a *per se* abuse of process and grant a sentence reduction under s. 24(1).

Suivant le cadre d'analyse proposé, il incombe au tribunal, et non au poursuivant, de s'assurer du respect des exigences de la Constitution. Deux éléments de contrôle de la conformité à l'art. 12 sont prévus, et aucun ne tient à l'exercice du pouvoir discrétionnaire en matière de poursuites. Premièrement, lorsque le régime même de détermination de la peine est contesté, le tribunal peut le déclarer inconstitutionnel. Deuxièmement, lorsque le délinquant prétend que la peine minimale obligatoire est totalement disproportionnée dans son cas, le tribunal peut conclure à un abus de procédure en soi et accorder une réduction de peine en vertu du par. 24(1).

In N's case, Code J. found that, prior to the enactment of the three-year mandatory minimum, the sentencing range for a first offence under s. 95 was a term of imprisonment between two years less a day and three years. Thus, the low end of the range is around two years less a day. The three-year mandatory minimum for a first offence under s. 95(2) is not grossly disproportionate to this low end. Therefore, at the first stage, the mandatory minimum does not violate s. 12. N's concession that a three-year sentence is not grossly disproportionate in his case disposes of the second stage.

Dans le dossier de N, le juge Code a conclu que, avant l'application de la peine minimale obligatoire de trois ans, la fourchette des peines infligées pour une première infraction à l'art. 95 allait de deux ans moins un jour à trois ans d'emprisonnement. La peine correspondant à l'extrémité inférieure de la fourchette était donc d'environ deux ans moins un jour d'emprisonnement. La peine minimale obligatoire de trois ans que prévoit actuellement le par. 95(2) pour une première infraction n'est pas totalement disproportionnée à la peine qui correspondait auparavant à l'extrémité inférieure de la fourchette. La peine minimale obligatoire ne viole donc pas l'art. 12 à la première étape du contrôle. Comme N reconnaît qu'une peine de trois ans d'emprisonnement n'est pas totalement disproportionnée dans son cas, la deuxième étape du contrôle est aussi franchie.

In C's case, Backhouse J. did not refer to the sentencing range for a second or subsequent offence prior to the enactment of the five-year mandatory minimum. Code J., however, noted that while the sentencing range for a first offence was between two years less a day and three years, much longer sentences were imposed for recidivists. It is clear, then, that a second or subsequent offence would have attracted a sentence considerably longer than three years — at the very least, in the range of four or five years. The present five-year mandatory minimum is not grossly

Dans le dossier de C, la juge Backhouse n'a pas fait état de la fourchette des peines infligées en cas de récidive avant l'application de la peine minimale obligatoire de cinq ans. Le juge Code a toutefois souligné que même si la fourchette des peines infligées pour une première infraction allait de deux ans moins un jour à trois ans d'emprisonnement, des peines beaucoup plus longues étaient imposées aux récidivistes. Il est donc clair qu'une récidive aurait entraîné une peine d'emprisonnement de bien plus de trois ans — au moins quatre ou cinq ans. La disproportionate to the previous low end of the range for second or subsequent offences under s. 95. Like N, C concedes that the mandatory minimum is not grossly disproportionate in his case.

peine minimale obligatoire actuelle de cinq ans d'emprisonnement n'est pas totalement disproportionnée à l'extrémité inférieure de la fourchette des peines auparavant infligées sous le régime de l'art. 95 en cas de récidive. À l'instar de N, C reconnaît que la peine minimale obligatoire n'est pas totalement disproportionnée en ce qui le concerne.

In conclusion, neither the sentencing scheme itself, nor its application to N or C, offends s. 12 of the *Charter*. Moreover, s. 95 is neither arbitrary nor overbroad, and therefore does not offend s. 7 of the *Charter*.

En conclusion, ni le régime de détermination de la peine comme tel, ni son application à N ou à C ne contreviennent à l'art. 12 de la *Charte*. De plus, l'art. 95 n'est ni arbitraire ni d'une portée excessive, et ne porte donc pas atteinte au droit garanti par l'art. 7 de la *Charte*.

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Andreea Baiasu, pour l'appelante Sa Majesté la Reine.

Nancy L. Dennison et *Richard A. Kramer*, pour l'appelant le procureur général du Canada.

Dirk Derstine et *Janani Shanmuganathan*, pour l'intimé Hussein Jama Nur.

Carlos Rippell et *Michael Dineen*, pour l'intimé Sidney Charles.

Julie Dassylva et *Gilles Laporte*, pour l'intervenant le procureur général du Québec.

Rodney G. Garson, for the intervener the Attorney General of British Columbia.

Rodney G. Garson, pour l'intervenant le procureur général de la Colombie-Britannique.

Joshua B. Hawkes, *Q.C.*, for the intervener the Attorney General of Alberta.

Joshua B. Hawkes, *c.r.*, pour l'intervenant le procureur général de l'Alberta.

Written submissions only by *Michael A. Feder*, *Julia K. Lockhart* and *Adrienne Smith*, for the intervener the Pivot Legal Society.

Argumentation écrite seulement par *Michael A. Feder*, *Julia K. Lockhart* et *Adrienne Smith*, pour l'intervenante Pivot Legal Society.

Bruce F. Simpson, for the intervener the John Howard Society of Canada.

Bruce F. Simpson, pour l'intervenante la Société John Howard du Canada.

Kimberly Potter, for the intervener the Canadian Civil Liberties Association.

Kimberly Potter, pour l'intervenante l'Association canadienne des libertés civiles.

Nader R. Hasan and *Gerald Chan*, for the intervener the British Columbia Civil Liberties Association.

Nader R. Hasan et *Gerald Chan*, pour l'intervenante l'Association des libertés civiles de la Colombie-Britannique.

Anil K. Kapoor and *Lindsay E. Trevelyan*, for the intervener the Advocates' Society.

Anil K. Kapoor et *Lindsay E. Trevelyan*, pour l'intervenante Advocates' Society.

Eric V. Gottardi and *Nikos Harris*, for the intervener the Canadian Bar Association.

Eric V. Gottardi et *Nikos Harris*, pour l'intervenante l'Association du Barreau canadien.

Solomon Friedman, for the intervener Canada's National Firearms Association.

Solomon Friedman, pour l'intervenante l'Association canadienne pour les armes à feu.

Joanna L. Birenbaum, for the intervener the Canadian Association for Community Living.

Joanna L. Birenbaum, pour l'intervenante l'Association canadienne pour l'intégration communautaire.

Faisal Mirza and *Anthony N. Morgan*, for the intervener the African Canadian Legal Clinic.

Faisal Mirza et *Anthony N. Morgan*, pour l'intervenante la Clinique juridique africaine canadienne.

The judgment of McLachlin C.J. and LeBel, Abella, Cromwell, Karakatsanis and Gascon JJ. was delivered by

Version française du jugement de la juge en chef McLachlin et des juges LeBel, Abella, Cromwell, Karakatsanis et Gascon rendu par

THE CHIEF JUSTICE —

LA JUGE EN CHEF —

I. Overview

I. Aperçu

[1] Gun-related crime poses grave danger to Canadians. Parliament has therefore chosen to prohibit some weapons outright, while restricting the possession of others. The *Criminal Code*, R.S.C.

[1] Les crimes liés aux armes à feu exposent les Canadiennes et les Canadiens à de graves dangers. Le législateur a donc résolu d'interdire carrément la possession de certaines armes et de restreindre

1985, c. C-46, imposes severe penalties for violations of these laws.

[2] Section 95(2)(*a*) imposes mandatory minimum sentences for the offence of possessing prohibited or restricted firearms when the firearm is loaded or kept with readily accessible ammunition (s. 95(1)) — three years for a first offence and five years for a second or subsequent offence.

[3] The respondents Hussein Jama Nur and Sidney Charles were convicted under s. 95(1). They assert that the mandatory minimum sentences imposed by s. 95(2)(*a*) are unconstitutional because they result in grossly disproportionate sentences in some cases, violating the guarantee in s. 12 of the *Canadian Charter of Rights and Freedoms* against cruel and unusual punishment. The Ontario Court of Appeal agreed, and held that the mandatory minimum sentences imposed by s. 95(2)(*a*) were unconstitutional.

[4] I agree with the Court of Appeal that the mandatory minimum sentences imposed by s. 95(2)(*a*) of the *Criminal Code* violate s. 12 of the *Charter*. Accordingly, the mandatory minimum sentences in s. 95(2)(*a*) of the *Criminal Code* are null and void under s. 52 of the *Constitution Act, 1982*. In most cases, including those of Nur and Charles, the mandatory minimum sentences of three and five years respectively do not constitute cruel and unusual punishment. But in some reasonably foreseeable cases that are caught by s. 95(1) they may do so. This has not been shown to be justified under s. 1 of the *Charter*. It follows that s. 95(2)(*a*) is unconstitutional as presently structured. This conclusion makes it unnecessary to consider the respondents' arguments that s. 95(2)(*a*) violates s. 7 of the *Charter*.

[5] This does not prevent judges from imposing exemplary sentences that emphasize deterrence and denunciation in appropriate circumstances. Nur and Charles fall into this category. Like the Court of Appeal, I would uphold the sentences imposed by the trial judges in their cases.

celle d'autres armes. Le *Code criminel*, L.R.C. 1985, c. C-46, prévoit de lourdes peines lorsqu'il y a infraction aux dispositions ainsi créées.

[2] L'alinéa 95(2)*a*) prévoit des peines minimales obligatoires pour la possession sans autorisation d'une arme à feu prohibée ou à autorisation restreinte lorsque l'arme est chargée ou que des munitions sont facilement accessibles (par. 95(1)), à savoir trois ans s'il s'agit d'une première infraction et cinq ans s'il s'agit d'une récidive.

[3] Les intimés, Hussein Jama Nur et Sidney Charles, ont été déclarés coupables de l'infraction établie au par. 95(1). Ils font valoir que les peines minimales obligatoires que prévoit l'al. 95(2)*a*) sont inconstitutionnelles car elles se traduisent parfois par des peines totalement disproportionnées, ce qui contrevient à la protection contre les peines cruelles et inusitées garantie à l'art. 12 de la *Charte canadienne des droits et libertés*. La Cour d'appel de l'Ontario leur a donné raison et a statué que les peines minimales obligatoires prévues à l'al. 95(2)*a*) étaient inconstitutionnelles.

[4] Je conviens avec la Cour d'appel que les peines minimales obligatoires prévues à l'al. 95(2)*a*) du *Code criminel* contreviennent à l'art. 12 de la *Charte*. Ces peines sont donc inopérantes par application de l'art. 52 de la *Loi constitutionnelle de 1982*. Dans la plupart des cas — dont ceux de MM. Nur et Charles —, les peines minimales obligatoires de trois et cinq ans ne constituent pas des peines cruelles et inusitées. Mais dans certaines situations raisonnablement prévisibles tombant sous le coup du par. 95(1), elles peuvent l'être. Il n'a pas été démontré qu'elles sont alors justifiées au regard de l'article premier de la *Charte*. Dans sa version actuelle, l'al. 95(2)*a*) est donc inconstitutionnel, une conclusion qui dispense de l'examen des prétentions des intimés selon lesquelles l'al. 95(2)*a*) contrevient à l'art. 7 de la *Charte*.

[5] Les tribunaux peuvent néanmoins infliger des peines exemplaires axées sur la dissuasion et la dénonciation lorsque les circonstances s'y prêtent, comme c'est le cas pour MM. Nur et Charles. À l'instar de la Cour d'appel, je suis d'avis de confirmer les peines infligées en première instance.

II. Legislative Background

[6] Firearm-related offences are serious crimes. Parliament has sought to protect the public from firearm-related injuries and to deter crimes involving firearms through a combination of strict licensing and registration requirements under the *Firearms Act*, S.C. 1995, c. 39, and criminal prohibitions under Part III of the *Criminal Code*: *Reference re Firearms Act (Can.)*, 2000 SCC 31, [2000] 1 S.C.R. 783 ("*Firearms Reference*").

[7] The *Criminal Code* imposes severe restrictions and sanctions on two classes of firearms. A "prohibited firearm" includes short-barrelled handguns, sawed-off rifles and shotguns, and automatic firearms: *Criminal Code*, s. 84(1). It is unlawful to possess a prohibited firearm unless the individual possessed the firearm prior to the prohibition coming into force: *Firearms Act*, s. 12. This grandfathering also applies to next of kin. A "restricted firearm" includes any handgun that is not a prohibited firearm, some semi-automatic firearms, and some firearms that are less than the specified length: *Criminal Code*, s. 84(1). These weapons are inherently dangerous and are commonly used in criminal activity.

[8] Anyone who wishes to possess a firearm must obtain a licence under the *Firearms Act*. Although one can obtain licences that authorize the possession of prohibited or restricted firearms, stringent criteria must be met: *Firearms Act*, ss. 7(2) and 12. The *Firearms Act* imposes controls on places where a person who has a licence can possess the restricted or prohibited firearms: s. 17. A Chief Firearms Officer may deny a person a licence in the interests of public safety: s. 5. A licensed person must obtain authorization to transport firearms from one designated place to another: s. 19. In addition, the Act requires that a person obtain a registration certificate for the firearm: s. 12.1.

II. Historique législatif

[6] Les infractions liées aux armes à feu sont graves. Le législateur a voulu protéger la population contre les blessures par balle et décourager la perpétration de telles infractions au moyen d'un régime strict exigeant permis et certificat d'enregistrement (*Loi sur les armes à feu*, L.C. 1995, c. 39) et prévoyant des interdictions (partie III du *Code criminel*) (*Renvoi relatif à la Loi sur les armes à feu (Can.)*, 2000 CSC 31, [2000] 1 R.C.S. 783 (le « *Renvoi relatif aux armes à feu* »)).

[7] Le *Code criminel* prévoit des restrictions et des sanctions importantes dans le cas de deux types d'armes à feu. Mentionnons d'abord l'« arme à feu prohibée », qui englobe l'arme de poing pourvue d'un canon court, la carabine ou le fusil de chasse scié et l'arme à feu automatique (*Code criminel*, par. 84(1)). Sa possession est illégale, sauf lorsque le propriétaire possédait l'arme avant l'entrée en vigueur de l'interdiction (*Loi sur les armes à feu*, art. 12). Ce droit acquis vaut pour les proches parents du particulier. Vient ensuite l'« arme à feu à autorisation restreinte », qui s'entend de toute arme de poing qui n'est pas une arme à feu prohibée, de certaines armes à feu semi-automatiques et de certaines armes à feu mesurant moins d'une longueur donnée (*Code criminel*, par. 84(1)). Dangereuses en soi, ces armes sont couramment utilisées lors de la perpétration d'actes criminels.

[8] Posséder une arme à feu exige l'obtention d'un permis conformément à la *Loi sur les armes à feu*. Une personne peut obtenir un permis de possession d'une arme à feu prohibée ou à autorisation restreinte, mais seulement si elle respecte certains critères stricts (*Loi sur les armes à feu*, par. 7(2) et art. 12). La *Loi sur les armes à feu* restreint alors les lieux où elle peut être en possession de l'arme à feu prohibée ou à autorisation restreinte (art. 17). Le contrôleur des armes à feu peut, dans l'intérêt de la sécurité publique, refuser de délivrer un permis à une personne (art. 5). Le titulaire d'un permis doit obtenir l'autorisation de transporter une arme à feu d'un lieu précis à un autre (art. 19). La Loi exige en outre qu'une personne obtienne un certificat d'enregistrement de son arme à feu (art. 12.1).

[9] Restricted or prohibited firearms must be stored unloaded, with a secure locking device and in a locked container or in a vault, safe or room that has been constructed or modified for the secure storage of firearms. Ammunition may not be stored with the firearm unless both the ammunition and the unloaded locked firearm are stored in a securely locked room or container that cannot be readily broken open or into: *Storage, Display, Transportation and Handling of Firearms by Individuals Regulations*, SOR/98-209, ss. 6 and 7. The firearms may only be loaded in a place where they can be lawfully discharged: s. 15.

[9] L'arme à feu prohibée ou à autorisation restreinte doit être entreposée, non chargée et rendue inopérante par un dispositif de verrouillage sécuritaire, dans un contenant verrouillé ou dans une chambre forte, un coffre-fort ou une pièce construits ou modifiés expressément pour l'entreposage sécuritaire des armes à feu. Les munitions ne peuvent être entreposées avec elle que si elle est non chargée et que le tout est entreposé dans une pièce ou un contenant gardé bien verrouillé et construit de façon qu'on ne peut le forcer facilement (*Règlement sur l'entreposage, l'exposition, le transport et le maniement des armes à feu par des particuliers*, DORS/98-209, art. 6 et 7). Une arme à feu ne peut être chargée qu'à l'endroit où il est permis de s'en servir (art. 15).

[10] These licensing and registration requirements under the *Firearms Act* are reinforced through a series of *Criminal Code* offences that criminalize the possession of firearms where the possession contravenes the terms and conditions of the *Firearms Act*. The provision at issue in this appeal is s. 95 of the *Criminal Code*. The relevant version came into force in December 1998: S.C. 1995, c. 39, s. 139. It prohibits the possession of a loaded prohibited or restricted firearm, or the possession of an unloaded prohibited or restricted firearm together with readily accessible ammunition that is capable of being discharged in the firearm: s. 95(1). The offence applies to a person in possession of a prohibited or restricted firearm who does not have an authorization or a licence to possess the firearm at the specific place at issue and a registration certificate for the firearm.

[10] Ces règles établies sous le régime de la *Loi sur les armes à feu* en matière de permis et d'enregistrement se doublent d'une série d'infractions prévues au *Code criminel* qui criminalisent la possession d'une arme à feu dont la possession contrevient à la *Loi sur les armes à feu*. Les pourvois portent sur l'art. 95 du *Code criminel*, dont la version pertinente est entrée en vigueur en décembre 1998 (L.C. 1995, c. 39, art. 139) et interdit la possession d'une arme à feu prohibée ou à utilisation restreinte chargée et celle d'une telle arme à feu non chargée avec des munitions facilement accessibles qui peuvent être utilisées avec elle (par. 95(1)). L'infraction est perpétrée par la personne en possession d'une arme à feu prohibée ou à autorisation restreinte qui n'a pas une autorisation ou un permis pour le lieu en cause, ou qui n'a pas de certificat d'enregistrement de l'arme à feu.

[11] The respondents challenge the constitutionality of the provisions in s. 95(2)(*a*)(i) and (ii) of the *Criminal Code* (as it read at the relevant time):

[11] Les intimés contestent la constitutionnalité des sous-al. 95(2)*a*)(i) et (ii) du *Code criminel*, dont voici la version applicable au moment considéré :

95. (1) Subject to subsection (3), every person commits an offence who, in any place, possesses a loaded prohibited firearm or restricted firearm, or an unloaded prohibited firearm or restricted firearm together with readily accessible ammunition that is capable of being discharged in the firearm, unless the person is the holder of

(*a*) an authorization or a licence under which the person may possess the firearm in that place; and

95. (1) Sous réserve du paragraphe (3), commet une infraction quiconque a en sa possession dans un lieu quelconque soit une arme à feu prohibée ou une arme à feu à autorisation restreinte chargées, soit une telle arme non chargée avec des munitions facilement accessibles qui peuvent être utilisées avec celle-ci, sans être titulaire à la fois :

a) d'une autorisation ou d'un permis qui l'y autorise dans ce lieu;

(*b*) the registration certificate for the firearm.

(2) Every person who commits an offence under subsection (1)

(*a*) is guilty of an indictable offence and liable to imprisonment for a term not exceeding 10 years and to a minimum punishment of imprisonment for a term of

(i) in the case of a first offence, three years, and

(ii) in the case of a second or subsequent offence, five years; or

(*b*) is guilty of an offence punishable on summary conviction and liable to imprisonment for a term not exceeding one year.

(3) Subsection (1) does not apply to a person who is using the firearm under the direct and immediate supervision of another person who is lawfully entitled to possess it and is using the firearm in a manner in which that other person may lawfully use it.

[12] Section 95 is a hybrid offence punishable by a maximum of 10 years' imprisonment if the Crown proceeds by way of indictment. When the provision was first introduced by Parliament, the offence carried a one-year minimum sentence if the Crown proceeded by indictment, and a one-year maximum penalty if the Crown proceeded summarily. In May 2008, Parliament increased the minimum term of imprisonment to three years for a first offence and five years for a subsequent offence if the Crown proceeded by indictment: S.C. 2008, c. 6, s. 8. But Parliament did not change the one-year maximum sentence if the Crown proceeded summarily. Therefore, there is a two-year gap between the maximum penalty on summary conviction and the minimum penalty on indictment. Nur challenges this gap under s. 7 of the *Charter*.

[13] A review of the firearms offences in the *Criminal Code* reveals that s. 95 carries a more serious penalty than any other simple possession offence. The mandatory minimum terms of imprisonment found in s. 95 reflect two aggravating factors. It applies to prohibited and restricted firearms, which present the most significant danger to public safety.

b) du certificat d'enregistrement de l'arme.

(2) Quiconque commet l'infraction prévue au paragraphe (1) est coupable :

a) soit d'un acte criminel passible d'un emprisonnement maximal de dix ans, la peine minimale étant :

(i) de trois ans, dans le cas d'une première infraction,

(ii) de cinq ans, en cas de récidive;

b) soit d'une infraction punissable, sur déclaration de culpabilité par procédure sommaire, d'un emprisonnement maximal de un an.

(3) Le paragraphe (1) ne s'applique pas à quiconque utilise une arme à feu sous la surveillance directe d'une personne qui en a la possession légale, de la manière dont celle-ci peut légalement s'en servir.

[12] L'article 95 crée une infraction mixte qui rend passible, sur mise en accusation, d'une peine carcérale d'au plus 10 ans. Dans sa version initiale, la disposition prévoyait une peine minimale d'un an lorsque le poursuivant optait pour la mise en accusation et une peine maximale d'un an lorsqu'il optait pour la procédure sommaire. En mai 2008, le législateur a porté la peine carcérale minimale à trois ans pour une première infraction et à cinq ans pour une récidive, lorsqu'il y avait mise en accusation (L.C. 2008, c. 6, art. 8). Il n'a cependant pas modifié la peine maximale d'un an encourue lorsque le poursuivant opte pour la procédure sommaire. Il existe donc un écart de deux ans entre la peine maximale applicable sur procédure sommaire et la peine minimale applicable sur mise en accusation. M. Nur conteste cet écart sur le fondement de l'art. 7 de la *Charte*.

[13] Il appert de l'examen des dispositions du *Code criminel* sur les armes à feu que l'art. 95 prévoit une peine plus lourde que toute autre disposition relative à la seule possession. Les peines carcérales minimales obligatoires d'emprisonnement prévues à l'art. 95 tiennent compte de deux circonstances aggravantes. Elles s'appliquent en effet à la possession d'une arme

It only applies if the firearm is loaded or if ammunition for the firearm is readily available.

prohibée ou d'une arme à autorisation restreinte, lesquelles présentent le plus grand risque qui soit pour la sécurité publique, et seulement lorsque l'arme est chargée ou que ses munitions sont facilement accessibles.

[14] Section 95(2)(*a*)(ii) imposes a five-year mandatory minimum term of imprisonment for a second or subsequent offence. For the purpose of determining whether a person has committed a second or subsequent offence within the meaning of s. 95(2)(*a*)(ii), one must have regard to s. 84(5) and (6):

(5) In determining, for the purpose of subsection 85(3), 95(2), 99(2), 100(2) or 103(2), whether a convicted person has committed a second or subsequent offence, if the person was earlier convicted of any of the following offences, that offence is to be considered as an earlier offence:

(*a*) an offence under section 85, 95, 96, 98, 98.1, 99, 100, 102 or 103 or subsection 117.01(1);

(*b*) an offence under section 244 or 244.2; or

(*c*) an offence under section 220, 236, 239, 272 or 273, subsection 279(1) or section 279.1, 344 or 346 if a firearm was used in the commission of the offence.

However, an earlier offence shall not be taken into account if 10 years have elapsed between the day on which the person was convicted of the earlier offence and the day on which the person was convicted of the offence for which sentence is being imposed, not taking into account any time in custody.

(6) For the purposes of subsection (5), the only question to be considered is the sequence of convictions and no consideration shall be given to the sequence of commission of offences or whether any offence occurred before or after any conviction.

[15] Charles challenges s. 84(5) and (6) as being overbroad and arbitrary, contrary to s. 7 of the *Charter*.

[16] The relevant provisions of the *Charter* state:

[14] Le sous-alinéa 95(2)*a*)(ii) prévoit une peine carcérale obligatoire d'au moins cinq ans en cas de récidive. Pour déterminer s'il y a récidive au sens du sous-al. 95(2)*a*)(ii), il faut se reporter aux par. 84(5) et (6) :

(5) Lorsqu'il s'agit de décider, pour l'application des paragraphes 85(3), 95(2), 99(2), 100(2) ou 103(2), si la personne déclarée coupable se trouve en état de récidive, il est tenu compte de toute condamnation antérieure à l'égard :

a) d'une infraction prévue aux articles 85, 95, 96, 98, 98.1, 99, 100, 102 ou 103 ou au paragraphe 117.01(1);

b) d'une infraction prévue aux articles 244 ou 244.2;

c) d'une infraction prévue aux articles 220, 236, 239, 272 ou 273, au paragraphe 279(1) ou aux articles 279.1, 344 ou 346, s'il y a usage d'une arme à feu lors de la perpétration.

Toutefois, il n'est pas tenu compte des condamnations précédant de plus de dix ans la condamnation à l'égard de laquelle la peine doit être déterminée, compte non tenu du temps passé sous garde.

(6) Pour l'application du paragraphe (5), il est tenu compte de l'ordre des déclarations de culpabilité et non de l'ordre de perpétration des infractions, ni du fait qu'une infraction a été commise avant ou après une déclaration de culpabilité.

[15] M. Charles tient les par. 84(5) et (6) pour inconstitutionnels et contraires à l'art. 7 de la *Charte* du fait que leur portée est excessive et qu'ils sont arbitraires.

[16] Voici le texte des dispositions pertinentes de la *Charte* :

1. The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

7. Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

12. Everyone has the right not to be subjected to any cruel and unusual treatment or punishment.

III. Facts and Judicial History

A. *Nur*

[17] One evening in January 2009, a young man entered a community centre in the Jane and Finch neighbourhood of Toronto and told a staff member that he was afraid of someone who was waiting outside to get him. The staff member saw someone waiting outside who looked threatening. The neighbourhood had very high levels of crime. Gun violence was a serious problem. The supervisor put the community centre on lockdown and called the police. When the police arrived, they saw four men standing at one of the entrances of the community centre. Nur was among them. As one of the police officers approached, the men scattered.

[18] The police officer chased Nur. He held his left hand against his body and appeared to be concealing something. As the officer gained ground on Nur, he saw Nur throw something away. The officer caught and arrested Nur moments after. Returning to the area where he had seen Nur throw something to the ground, the officer found a loaded handgun under a parked car. The gun was a working 22-calibre semi-automatic with an oversized ammunition clip. There were 23 bullets in the clip and one in the chamber. The gun is a prohibited firearm. When functioning properly, the gun can fire all 24 rounds in 3.5 seconds.

1. La *Charte canadienne des droits et libertés* garantit les droits et libertés qui y sont énoncés. Ils ne peuvent être restreints que par une règle de droit, dans des limites qui soient raisonnables et dont la justification puisse se démontrer dans le cadre d'une société libre et démocratique.

7. Chacun a droit à la vie, à la liberté et à la sécurité de sa personne; il ne peut être porté atteinte à ce droit qu'en conformité avec les principes de justice fondamentale.

12. Chacun a droit à la protection contre tous traitements ou peines cruels et inusités.

III. Faits et genèse de l'instance

A. *Dossier Nur*

[17] Un soir de janvier 2009, à Toronto, un jeune homme est entré dans un centre communautaire situé près de l'intersection de la rue Jane et de l'avenue Finch. Il a dit à un employé qu'il avait peur de quelqu'un qui l'attendait à l'extérieur et qui en avait après lui. L'employé a aperçu une personne à l'air menaçant qui attendait à l'extérieur. Le quartier connaissait un taux très élevé de criminalité, et le recours aux armes à feu y constituait un problème grave. Le surveillant a verrouillé les lieux et appelé la police. À leur arrivée, les policiers ont vu quatre hommes, dont M. Nur, près de l'une des entrées. Lorsqu'un agent s'est approché, les hommes ont pris la fuite dans des directions différentes.

[18] Pris en chasse par le policier, M. Nur serrait sa main gauche contre son corps et semblait dissimuler un objet. Au moment où l'agent allait le rattraper, M. Nur s'est débarrassé d'un objet. Quelques instants plus tard, M. Nur était immobilisé et mis en état d'arrestation. Le policier est revenu sur ses pas à l'endroit où il avait vu M. Nur jeter un objet par terre. Il a trouvé une arme de poing chargée sous une voiture garée. Il s'agissait d'un pistolet semi-automatique de calibre 22 en état de marche muni d'un chargeur grande dimension, une arme à feu prohibée. L'arme contenait 23 balles, dont une dans la chambre. Lorsqu'il est en bon état de marche, le pistolet permet de tirer ses 24 balles en 3,5 secondes.

[19] Nur was not found to be involved with the threatening behaviour, and it was not clear when, for how long, or how Nur came to possess the loaded handgun.

[19] Il n'a pas été établi que M. Nur avait quoi que ce soit à voir avec le comportement menaçant, et aucun élément n'a clairement indiqué le moment à partir duquel M. Nur avait eu l'arme chargée en sa possession, la durée de cette possession, ou la manière dont il était entré en possession de l'arme.

(1) Ontario Superior Court of Justice

(1) Cour supérieure de justice de l'Ontario

[20] Nur was charged with one count of possession of a loaded prohibited firearm contrary to s. 95(1) of the *Criminal Code*. The Crown proceeded by indictment and Nur elected to be tried by judge alone. He ultimately pleaded guilty to the charge, but he did not admit any facts relevant to the allegations beyond those essential to the plea. At his sentencing, Nur put the Crown to the proof of any facts that it relied on as aggravating factors for sentencing. Nur also challenged the constitutionality of the three-year mandatory minimum sentence imposed by s. 95(2)(*a*)(i).

[20] M. Nur a été accusé d'un chef de possession d'une arme à feu prohibée chargée, une infraction prévue au par. 95(1) du *Code criminel*. Après avoir été mis en accusation, M. Nur a opté pour un procès devant juge seul. Il a finalement plaidé coupable, mais n'a reconnu aucun autre fait que ceux qui étaient essentiels à son plaidoyer. À l'audience de détermination de la peine, M. Nur a mis le poursuivant au défi de prouver les circonstances aggravantes invoquées. Il a également contesté la constitutionnalité de la peine minimale obligatoire de trois ans prévue au sous-al. 95(2)*a*)(i).

[21] Nur comes from a supportive, law-abiding family who came to Canada as refugees. At the time of the offence, he was 19 and attending high school. He was performing well and hoped to eventually attend university. He had worked a number of part-time jobs and volunteered in the community. Teachers and past employers praised his performance and his considerable potential. One teacher described Nur as "an exceptional student and athlete who excelled in the classroom and on the basketball court . . . an incredible youth with unlimited academic and great leadership skills": 2011 ONSC 4874, 241 C.R.R. (2d) 306, at para. 34. Nur had no prior criminal record.

[21] M. Nur est issu d'une famille de réfugiés soutenante et respectueuse des lois. Au moment de l'infraction, il avait 19 ans et fréquentait l'école secondaire. Il avait de bonnes notes et espérait fréquenter un jour l'université. Il avait eu quelques emplois à temps partiel et faisait du bénévolat dans la collectivité. Ses enseignants et ses anciens employeurs ont souligné ses bons résultats et ses grandes perspectives d'avenir. Pour reprendre les propos d'un enseignant, M. Nur était [TRADUCTION] « un étudiant exceptionnel et un athlète qui excellait tant en classe que sur le terrain de basketball [. . .] un jeune extrêmement doué dont les aptitudes aux études se doublaient d'un grand sens du leadership » (2011 ONSC 4874, 241 C.R.R. (2d) 306, par. 34). M. Nur n'avait pas de casier judiciaire.

[22] The trial judge held that the three-year mandatory minimum sentence did not offend ss. 12 and 15 of the *Charter*. However, he concluded that the two-year gap between the one-year maximum sentence if the Crown proceeded summarily and the three-year minimum sentence if the Crown proceeded on indictment offended s. 7 of the *Charter* because it was arbitrary and was not justified under s. 1. Nevertheless, the trial judge held that Nur was not personally affected by the gap. In his view, the

[22] Selon le juge du procès, la peine minimale obligatoire de trois ans ne contrevient pas aux art. 12 et 15 de la *Charte*. Il conclut toutefois que l'écart de deux ans entre la peine maximale d'un an — sur procédure sommaire — et la peine minimale de trois ans — sur mise en accusation — ne respecte pas l'art. 7 de la *Charte* parce qu'il est arbitraire et qu'il ne peut se justifier par application de l'article premier. Le juge arrive néanmoins à la conclusion que cet écart ne pénalise pas M. Nur. À son

gap only posed a constitutional problem for a small class of accused, in those cases where the Crown would reasonably elect to proceed summarily but for the arbitrary two-year gap. The trial judge held that the Crown would not have proceeded summarily against Nur regardless of the maximum penalty available on a summary conviction proceeding. The trial judge therefore dismissed the s. 7 claim.

avis, l'écart ne pose un problème constitutionnel que dans un nombre infime de cas, à savoir ceux où le poursuivant aurait raisonnablement opté pour la procédure sommaire n'eût été l'écart arbitraire de deux ans. Il conclut que, dans le cas de M. Nur, le poursuivant n'aurait pas opté pour la procédure sommaire peu importe la peine maximale alors applicable. Il rejette donc la prétention fondée sur l'art. 7.

[23] The trial judge held that a sentence of 40 months was appropriate for the offence and the offender, having regard to the "inflationary floor" of the mandatory minimum sentence. Nur had been denied bail and had been in custody for 26 months. Nur received two to one credit for 20 months of pre-trial custody at the time of sentencing. As a result, the trial judge imposed a sentence of one day in custody to be followed by two years of probation.

[23] Selon le juge, une peine de 40 mois est appropriée et tient compte de la nature de l'infraction et de la situation du délinquant, eu égard au [TRADUCTION] « seuil ascendant » que constitue la peine minimale obligatoire. M. Nur s'est vu refuser la liberté sous caution et a passé 26 mois sous garde. Lors de la détermination de sa peine, on lui a accordé des crédits pour une période de détention présentencielle de 20 mois à raison de deux jours contre un. Le juge lui a donc infligé une peine carcérale d'un jour assortie d'une période de probation de deux ans.

(2) Court of Appeal for Ontario, 2013 ONCA 677, 117 O.R. (3d) 401

(2) Cour d'appel de l'Ontario, 2013 ONCA 677, 117 O.R. (3d) 401

[24] Nur appealed to the Court of Appeal, which heard his appeal, and five others, concerning constitutional challenges to various provisions of the *Criminal Code* imposing or related to the imposition of mandatory minimum sentences for various firearm-related offences.

[24] M. Nur a interjeté appel à la Cour d'appel, qui a entendu l'affaire, de même que cinq autres dossiers de contestation constitutionnelle visant diverses dispositions du *Code criminel* qui imposent des peines minimales obligatoires pour diverses infractions liées aux armes à feu ou qui se rapportent à pareille imposition.

[25] Doherty J.A., for the court, allowed the appeal. He held that the three-year mandatory minimum penalty imposed by s. 95(2)(*a*)(i) was contrary to s. 12 of the *Charter* based on a reasonable hypothetical on the licensing end of the s. 95 spectrum, and that it was not saved by s. 1. He held that the appropriate remedy was to hold s. 95(2)(*a*)(i) of no force or effect to the extent that it imposes a three-year mandatory minimum term of imprisonment when the Crown proceeds by way of indictment. His declaration did not affect the 10-year maximum penalty in s. 95(2)(*a*). However, he also concluded that his analysis did not prevent Parliament from retaining the three-year mandatory minimum for the "true crime end" of the s. 95 spectrum,

[25] Au nom de la Cour d'appel, le juge Doherty accueille l'appel. Il estime que la peine minimale obligatoire de trois ans d'emprisonnement prévue au sous-al. 95(2)*a*)(i) contrevient à l'art. 12 de la *Charte* dans la situation hypothétique raisonnable où l'infraction commise se situe à l'extrémité du continuum d'application de l'art. 95 correspondant aux infractions réglementaires et que la disposition qui prévoit la peine minimale ne peut être sauvegardée par application de l'article premier. La réparation qui lui paraît convenable consiste à déclarer inopérant le sous-al. 95(2)*a*)(i) dans la mesure où il prévoit une peine minimale obligatoire de trois ans d'emprisonnement lorsque le poursuivant opte pour la mise en accusation. La déclaration d'invalidité ne

that is "[i]ndividuals who have loaded restricted or prohibited firearms that they have no business possessing anywhere or at any time, and who are engaged in criminal conduct or conduct that poses a danger to others": para. 206. These offenders, Doherty J.A. held, should continue to receive exemplary sentences that emphasize deterrence and denunciation.

s'applique pas à la peine maximale de 10 ans prévue à l'al. 95(2)*a*). Selon le juge Doherty, son analyse n'empêche toutefois pas le législateur de conserver la peine minimale obligatoire de trois ans dans le cas d'un [TRADUCTION] « vrai crime » qui se situe à l'autre extrémité du continuum d'application de l'art. 95, c'est-à-dire une infraction perpétrée par une « personne munie d'une arme à feu prohibée ou à autorisation restreinte chargée qu'elle n'est censée posséder nulle part et à aucun moment et qui prend part à un acte criminel ou qui expose autrui à un danger » (par. 206). Le juge conclut qu'une peine exemplaire, axée sur la dissuasion et la dénonciation, doit continuer d'être infligée à un tel délinquant.

[26] The Court of Appeal held that, despite mitigating factors, the trial judge's sentence was appropriate and should be upheld.

[26] La Cour d'appel considère que malgré l'existence de circonstances atténuantes, la peine infligée en première instance est appropriée et doit être confirmée.

B. *Charles*

[27] In May 2008, Charles and another man were living in a Toronto rooming house. An incident at the rooming house was reported to the police. They attended and secured the scene. The Emergency Task Force arrived and searched the house, finding a loaded Ruger semi-automatic handgun and ammunition in Charles' bedroom. It was equipped with an over-capacity magazine, which is a prohibited device under the *Criminal Code*, containing 13 rounds of live 9-mm ammunition. A further round of ammunition was found on Charles' bed near the gun. The serial number on the gun had been removed. Charles admitted to police that he did not have a licence to possess a firearm and did not hold a current registration certificate for the firearm. Charles was arrested and charged with various firearm-related offences.

B. *Dossier Charles*

[27] En mai 2008, après le signalement d'un incident à la maison de chambres de Toronto où habitaient M. Charles et un autre homme, les policiers se sont rendus sur place et ont établi un périmètre de sécurité. En fouillant les lieux, l'équipe d'intervention d'urgence a découvert dans la chambre de M. Charles une arme de poing semi-automatique Ruger chargée et des munitions. L'arme était munie d'un chargeur grande capacité — un dispositif prohibé suivant le *Code criminel* — contenant 13 balles 9 mm. D'autres munitions ont été trouvées sur le lit de M. Charles, près de l'arme. Le numéro de série de l'arme avait été effacé. M. Charles a reconnu qu'il n'avait ni permis de possession, ni certificat d'enregistrement valide. Il a été arrêté et accusé de diverses infractions relatives aux armes à feu.

(1) Ontario Superior Court of Justice

[28] The Crown elected to proceed by way of indictment. Charles pleaded guilty to possession of a loaded prohibited firearm, contrary to s. 95(1) of the *Criminal Code*. He also pleaded guilty to possession of a firearm knowing that the serial number had been defaced, contrary to s. 108(1)(*b*); possession

(1) Cour supérieure de justice de l'Ontario

[28] Le poursuivant a opté pour la mise en accusation. M. Charles a plaidé coupable à l'accusation de possession d'une arme à feu prohibée chargée, une infraction prévue au par. 95(1) du *Code criminel*. Il a aussi plaidé coupable aux accusations suivantes : possession d'une arme à feu dont il savait que

of a firearm while subject to a firearms prohibition order, contrary to s. 117.01(1), and without being the holder of a licence, contrary to s. 91(1); and possession of ammunition while subject to a firearms prohibition order, contrary to s. 117.01(1).

le numéro de série avait été maquillé (al. 108(1)*b*)), possession d'une arme à feu malgré une ordonnance qui le lui interdisait (par. 117.01(1)), possession d'une arme à feu sans permis (par. 91(1)) et possession de munitions malgré une ordonnance qui le lui interdisait (par. 117.01(1)).

[29] Charles has a lengthy and serious criminal record. At the time of sentencing, it included approximately 20 prior convictions, five of which involved crimes of violence and five other convictions for firearm-related offences. Two of Charles's prior convictions are relevant (under s. 84(5) and (6)) to the application of the mandatory minimum sentence in s. 95(2)(*a*)(ii).

[29] M. Charles a un lourd casier judiciaire et a commis de graves infractions. Au moment de déterminer sa peine, il comptait environ 20 déclarations de culpabilité, dont cinq pour des crimes avec violence et cinq autres pour des infractions liées aux armes à feu. Deux de ces déclarations de culpabilité valent (suivant les par. 84(5) et (6)) pour l'application de la peine minimale obligatoire du sous-al. 95(2)*a*)(ii).

[30] The first notable conviction was in 2002, when Charles pleaded guilty to a charge of possession of ammunition while subject to a firearms prohibition order, contrary to s. 117.01(1) of the *Criminal Code*. He was charged following a dispute with his grandmother regarding a gun. The police responded to the dispute and found a locked box containing a single .38 calibre bullet, as well as identification documents belonging to Charles. Returning later to arrest him, the police also found Charles in possession of a large quantity of crack cocaine, electronic scales, a cell phone, scissors and a screwdriver. He was charged with possession of ammunition contrary to a prohibition order and possession of cocaine for the purpose of trafficking. It appears from the record that he was sentenced to two months' imprisonment on each charge, to be served concurrently, plus 96 days' credit for presentence custody.

[30] La première remonte à 2002. M. Charles avait plaidé coupable à l'accusation d'avoir été en possession de munitions malgré une ordonnance qui lui interdisait la possession d'une arme à feu (par. 117.01(1) du *Code criminel*). L'accusation avait été portée par suite d'une altercation avec sa grand-mère au sujet d'une arme de poing. Les policiers étaient alors intervenus et avaient trouvé une boîte verrouillée contenant une balle de calibre .38 ainsi que des papiers d'identité appartenant à M. Charles. Lorsqu'ils étaient revenus l'arrêter, les policiers avaient trouvé en sa possession de grandes quantités de crack, des balances électroniques, un téléphone portable, des ciseaux et un tournevis. M. Charles a été accusé de possession de munitions malgré une ordonnance d'interdiction et de possession de cocaïne en vue d'en faire le trafic. Le dossier révèle qu'il a été condamné à deux mois d'emprisonnement pour chacun des chefs, à purger concurremment, en sus de ses 96 jours de détention présentencielle.

[31] The second notable conviction was in 2004, when Charles pleaded guilty to robbing an employment agency with three accomplices, while using an imitation firearm and having his face masked with the intent to commit an indictable offence, contrary to s. 85(2) of the *Criminal Code*. He was sentenced to 18 and a half months' imprisonment on each count, to be served concurrently, after credit of four and a half months of presentence custody.

[31] La deuxième déclaration de culpabilité remonte à 2004. Sur le fondement du par. 85(2) du *Code criminel*, il a été accusé du vol qualifié d'une agence de placement avec trois complices. Il avait utilisé une fausse arme à feu et masqué son visage dans un dessein criminel. M. Charles a plaidé coupable. Il a été condamné à une peine carcérale de 18 mois et demi pour chacun des chefs, à purger concurremment, après l'octroi d'un crédit pour détention présentencielle de quatre mois et demi.

[32] At sentencing for the present offence, Charles contested the Crown's invocation of the five-year mandatory minimum penalty. He challenged the combined effect of ss. 84(5)(*a*) and 95(2)(*a*)(ii) as being contrary to ss. 7, 9 and 12 of the *Charter*, though he later conceded that the determination of the s. 12 claim was dispositive of the ss. 7 and 9 challenges. Charles argued that the inclusion in s. 84(5)(*a*) of offences that did not involve the possession of firearms as earlier offences for the purpose of s. 95(2) violated s. 12.

[32] Lors de la détermination de sa peine pour l'infraction visée en l'espèce, M. Charles a contesté la constitutionnalité de la peine minimale obligatoire de cinq ans d'emprisonnement requise par le poursuivant. Il a soutenu que l'effet combiné de l'al. 84(5)*a*) et du sous-al. 95(2)*a*)(ii) contrevenait aux art. 7, 9 et 12 de la *Charte*, mais il a reconnu par la suite que l'issue de la contestation constitutionnelle fondée sur l'art. 12 déterminerait le sort de celles fondées sur les deux autres articles. Il a fait valoir que, pour l'application du par. 95(2), il est contraire à l'art. 12 de la *Charte* de compter au nombre des infractions antérieures celles énumérées à l'al. 84(5)*a*) qui ne comportent pas la possession d'une arme à feu.

[33] The sentencing judge dismissed Charles' s. 12 challenge. She held that the five-year mandatory minimum sentence imposed by s. 95(2)(*a*)(ii) was not grossly disproportionate for Charles, in light of the gravity of these crimes. She also held that Charles had failed to put forward any reasonable hypothetical circumstances in which the application of the five-year mandatory minimum sentence on conviction for a s. 95(1) offence to an offender previously convicted of an offence under ss. 85(2) or 117.01(1), would be grossly disproportionate. She sentenced Charles to seven years' imprisonment, less five years' credit on a two to one basis for two years, six months of pre-sentence custody: 2010 ONSC 8035, 222 C.R.R. (2d) 118.

[33] La juge du procès rejette la contestation fondée sur l'art. 12. À son avis, la peine minimale obligatoire de cinq ans prévue au sous-al. 95(2)*a*)(ii) n'est pas totalement disproportionnée dans le cas de M. Charles étant donné la gravité de ses crimes. Ce dernier n'a d'ailleurs invoqué aucune situation hypothétique raisonnable où il aurait été totalement disproportionné qu'un délinquant précédemment déclaré coupable d'une infraction prévue aux par. 85(2) ou 117.01(1) se voit infliger la peine minimale obligatoire de cinq ans pour avoir contrevenu au par. 95(1). La juge le condamne à une peine carcérale de sept ans, réduite de cinq ans après l'octroi d'un crédit à raison de deux jours contre un pour la détention présentencielle d'une durée de deux ans et six mois (2010 ONSC 8035, 222 C.R.R. (3d) 118).

(2) <u>Court of Appeal for Ontario, 2013 ONCA 681, 117 O.R. (3d) 456</u>

(2) <u>Cour d'appel de l'Ontario, 2013 ONCA 681, 117 O.R. (3d) 456</u>

[34] Charles appealed to the Court of Appeal, which heard his appeal with Nur and four others concerning constitutional challenges arising out of the imposition of mandatory minimum sentences for various firearm-related offences.

[34] M. Charles s'est pourvu en Cour d'appel, qui a regroupé son dossier avec celui de M. Nur et quatre autres dossiers de contestation constitutionnelle de peines minimales obligatoires prévues à l'égard de diverses infractions liées aux armes à feu.

[35] Cronk J.A., for the court, held that the five-year mandatory minimum sentence of imprisonment for a second offence under s. 95(2) is grossly disproportionate when measured against a reasonable hypothetical in the nature of a licensing offence, even where the offender has previously been

[35] Au nom de la Cour d'appel, la juge Cronk conclut que la peine minimale obligatoire de cinq ans d'emprisonnement qui s'applique en cas de récidive est totalement disproportionnée si l'on considère la situation hypothétique raisonnable où l'infraction est de type réglementaire, à supposer même que le

convicted of an offence listed under s. 84(5). Consequently, she declared s. 95(2)(*a*)(ii) of no force or effect to the extent that it imposes a mandatory minimum sentence of five years' imprisonment for a second or subsequent offence when the Crown proceeds by way of indictment. However, Cronk J.A. dismissed Charles' claims under s. 7 of the *Charter*, holding that the impugned provisions were neither arbitrary nor overbroad and, therefore, did not infringe s. 7.

délinquant hypothétique ait précédemment été reconnu coupable d'une infraction visée au par. 84(5). Elle déclare donc le sous-al. 95(2)*a*)(ii) inopérant dans la mesure où il prévoit une peine minimale obligatoire de cinq ans d'emprisonnement en cas de récidive lorsque le poursuivant opte pour la mise en accusation. Elle rejette toutefois les prétentions de M. Charles fondées sur l'art. 7 de la *Charte*, estimant que les dispositions contestées ne sont pas arbitraires et que leur portée n'est pas excessive, de sorte qu'elles ne contreviennent pas à l'art. 7.

[36] Charles did not otherwise attack his overall sentence and conceded that a sentence of five years' imprisonment for his s. 95(1) offence alone was appropriate, even without the application of the five-year mandatory minimum. Consequently, Cronk J.A. affirmed the sentence imposed by the sentencing judge.

[36] M. Charles ne contestait pas par ailleurs la peine globale dont il avait écopé et il reconnaissait qu'une peine carcérale de cinq ans pour infraction au par. 95(1) serait appropriée dans son cas à lui même si la peine minimale obligatoire ne s'appliquait pas. Par conséquent, la juge Cronk confirme la peine infligée en première instance.

IV. Issues

IV. Questions en litige

[37] This appeal raises the following issues:

(a) Do the mandatory minimum terms of imprisonment in s. 95(2)(*a*)(i) and (ii) of the *Criminal Code* infringe s. 12 of the *Charter*?

(b) Do the mandatory minimum terms of imprisonment in s. 95(2)(*a*)(i) and (ii) of the *Criminal Code* infringe s. 7 of the *Charter*?

(c) If so, are they saved under s. 1 of the *Charter*?

[37] Le pourvoi soulève les questions suivantes :

a) Les peines minimales obligatoires d'emprisonnement prévues aux sous-al. 95(2)*a*)(i) et (ii) du *Code criminel* contreviennent-elles à l'art. 12 de la *Charte*?

b) Les peines minimales obligatoires d'emprisonnement prévues aux sous-al. 95(2)*a*)(i) et (ii) du *Code criminel* contreviennent-elles à l'art. 7 de la *Charte*?

c) Dans l'affirmative, sont-elles sauvegardées par application de l'article premier de la *Charte*?

V. Discussion

V. Analyse

A. *Do the Mandatory Minimum Terms of Imprisonment in Section 95(2)(a)(i) and (ii) Infringe Section 12 of the Charter?*

A. *Les peines minimales obligatoires d'emprisonnement prévues aux sous-al. 95(2)a)(i) et (ii) contreviennent-elles à l'art. 12 de la Charte?*

(1) The Test for Infringement of Section 12

(1) Le critère permettant de déterminer s'il y a violation ou non de l'art. 12

[38] Section 12 of the *Charter* states that everyone has the right not to be subjected to any cruel and

[38] L'article 12 de la *Charte* énonce que chacun a droit à la protection contre toutes peines cruelles

unusual punishment. The question is whether the mandatory minimum sentences imposed by s. 95(2) violate this guarantee. The respondents say they do, because s. 95(2) catches conduct that falls far short of true criminal conduct — for example licensing offences. The Attorney General for Ontario responds that these examples are inadmissible hypotheticals and should not enter into the constitutional analysis, and that in any event, the Crown will choose to prosecute offences of lesser culpability by summary conviction, avoiding the mandatory minimum provisions.

et inusitées. La question à trancher est celle de savoir si les peines minimales obligatoires prévues au par. 95(2) portent atteinte à cette garantie. Les intimés soutiennent que c'est le cas parce que la disposition s'applique à des actes qui ne constituent pas de véritables actes criminels, par exemple les infractions réglementaires. La procureure générale de l'Ontario rétorque que cet exemple correspond à une situation hypothétique inadmissible, qu'il ne doit pas être pris en compte dans l'analyse constitutionnelle et que, de toute manière, le ministère public optera pour la procédure sommaire dans le cas d'une infraction comportant une culpabilité moindre, ce qui écartera l'application des peines minimales obligatoires.

[39] This Court has set a high bar for what constitutes "cruel and unusual . . . punishment" under s. 12 of the *Charter*. A sentence attacked on this ground must be grossly disproportionate to the punishment that is appropriate, having regard to the nature of the offence and the circumstances of the offender: *R. v. Smith*, [1987] 1 S.C.R. 1045, at p. 1073. Lamer J. (as he then was) explained at p. 1072 that the test of gross disproportionality "is aimed at punishments that are more than merely excessive". He added, "[w]e should be careful not to stigmatize every disproportionate or excessive sentence as being a constitutional violation". A prescribed sentence may be grossly disproportionate as applied to the offender before the court or because it would have a grossly disproportionate impact on others, rendering the law unconstitutional.

[39] La Cour place la barre haute lorsqu'il s'agit de tenir une peine pour « cruel[le] et inusité[e] » au sens de l'art. 12 de la *Charte*. La peine doit en effet être totalement disproportionnée à celle qui convient eu égard à la nature de l'infraction et à la situation du délinquant (*R. c. Smith*, [1987] 1 R.C.S. 1045, p. 1073). Le juge Lamer (plus tard Juge en chef) explique à la p. 1072 que le critère de la disproportion [totale] « vise les peines qui sont plus que simplement excessives ». Il ajoute : « Il faut éviter de considérer que toute peine disproportionnée ou excessive est contraire à la Constitution . . . » Une peine prescrite peut être totalement disproportionnée dans le cas du délinquant en cause ou peut avoir sur une autre personne un effet totalement disproportionné, la disposition étant dès lors inconstitutionnelle.

[40] In determining an appropriate sentence for purposes of the comparison demanded by this analysis, regard must be had to the sentencing objectives in s. 718 of the *Criminal Code*, which instructs the sentencing judge as follows:

[40] Pour déterminer la peine appropriée aux fins de la comparaison qui s'impose dès lors, il faut tenir compte des objectifs de détermination de la peine énoncés à l'art. 718 du *Code criminel*, qui précise ce qui suit à l'intention du tribunal appelé à déterminer la peine :

718. The fundamental purpose of sentencing is to contribute, along with crime prevention initiatives, to respect for the law and the maintenance of a just, peaceful and safe society by imposing just sanctions that have one or more of the following objectives:

(*a*) to denounce unlawful conduct;

718. Le prononcé des peines a pour objectif essentiel de contribuer, parallèlement à d'autres initiatives de prévention du crime, au respect de la loi et au maintien d'une société juste, paisible et sûre par l'infliction de sanctions justes visant un ou plusieurs des objectifs suivants :

a) dénoncer le comportement illégal;

(*b*) to deter the offender and other persons from committing offences;

(*c*) to separate offenders from society, where necessary;

(*d*) to assist in rehabilitating offenders;

(*e*) to provide reparations for harm done to victims or to the community; and

(*f*) to promote a sense of responsibility in offenders, and acknowledgment of the harm done to victims and to the community.

[41] The sentencing judge must also have regard to the following: any aggravating and mitigating factors, including those listed in s. 718.2(*a*)(i) to (iv); the principle that a sentence should be similar to sentences imposed on similar offenders for similar offences committed in similar circumstances (s. 718.2(*b*)); the principle that where consecutive sentences are imposed, the combined sentence should not be unduly long or harsh (s. 718.2(*c*)); and the principle that courts should exercise restraint in imposing imprisonment (ss. 718.2(*d*) and (*e*)).

[42] In reconciling these different goals, the fundamental principle of sentencing under s. 718.1 of the *Criminal Code* is that "[a] sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender."

[43] It is no surprise, in view of the constraints on sentencing, that imposing a proportionate sentence is a highly individualized exercise, tailored to the gravity of the offence, the blameworthiness of the offender, and the harm caused by the crime: *R. v. M. (C.A.)*, [1996] 1 S.C.R. 500, at para. 80. "Only if this is so can the public be satisfied that the offender 'deserved' the punishment he received and feel a confidence in the fairness and rationality of the system": *Re B.C. Motor Vehicle Act*, [1985] 2 S.C.R. 486, at p. 533, per Wilson J. As LeBel J. explained in *R. v. Ipeelee*, 2012 SCC 13, [2012] 1 S.C.R. 433:

b) dissuader les délinquants, et quiconque, de commettre des infractions;

c) isoler, au besoin, les délinquants du reste de la société;

d) favoriser la réinsertion sociale des délinquants;

e) assurer la réparation des torts causés aux victimes ou à la collectivité;

f) susciter la conscience de leurs responsabilités chez les délinquants, notamment par la reconnaissance du tort qu'ils ont causé aux victimes et à la collectivité.

[41] Le juge qui détermine la peine doit également tenir compte des circonstances aggravantes et atténuantes, y compris celles énumérées aux sous-al. 718.2*a*)(i) à (iv), du principe de l'infliction de peines semblables à celles infligées à des délinquants pour des infractions semblables commises dans des circonstances semblables (al. 718.2*b*)), de l'obligation d'éviter l'excès de nature ou de durée dans l'infliction de peines consécutives (al. 718.2*c*)) et de l'obligation de faire preuve de retenue dans l'infliction d'une peine carcérale (al. 718.2*d*) et *e*)).

[42] Pour concilier ces différents objectifs, le principe fondamental de la détermination de la peine suivant l'art. 718.1 du *Code criminel* veut que « [l]a peine [soit] proportionnelle à la gravité de l'infraction et au degré de responsabilité du délinquant. »

[43] Il n'est donc pas étonnant, au vu de toutes ces exigences, que l'entreprise qui consiste à imposer une peine proportionnelle fasse grandement appel à l'individualisation et prenne en compte la gravité de l'infraction, la culpabilité morale du délinquant et le préjudice causé par le crime (*R. c. M. (C.A.)*, [1996] 1 R.C.S. 500, par. 80). Dans le *Renvoi sur la Motor Vehicle Act (C.-B.)*, [1985] 2 R.C.S. 486, p. 533, la juge Wilson dit que « [c]e n'est que dans ce cas que le public peut être convaincu que le contrevenant "méritait" la punition qui lui a été infligée et avoir confiance dans l'équité et la rationalité du système ». Pour reprendre les propos du juge LeBel dans l'arrêt *R. c. Ipeelee*, 2012 CSC 13, [2012] 1 R.C.S. 433 :

Proportionality is the *sine qua non* of a just sanction. First, the principle ensures that a sentence reflects the gravity of the offence. This is closely tied to the objective of denunciation. It promotes justice for victims and ensures public confidence in the justice system.

. . .

Second, the principle of proportionality ensures that a sentence does not exceed what is appropriate, given the moral blameworthiness of the offender. In this sense, the principle serves a limiting or restraining function and ensures justice for the offender. In the Canadian criminal justice system, a just sanction is one that reflects both perspectives on proportionality and does not elevate one at the expense of the other. [para. 37]

[44] Mandatory minimum sentences, by their very nature, have the potential to depart from the principle of proportionality in sentencing. They emphasize denunciation, general deterrence and retribution at the expense of what is a fit sentence for the gravity of the offence, the blameworthiness of the offender, and the harm caused by the crime. They function as a blunt instrument that may deprive courts of the ability to tailor proportionate sentences at the lower end of a sentencing range. They may, in extreme cases, impose unjust sentences, because they shift the focus from the offender during the sentencing process in a way that violates the principle of proportionality. They modify the general process of sentencing which relies on the review of all relevant factors in order to reach a proportionate result. They affect the outcome of the sentence by changing the normal judicial process of sentencing.

[45] General deterrence — using sentencing to send a message to discourage others from offending — is relevant. But it cannot, without more, sanitize a sentence against gross disproportionality: "General deterrence can support a sentence which is more severe while still within the range of punishments that are not cruel and unusual" (*R. v. Morrisey*, 2000 SCC 39, [2000] 2 S.C.R. 90, at para. 45, per Gonthier J.). Put simply, a person cannot be made to suffer a

La proportionnalité représente la condition *sine qua non* d'une sanction juste. Premièrement, la reconnaissance de ce principe garantit que la peine reflète la gravité de l'infraction et crée ainsi un lien étroit avec l'objectif de dénonciation. La proportionnalité favorise ainsi la justice envers les victimes et assure la confiance du public dans le système de justice.

. . .

Deuxièmement, le principe de proportionnalité garantit que la peine n'excède pas ce qui est approprié compte tenu de la culpabilité morale du délinquant. En ce sens, il joue un rôle restrictif et assure la justice de la peine envers le délinquant. En droit pénal canadien, une sanction juste prend en compte les deux optiques de la proportionnalité et n'en privilégie aucune par rapport à l'autre. [par. 37]

[44] La peine minimale obligatoire est en soi susceptible de s'écarter du principe de proportionnalité lors de la détermination de la peine. Elle est davantage axée sur la dénonciation, la dissuasion générale et le châtiment que sur ce qui constitue une peine appropriée au vu de la gravité de l'infraction, de la culpabilité morale du délinquant et du préjudice causé. Implacable, la peine minimale obligatoire est susceptible d'empêcher le tribunal d'arrêter une peine proportionnelle se situant à l'extrémité inférieure de la fourchette. Dans certains cas extrêmes, elle peut même emporter l'infliction d'une peine injuste, le délinquant n'étant plus au centre du processus, et ce, d'une manière qui contrevient au principe de proportionnalité. Elle modifie le processus général de la détermination de la peine, lequel prend appui sur l'examen de tous les éléments pertinents pour arriver à un résultat proportionné. Elle influe sur le résultat en modifiant le processus judiciaire habituel de détermination de la peine.

[45] La dissuasion générale, à savoir l'infliction d'une peine pour transmettre un message de nature à dissuader les autres citoyens de contrevenir à la loi, importe. Or, cette seule considération ne saurait empêcher la disproportion totale : « [l]a dissuasion générale peut justifier l'infliction d'une peine qui, quoique sévère, se situe à l'intérieur de la fourchette des peines qui ne sont pas cruelles et inusitées » (*R. c. Morrisey*, 2000 CSC 39, [2000] 2 R.C.S. 90, par. 45,

grossly disproportionate punishment simply to send a message to discourage others from offending.

le juge Gonthier). Pour simplifier, on ne peut infliger à une personne une peine totalement disproportionnée à la seule fin de dissuader ses concitoyens de désobéir à la loi.

[46] To recap, a challenge to a mandatory minimum sentencing provision on the ground it constitutes cruel and unusual punishment under s. 12 of the *Charter* involves two steps. First, the court must determine what constitutes a proportionate sentence for the offence having regard to the objectives and principles of sentencing in the *Criminal Code*. Then, the court must ask whether the mandatory minimum requires the judge to impose a sentence that is grossly disproportionate to the fit and proportionate sentence. If the answer is yes, the mandatory minimum provision is inconsistent with s. 12 and will fall unless justified under s. 1 of the *Charter*.

[46] En bref, statuer sur une disposition prévoyant une peine minimale obligatoire dont on allègue l'inconstitutionnalité parce qu'elle infligerait une peine cruelle et inusitée contrairement à l'art. 12 de la *Charte* commande une analyse en deux étapes. Premièrement, le tribunal doit déterminer ce qui constituerait une peine proportionnée à l'infraction eu égard aux objectifs et aux principes de détermination de la peine établis par le *Code criminel*. Deuxièmement, il lui faut décider si la disposition contraint à l'infliction d'une peine totalement disproportionnée à la peine juste et proportionnée. Dans l'affirmative, la disposition en cause est incompatible avec l'art. 12 et de ce fait inopérante, sauf justification par application de l'article premier de la *Charte*.

(2) Whose Situation Is Considered in the Section 12 Analysis?

(2) Quelle situation prendre en compte dans l'analyse fondée sur l'art. 12?

[47] We have seen that a s. 12 challenge to a mandatory sentencing provision compares a fit and proportionate sentence for the offence with the sentence imposed by the mandatory minimum. At this point, a question arises — a question that is at the heart of this case. In analyzing the constitutionality of a mandatory minimum sentencing provision, who does the court take as the offender? Does the court consider only the offender who brings the s. 12 challenge? Or should it also, if necessary, consider how the provision impacts on other persons who might reasonably be caught by it?

[47] Nous avons vu que, dans le cadre de la contestation constitutionnelle fondée sur l'art. 12 d'une disposition prévoyant une peine minimale obligatoire, on compare la peine juste et proportionnée et la peine minimale obligatoire. Se pose alors la question qui se trouve au cœur de la présente affaire. Dans l'examen de la constitutionnalité de la disposition contestée, quel délinquant le tribunal prend-il en considération? S'en tient-il à l'auteur du recours fondé sur l'art. 12 ou doit-il également, si besoin est, considérer l'effet de la disposition sur d'autres personnes raisonnablement susceptibles de tomber sous le coup de celle-ci?

[48] Nur and Charles do not argue that the mandatory minimum terms of imprisonment in s. 95(2) are grossly disproportionate as applied to them. Rather, they argue that these mandatory minimum terms of imprisonment violate s. 12 as they apply to other offenders. Against this, the Attorney General of Ontario, supported by other Attorneys General, argues for a test that puts the primary or exclusive focus on the offender before the court. (The Attorney General of Ontario says the analysis should ask

[48] MM. Nur et Charles font valoir non pas que les peines minimales obligatoires d'emprisonnement prévues au par. 95(2) sont totalement disproportionnées dans leur cas, mais bien que ces peines contreviennent à l'art. 12 lorsqu'elles s'appliquent à d'autres délinquants. La procureure générale de l'Ontario, avec l'appui d'homologues, rétorque que le critère doit s'attacher principalement, voire uniquement, à la situation du délinquant qui saisit le tribunal. (Selon elle, le tribunal doit se demander si

whether the mandatory minimum is grossly disproportionate having regard to the purpose and gravity of the offence as manifested in *actual* common instances of committing the offence, as well as the *actual* case before the court: A.F. (Nur), at para. 41. The Attorney General of British Columbia goes further, asserting that only the circumstances of the offender should be considered.)

la peine minimale obligatoire est totalement disproportionnée eu égard à la raison d'être de l'infraction et à la gravité des actes réprimés, non seulement dans le cas *concret* dont il est saisi, mais également dans d'autres situations *concrètes* courantes (m.a. (Nur), par. 41). Son homologue de la Colombie-Britannique va plus loin et prétend que l'analyse ne doit porter que sur la situation du délinquant qui est à l'origine de l'instance.)

[49] For the reasons that follow, I conclude that excluding consideration of reasonably foreseeable applications of a mandatory minimum sentencing law would run counter to the settled authority of this Court and artificially constrain the inquiry into the law's constitutionality.

[49] Pour les motifs qui suivent, je conclus que ne pas tenir compte des applications raisonnablement prévisibles d'une disposition créant une peine minimale obligatoire irait à l'encontre de la jurisprudence établie de la Cour et limiterait de manière artificielle l'analyse portant sur la constitutionnalité de la disposition.

[50] To confine consideration to the offender's situation runs counter to the long and settled jurisprudence of this Court relating to *Charter* review generally, and to s. 12 review in particular.

[50] Ne faire porter l'examen que sur la situation du délinquant en cause va à l'encontre de la jurisprudence de la Cour, établie de longue date, concernant le contrôle constitutionnel au regard de la *Charte* en général et de l'art. 12 en particulier.

[51] I turn first to the general jurisprudence of *Charter* review. This Court has consistently held that a challenge to a law under s. 52 of the *Constitution Act, 1982* does not require that the impugned provision contravene the rights of the claimant: *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295, at p. 314; *R. v. Morgentaler*, [1988] 1 S.C.R. 30; *R. v. Wholesale Travel Group Inc.*, [1991] 3 S.C.R. 154; *R. v. Heywood*, [1994] 3 S.C.R. 761; *R. v. Mills*, [1999] 3 S.C.R. 668; *R. v. Ferguson*, 2008 SCC 6, [2008] 1 S.C.R. 96, at paras. 58-66. As I wrote in *Ferguson*, "[a] claimant who otherwise has standing can generally seek a declaration of invalidity under s. 52 on the grounds that a law has unconstitutional effects either in his own case or on third parties": para. 59. This is because "[i]t is the nature of the law, not the status of the accused, that is in issue": *Big M*, at p. 314, per Dickson J. Section 52 of the *Constitution Act, 1982* entrenches not only the supremacy of the Constitution but also commands that "any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect". If the only way to challenge an unconstitutional law were on the

[51] Considérons d'abord la jurisprudence sur le contrôle constitutionnel effectué au regard de la *Charte* en général. La Cour a toujours estimé qu'une personne pouvait contester une disposition législative sur le fondement de l'art. 52 de la *Loi constitutionnelle de 1982* même lorsque ses propres droits n'étaient pas bafoués par la disposition (*R. c. Big M Drug Mart Ltd.*, [1985] 1 R.C.S. 295, p. 314; *R. c. Morgentaler*, [1988] 1 R.C.S. 30; *R. c. Wholesale Travel Group Inc.*, [1991] 3 R.C.S. 154; *R. c. Heywood*, [1994] 3 R.C.S. 761; *R. c. Mills*, [1999] 3 R.C.S. 668; *R. c. Ferguson*, 2008 CSC 6, [2008] 1 R.C.S. 96, par. 58-66). Comme je l'indique dans l'arrêt *Ferguson*, « [u]n demandeur qui a par ailleurs qualité pour agir peut généralement solliciter une déclaration d'invalidité en application de l'art. 52 au motif qu'une disposition a des effets inconstitutionnels pour lui-même ou pour des tiers » (par. 59). Il en est ainsi parce que « [c]'est la nature de la loi, et non pas le statut de l'accusé, qui est en question » (*Big M*, p. 314, le juge Dickson). Non seulement l'art. 52 de la *Loi constitutionnelle de 1982* consacre la primauté de la Constitution, mais il dispose que celle-ci « rend inopérantes les

basis of the precise facts before the court, bad laws might remain on the books indefinitely. This violates the rule of law. No one should be subjected to an unconstitutional law: *Big M*, at p. 313. This reflects the principle that the Constitution belongs to all citizens, who share a right to the constitutional application of the laws of Canada.

dispositions incompatibles de toute autre règle de droit ». Si une loi inconstitutionnelle ne pouvait être contestée qu'au regard des faits précis d'une instance donnée, des lois invalides pourraient demeurer en vigueur indéfiniment, ce qui irait à l'encontre de la primauté du droit. Nul ne doit être soumis à une loi inconstitutionnelle (*Big M*, p. 313). Est ainsi consacré le principe de l'appartenance de la Constitution à tous les citoyens, lesquels possèdent en commun le droit à l'application constitutionnelle des lois canadiennes.

[52] The argument that the focus should be mainly or exclusively on the offender before the court is also inconsistent with the jurisprudence of the Court on the review of mandatory minimum sentences under s. 12 of the *Charter*. The cases have sometimes referred to this review as proceeding on "reasonable hypotheticals". The Attorney General of Ontario concedes that the cases under s. 12 support looking beyond the circumstances of the offender before the court, but asks us to overrule them. She says the cases on what constitutes a "reasonable hypothetical" are "irreconcilable". A review of the cases does not, with respect, support this contention.

[52] L'argument selon lequel l'analyse doit s'attacher principalement, voire uniquement, à la situation du délinquant qui saisit le tribunal va également à l'encontre de la jurisprudence de la Cour sur le contrôle constitutionnel d'une peine minimale obligatoire au regard de l'art. 12 de la *Charte*. La Cour a parfois dit de ce contrôle qu'il était effectué en fonction de « situations hypothétiques raisonnables ». La procureure générale de l'Ontario admet que les décisions rendues sur le fondement de l'art. 12 militent en faveur de la prise en compte de la situation d'autres personnes que l'auteur de la contestation, mais elle nous demande de revenir sur ces décisions. Elle affirme que les décisions qui définissent la « situation hypothétique raisonnable » sont [TRADUCTION] « inconciliables entre elles ». L'examen de la jurisprudence lui donne malheureusement tort.

[53] The first case to consider the question was *Smith*. The majority of the Court, per Lamer J. (as he then was) struck down a seven-year mandatory minimum sentence for importing narcotics on the basis that the law could catch a student driving home to Canada from the United States with her first joint of grass. The Court acknowledged that a long prison sentence was appropriate with few exceptions for people who import drugs into the country, but held that because it could catch people for whom the seven-year minimum sentence would be grossly disproportionate, it violated the s. 12 guarantee against cruel and unusual punishment.

[53] Dans l'arrêt *Smith*, le premier rendu sur ce point, les juges majoritaires de la Cour, par la voix du juge Lamer (plus tard Juge en chef), ont invalidé une peine minimale obligatoire de sept ans d'emprisonnement prévue pour l'importation de stupéfiants au motif que la disposition qui la prévoyait pouvait s'appliquer à un étudiant qui, de retour des États-Unis, était trouvé en possession de son premier joint de marijuana. La Cour a alors reconnu que, à quelques exceptions près, une longue peine carcérale était indiquée pour les personnes qui importaient de la drogue au pays. Elle a cependant statué que, dans la mesure où il était totalement disproportionné qu'une peine carcérale de sept ans s'applique à certaines personnes, la peine prévue contrevenait à l'art. 12 de la *Charte*, qui garantit la protection de chacun contre les peines cruelles et inusitées.

[54] A few years later in *R. v. Goltz*, [1991] 3 S.C.R. 485, the Court, per Gonthier J. for the majority, confirmed that a s. 12 review of mandatory minimum sentencing laws may look at cases other than that of the offender, and commented on the scope of that review. Laws should not be struck down as unconstitutional on the basis of examples that were unlikely ever to arise. The focus must be on "reasonable hypothetical circumstances, as opposed to far-fetched or marginally imaginable cases": p. 506 (emphasis in original). The Court upheld a minimum sentence of seven days' imprisonment for driving while prohibited.

[54] Quelques années plus tard, dans l'arrêt *R. c. Goltz*, [1991] 3 R.C.S. 485, le juge Gonthier, au nom des juges majoritaires de la Cour, confirmait que, lorsqu'il se fondait sur l'art. 12 de la *Charte*, le contrôle constitutionnel d'une disposition prévoyant une peine minimale obligatoire d'emprisonnement pouvait s'effectuer en fonction d'une autre situation que celle du délinquant en cause, et il se prononçait sur la portée de ce contrôle. Une disposition ne devait pas être déclarée inconstitutionnelle en fonction de situations éventuelles peu susceptibles de se présenter. Il fallait s'attacher à des « circonstances hypothétiques raisonnables, par opposition à des situations invraisemblables ou difficilement imaginables » (p. 506 (souligné dans l'original)). La Cour a confirmé la peine minimale de sept jours d'emprisonnement infligée pour conduite d'un véhicule malgré une interdiction de prendre le volant.

[55] Once again, in *Morrisey*, the majority of the Court, per Gonthier J., stressed that the "reasonableness of the hypothetical cannot be overstated": para. 30. The Court upheld a four-year mandatory minimum sentence for criminal negligence causing death by using a firearm.

[55] Dans l'arrêt *Morrisey*, la Cour s'est de nouveau prononcée sur ce point, toujours par la voix du juge Gonthier, au nom des juges majoritaires, opinant que « [l]'on ne saurait trop insister sur le caractère raisonnable de l'hypothèse » (par. 30). La Cour a confirmé la peine minimale obligatoire de quatre ans d'emprisonnement pour négligence criminelle causant la mort par suite de l'usage d'une arme à feu.

[56] These are the only three cases to directly address the question of what cases, or "hypotheticals", the court should consider on a s. 12 challenge to a mandatory minimum sentencing provision.[1] In my view, they do not establish that the jurisprudence is "irreconcilable". A single theme underlies *Goltz* and *Morrisey* — the only two cases to discuss the issue in detail — reasonable foreseeability. When Gonthier J. in *Goltz* speaks of the "reasonable hypothetical" he is speaking of *a situation that may reasonably be expected to arise* — not "marginally

[56] Ce sont les trois seuls arrêts qui portent directement sur les situations ou les « hypothèses » que le tribunal doit considérer pour statuer sur la constitutionnalité — au regard de l'art. 12 — d'une disposition prévoyant une peine minimale obligatoire[1]. À mon sens, ils ne permettent pas de conclure que les décisions rendues en la matière sont « inconciliables entre elles ». Une notion est commune aux deux seuls arrêts — *Goltz* et *Morrisey* — qui approfondissent le sujet : la prévisibilité raisonnable. Dans *Goltz*, le juge Gonthier renvoie

[1] In a brief oral judgment in *R. v. Brown*, [1994] 3 S.C.R. 749, the Court declined to consider a reasonable hypothetical with an underlying offence different from that in the case before the Court for the offence of using a firearm in the commission of an indictable offence under s. 85 of the *Criminal Code*, given that the Attorney General of Manitoba limited his defence of the constitutionality of the provision to the underlying offence of armed robbery. The Court did not give sustained consideration to the scope of the reasonable hypothetical.

[1] Dans *R. c. Brown*, [1994] 3 R.C.S. 749, un arrêt bref rendu de vive voix, la Cour a refusé de considérer une situation hypothétique raisonnable relative à une autre infraction sous-jacente que celle invoquée devant elle pour l'infraction d'usage d'une arme à feu lors de la perpétration d'une infraction, suivant l'art. 85 du *Code criminel*, puisque le procureur général du Manitoba ne plaidait la constitutionnalité de la disposition que pour l'infraction sous-jacente de vol à main armée. La Cour ne s'est pas attardée à la teneur d'une situation hypothétique raisonnable.

imaginable", not "far-fetched", but "reasonable". The early case of *Smith* is not inconsistent in words or result with the theme developed in *Goltz* and *Morrisey* — in determining whether mandatory minimum sentencing laws violate s. 12, it is appropriate to consider how the law may impact on third parties in reasonably foreseeable situations.

à des « situations hypothétiques raisonnables » lorsqu'il parle de *situations dont on peut raisonnablement prévoir qu'elles se présenteront*, non à des situations « invraisemblables » ou « difficilement imaginables », mais bien à des situations « raisonnables ». Le premier arrêt rendu sur ce point — *Smith* — n'est pas incompatible en termes de terminologie et de résultat avec la notion dégagée dans les arrêts *Goltz* et *Morrisey*, à savoir que pour décider si une peine minimale obligatoire contrevient ou non à l'art. 12, il convient de tenir compte des répercussions de la disposition en cause sur des tiers dans des situations hypothétiques raisonnables.

[57] Unfortunately, the word "hypothetical" has overwhelmed the word "reasonable" in the intervening years, leading to debate on how general or particular a hypothetical must be, and to the unfortunate suggestion that if a trial judge fails to assign a particular concatenation of characteristics to her hypothetical, the analysis is vitiated. With respect, this overcomplicates the matter. The question is simply whether it is reasonably foreseeable that the mandatory minimum sentence will impose sentences that are grossly disproportionate to some peoples' situations, resulting in a violation of s. 12. The terminology of "reasonable hypothetical" may be helpful in this regard, but the focus remains squarely on whether the sentence would be grossly disproportionate in reasonably foreseeable cases. At its core, the process is simply an application of well established principles of legal and constitutional interpretation.

[57] Au fil des ans, le mot « hypothétiques » l'a malheureusement emporté sur le mot « raisonnables », d'où le débat quant à savoir à quel point la situation hypothétique avancée doit avoir une portée générale ou particulière. D'où également la proposition malheureuse selon laquelle le juge du procès voit son analyse viciée s'il omet d'attribuer à la situation hypothétique considérée un enchaînement précis de caractéristiques. Soit dit en tout respect, c'est compliquer inutilement les choses. Il faut seulement se demander s'il est raisonnablement prévisible que la disposition prévoyant une peine minimale obligatoire inflige une peine totalement disproportionnée dans le cas de certaines personnes, de sorte qu'elle contreviendrait à l'art. 12. La notion de « situations hypothétiques raisonnables » peut être utile à cet égard, mais la principale question demeure celle de savoir si la peine considérée serait totalement disproportionnée dans des cas raisonnablement prévisibles. La démarche équivaut fondamentalement à appliquer des principes bien établis d'interprétation juridique et constitutionnelle.

[58] I conclude that the jurisprudence on general *Charter* review and on s. 12 review of mandatory minimum sentencing provisions supports the view that a court may look not only at the offender's situation, but at other reasonably foreseeable situations where the impugned law may apply. I see no reason to overrule this settled principle.

[58] J'arrive à la conclusion que la jurisprudence sur le contrôle au regard de la *Charte* en général et sur le contrôle au regard de l'art. 12 d'une disposition prévoyant une peine minimale obligatoire permet au tribunal de se pencher non seulement sur la situation du délinquant, mais aussi sur toute autre situation raisonnablement prévisible à laquelle la disposition pourrait s'appliquer. Je ne vois aucune raison de revenir sur ce principe établi.

[59] I add this. This Court does not and should not lightly overrule its prior decisions, particularly when they have been elaborated consistently over a number of years and when they represent the considered view of firm majorities: see, e.g., *Ontario (Attorney General) v. Fraser*, 2011 SCC 20, [2011] 2 S.C.R. 3, at paras. 56-57; *Canada v. Craig*, 2012 SCC 43, [2012] 2 S.C.R. 489, at para. 27. Deciding whether to do so requires us to balance correctness against certainty: *Craig*, at para. 27; *Canada (Attorney General) v. Bedford*, 2013 SCC 72, [2013] 3 S.C.R. 1101, at para. 47. We must be especially careful before reversing a precedent where the effect is — as it would be here — to diminish *Charter* protection: *R. v. Henry*, 2005 SCC 76, [2005] 3 S.C.R. 609, at para. 44.

[59] Ajoutons que la Cour ne revient pas à la légère sur ses précédents — et qu'elle ne doit pas le faire —, spécialement lorsqu'ils ont été établis avec cohérence pendant un certain nombre d'années et qu'ils représentent l'opinion réfléchie de formations nettement majoritaires (voir p. ex. *Ontario (Procureur général) c. Fraser*, 2011 CSC 20, [2011] 2 R.C.S. 3, par. 56-57; *Canada c. Craig*, 2012 CSC 43, [2012] 2 R.C.S. 489, par. 27). La décision de revenir sur un précédent exige au préalable la mise en balance de la justesse et de la certitude (*Craig*, par. 27; *Canada (Procureur général) c. Bedford*, 2013 CSC 72, [2013] 3 R.C.S. 1101, par. 47). Il nous faut faire preuve d'une grande prudence lorsqu'il s'agit de revenir sur un précédent et que le revirement aurait pour effet — comme en l'espèce — d'affaiblir une protection offerte par la *Charte* (*R. c. Henry*, 2005 CSC 76, [2005] 3 R.C.S. 609, par. 44).

[60] The Attorney General of Ontario raises a second argument for abandoning the s. 12 jurisprudence — that it is "unworkable" and leads to uncertainty. This contention rests on the debate about reasonable hypotheticals. As just discussed, the term "reasonable hypothetical" simply means that the court must look at reasonably foreseeable applications of the mandatory minimum at issue, and ask whether these would be grossly disproportionate and thus impose cruel and unusual punishment. This is the sort of inquiry judges have consistently conducted in *Charter* review. It is an inquiry into the range or scope of the law — into what Dickson J. in *Big M* referred to as the "nature of the law".

[60] La procureure générale de l'Ontario prétend en deuxième lieu qu'il convient de rompre avec les précédents relatifs à l'art. 12 parce qu'ils sont [TRADUCTION] « inapplicables » et sources d'incertitude. Sa prétention prend appui sur le débat qui entoure la définition des situations hypothétiques raisonnables. Or, je le répète, il faut y voir seulement les applications raisonnablement prévisibles de la peine minimale obligatoire en cause et se demander s'il en résulte l'infliction de peines totalement disproportionnées et, de ce fait, cruelles et inusitées. Telle a été la démarche constante des tribunaux lors d'un contrôle constitutionnel. Elle vise à déterminer la portée de la disposition ou son champ d'application, ce que le juge Dickson appelle la « nature de la loi » dans l'arrêt *Big M*.

[61] To be sure, the language of "reasonable hypotheticals" in the context of mandatory minimum sentences and the exaggerated debate that has surrounded the term has led some to fear that the potential for finding a law inconsistent with the *Charter* is limited only by the bounds of a particular judge's imagination. This fear is misplaced. Determining the reasonable reach of a law is essentially a question of statutory interpretation. At bottom, the court is simply asking: What is the reach of the law? What kind of conduct may the law reasonably be expected to catch? What is the law's reasonably foreseeable

[61] Dans le contexte des peines minimales obligatoires d'emprisonnement et du débat aux proportions exagérées qu'a suscité l'expression « situations hypothétiques raisonnables », d'aucuns ont certainement craint que seule l'imagination du juge saisi ne limite la possibilité d'une déclaration d'inconstitutionnalité. Cette crainte n'est pas fondée. Déterminer la portée raisonnable d'une loi relève essentiellement de l'interprétation législative. Au fond, le tribunal se demande seulement ce qui suit. Quelle est la portée de la loi? Quels actes pourraient raisonnablement tomber sous le coup de la loi? Quelle

impact? Courts have always asked these questions in construing the scope of offences and in determining their constitutionality.

est l'incidence raisonnablement prévisible de la loi? Telles sont les questions que les tribunaux se posent toujours pour délimiter la portée d'une disposition créant une infraction et se prononcer sur sa constitutionnalité.

[62] The inquiry into cases that the mandatory minimum provision may reasonably be expected to capture must be grounded in judicial experience and common sense. The judge may wish to start with cases that have actually arisen (I will address the usefulness of reported cases later), and make reasonable inferences from those cases to deduce what other cases are reasonably foreseeable. Fanciful or remote situations must be excluded: *Goltz*, at p. 506. To repeat, the exercise must be grounded in experience and common sense. Laws should not be set aside on the basis of mere speculation.

[62] L'examen des situations dont on peut raisonnablement s'attendre à ce qu'elles tombent sous le coup de la disposition prévoyant une peine minimale obligatoire doit s'appuyer sur l'expérience judiciaire et le bon sens. Le tribunal peut d'abord considérer les situations qui se sont présentées (je me penche plus loin sur l'utilité des cas répertoriés) et déterminer au moyen d'inférences raisonnables quelles autres situations sont raisonnablement prévisibles. Les hypothèses fantaisistes ou n'ayant qu'un faible rapport avec l'espèce doivent être écartées (*Goltz*, p. 506). Faut-il le rappeler, l'entreprise doit prendre appui sur l'expérience judiciaire et le bon sens. Une loi ne saurait être rendue inopérante sur la base de pures conjectures.

[63] Not only is looking at the law's impact on persons whom it is reasonably foreseeable the law may catch workable — it is essential to effective constitutional review. Refusing to consider reasonably foreseeable impacts of an impugned law would dramatically curtail the reach of the *Charter* and the ability of the courts to discharge their duty to scrutinize the constitutionality of legislation and maintain the integrity of the constitutional order. The protection of individuals' rights demands constitutional review that looks not only to the situation of the offender before the court, but beyond that to the reasonably foreseeable reach of the law. Testing the law against reasonably foreseeable applications will prevent people from suffering cruel and unusual punishment in the interim until the mandatory minimum is found to be unconstitutional in a particular case.

[63] Non seulement il est possible d'examiner l'effet de la loi sur les personnes auxquelles il est raisonnablement prévisible qu'elle s'applique, mais cela est essentiel au contrôle constitutionnel véritable. Refuser de prendre en compte les répercussions raisonnablement prévisibles de la loi contestée réduirait radicalement la portée de la *Charte* et la faculté qu'ont les tribunaux de s'acquitter de leur obligation de s'assurer de la constitutionnalité des lois et de préserver l'intégrité de l'ordre constitutionnel. La protection des droits individuels commande un contrôle constitutionnel qui s'intéresse non seulement à la situation du délinquant qui saisit le tribunal, mais également à celle de toute personne dont il est raisonnablement prévisible qu'elle tombe sous le coup de la loi en cause. Contrôler la loi au regard d'applications raisonnablement prévisibles permet d'éviter que des justiciables ne soient condamnés à des peines cruelles et inusitées avant que la peine minimale obligatoire ne soit déclarée inconstitutionnelle dans un cas donné.

[64] Refusing to consider an impugned law's impact on third parties would also undermine the prospect of bringing certainty to the constitutionality

[64] L'omission de se pencher sur l'effet de la loi contestée sur des tiers compromettrait en outre l'éventualité que la constitutionnalité d'une loi ne

of legislation, condemning constitutional jurisprudence to a wilderness of single instances. Citizens, the police and government are entitled — and indeed obliged — to know what the criminal law is and whether it is constitutional. Looking at whether the mandatory minimum has an unconstitutional impact on others avoids the chilling effect of unconstitutional laws remaining on the statute books.

devienne certaine, de sorte qu'il faudrait s'en remettre à d'innombrables instances engagées individuellement pour constituer une jurisprudence sur ce point. Les citoyens, la police et l'État ont le droit — et même l'obligation — de connaître la teneur du droit criminel et de savoir s'il est constitutionnel. Se demander si une peine minimale obligatoire se révèle inconstitutionnelle pour d'autres personnes permet d'éviter que des dispositions inconstitutionnelles ne demeurent malencontreusement en vigueur.

[65] I conclude that a mandatory minimum sentence may be challenged on the ground that it would impose a grossly disproportionate sentence either on the offender or on other persons in reasonably foreseeable situations. The constant jurisprudence of this Court and effective constitutional review demand no less. In the result, a mandatory minimum sentencing provision may be challenged on the basis that it imposes cruel and unusual punishment (i.e. a grossly disproportionate sentence) on the particular offender before the court, or failing this, on the basis that it is reasonably foreseeable that it will impose cruel and unusual punishment on other persons.

[65] J'estime qu'une peine minimale obligatoire peut être contestée pour le motif qu'elle inflige une peine totalement disproportionnée au délinquant ou à d'autres personnes se trouvant dans des situations raisonnablement prévisibles. La jurisprudence constante de la Cour et le contrôle constitutionnel véritable n'exigent rien de moins. Dès lors, la disposition qui prévoit une telle peine peut être invalidée parce qu'elle inflige une peine cruelle et inusitée (c'est-à-dire, totalement disproportionnée) au délinquant poursuivi ou, sinon, parce qu'il est raisonnablement prévisible qu'elle inflige à d'autres personnes une peine cruelle et inusitée.

[66] I turn now to some of the ancillary debates surrounding how a court should proceed where mandatory minimum sentencing laws are challenged under s. 12 on the basis of their reasonably foreseeable application to others.

[66] Passons maintenant aux débats connexes que suscite la question de savoir quelle doit être la démarche du tribunal appelé à statuer sur la constitutionnalité d'une disposition prévoyant une peine minimale obligatoire, au regard de l'art. 12 et en fonction de son application raisonnablement prévisible à des tiers.

[67] The first debate concerns the degree of "likelihood" required to satisfy the reasonable foreseeability test. The Attorney General of Ontario argues that the s. 12 question is whether it is *likely* that the *general application* of the offence would result in the imposition of a grossly disproportionate sentence amounting to cruel and unusual punishment: A.F. (Nur), at para. 66. She says the Court of Appeal erred by failing to confine itself to common instances of conduct caught by the provision and basing its decision on unlikely scenarios: para. 68-73. These instances create a presumption of constitutionality that can be defeated only by showing

[67] Le premier sujet de débat touche le degré de « vraisemblance » requis pour satisfaire au critère de la prévisibilité raisonnable. La procureure générale de l'Ontario soutient que, pour l'application de l'art. 12, il faut se demander s'il est *vraisemblable* que l'*application générale* de la disposition emporte l'infliction d'une peine totalement disproportionnée équivalant à une peine cruelle et inusitée (m.a. (Nur), par. 66). À son avis, la Cour d'appel a eu tort de ne pas s'en tenir aux situations courantes auxquelles s'applique la disposition et de se prononcer en fonction de scénarios invraisemblables (par. 68-73). Ces situations courantes établissent selon elle

that the offender before the court would suffer cruel and unusual punishment: para. 68.

une présomption de constitutionnalité qui ne peut-être réfutée que par la preuve que le délinquant en cause se verrait infliger une peine cruelle et inusitée (par. 68).

[68] The reasonable foreseeability test is not confined to situations that are likely to arise in the general day-to-day application of the law. Rather, it asks what situations may reasonably arise. It targets circumstances that are foreseeably captured by the minimum conduct caught by the offence. Only situations that are "remote" or "far-fetched" are excluded: *Goltz*, at p. 515. Contrary to what the Attorney General of Ontario suggests there is a difference between what is foreseeable although "unlikely to arise" and what is "remote [and] far-fetched": A.F. (Nur), at para. 66. Moreover, adoption of the likelihood standard would constitute a new and radically narrower approach to constitutional review of legislation than that consistently adhered to since *Big M*. The Court has never asked itself whether a projected application of an impugned law is common or "likely" in deciding whether a law violates a provision of the *Charter*. To set the threshold for constitutional review at common or likely instances would be to allow bad laws to stay on the books.

[68] Le critère de la prévisibilité raisonnable ne s'applique pas uniquement aux situations qui se présenteront vraisemblablement dans le cadre de l'application générale et habituelle de la loi. Il requiert plutôt qu'on se demande quelles situations sont raisonnablement susceptibles de se présenter. Il vise les cas dont il est prévisible qu'ils tombent sous le coup des conditions minimales de perpétration de l'infraction. Seules sont écartées les situations « invraisemblables » ou « n'ayant qu'un faible rapport avec l'espèce » (*Goltz*, p. 515). Contrairement à ce que laisse entendre la procureure générale de l'Ontario, il faut distinguer ce qui est prévisible bien que [TRADUCTION] « peu susceptible de se présenter » de ce qui est « invraisemblable [et] n'a qu'un faible rapport avec l'espèce » (m.a. (Nur), par. 66). De plus, l'application d'un critère de vraisemblance donnerait lieu à une approche nouvelle dont la portée serait radicalement réduite par rapport à celle constamment retenue depuis l'arrêt *Big M* pour le contrôle constitutionnel d'un texte législatif. Pour décider si une loi contrevient à une disposition de la *Charte*, la Cour ne s'est jamais demandé si l'application projetée de la loi contestée était courante ou « vraisemblable ». Si on ne tenait compte que des situations courantes ou vraisemblables pour statuer sur la constitutionnalité, on permettrait à des lois invalides de demeurer en vigueur.

[69] The Attorney General of Ontario urges that the approach she proposes is necessary to prevent uncertainty in the law. A presumption of constitutionality arising from the appropriateness of the mandatory minimum (having regard to the purpose and gravity of the offence) in common or likely cases, she asserts, will set a constant standard that can only exceptionally be rebutted by a finding that the mandatory minimum is grossly disproportionate as applied to a particular offender. This, she argues, will provide certainty.

[69] La procureure générale de l'Ontario fait valoir que l'approche qu'elle préconise s'impose pour prévenir l'incertitude du droit. Une présomption de constitutionnalité découlant du caractère approprié de la peine minimale obligatoire (eu égard à la raison d'être de la disposition et à la gravité des actes réprimés) dans des situations courantes ou vraisemblables établira selon elle une norme constante qui ne pourra être écartée qu'à titre exceptionnel par la conclusion selon laquelle, dans le cas d'un délinquant en particulier, la peine minimale obligatoire est totalement disproportionnée. Il s'agit à son sens d'une approche qui est de nature à assurer la certitude.

[70] I am not persuaded by this argument. In essence, it would make the sentencing range for common occurrences of the offence the constitutional norm. This is problematic for two reasons. Appropriate sentencing ranges are themselves subject to debate and, more importantly, any gain in clarity would come at the price of appropriate constitutional review and unconstitutional applications of the law. The question is, certainty for whom? The Attorney General of Ontario's test provides a degree of certainty for offenders in situations that commonly occur. But it provides no certainty for offenders outside that category. They — and their prosecutors and judges — are left to wonder whether the mandatory minimum will be unconstitutional in their situation. Finally, as discussed below, the reasonably foreseeable test, applied in accordance with the principle of *stare decisis*, will provide sufficient certainty in the law.

[70] Cette thèse ne me convainc pas. Elle revient essentiellement à faire de la fourchette des peines prévues pour les modes courants de perpétration de l'infraction la norme constitutionnelle applicable, ce qui est problématique pour deux raisons. D'abord, les fourchettes des peines appropriées font elles-mêmes débat et, surtout, un gain de clarté serait obtenu au détriment d'un contrôle constitutionnel approprié et se traduirait par des applications inconstitutionnelles de la loi. La question est de savoir à qui doit bénéficier la clarté. Le critère préconisé par la procureure générale de l'Ontario établit un degré de certitude pour le délinquant dont la situation se présente couramment. Les autres délinquants n'ont pas droit à la certitude, si bien que, tout comme leurs poursuivants et leurs juges, ils en sont réduits à se demander si la peine minimale obligatoire sera inconstitutionnelle dans leurs cas. Enfin, le critère de la prévisibilité raisonnable, appliqué en conformité avec le principe du *stare decisis*, assurera suffisamment la certitude du droit. J'y reviendrai.

[71] This brings us to the second ancillary question — the effect of a ruling that a particular mandatory minimum provision does not violate s. 12. Two questions arise. First, can a particular offender argue in a future case that the provision violates s. 12 because it imposes cruel and unusual punishment on him or her? The answer, all agree, must be yes. If the offender can establish new circumstances or evidence, including mitigating factors specific to the offender, it is open to a court to reconsider the constitutionality of the law. Second, can the offender in a future case argue that the provision as applied to others violates s. 12? The answer to this question is that it depends. Once a law is held not to violate s. 12, *stare decisis* prevents an offender in a later case from simply rearguing what constitutes a reasonably foreseeable range of the law. But *stare decisis* does not prevent a court from looking at different circumstances and new evidence that was not considered in the preceding case. A court's conclusion based on its review of the provision's reasonably foreseeable applications does not foreclose consideration in future of different reasonable applications: *Morrisey*, at para. 89, per Arbour J. That said, the threshold for revisiting the constitutionality of a mandatory minimum is high and requires

[71] Passons maintenant au deuxième sujet de débat, à savoir l'effet d'une décision selon laquelle une disposition donnée prévoyant une peine minimale obligatoire ne contrevient pas à l'art. 12. Il appelle deux questions. D'abord, un délinquant peut-il ultérieurement soutenir que la disposition viole l'art. 12 en ce qu'elle lui inflige une peine cruelle et inusitée? Tous conviennent que la réponse doit être affirmative. Lorsque le délinquant peut démontrer l'existence d'une situation nouvelle ou d'un élément de preuve nouveau, y compris des circonstances atténuantes qui lui sont propres, la constitutionnalité de la loi peut être réexaminée. Ensuite, le délinquant peut-il ultérieurement soutenir que, dans son application à d'autres personnes, la disposition viole l'art. 12? La réponse est alors moins claire. Dès qu'il est établi que la disposition ne porte pas atteinte à la protection prévue à l'art. 12, le principe du *stare decisis* empêche le délinquant, dans une instance ultérieure, de simplement avancer à nouveau ce qui constitue selon lui un champ d'application de la loi raisonnablement prévisible. Le *stare decisis* n'empêche cependant pas le tribunal de considérer une situation nouvelle ou un élément de preuve nouveau qui ne l'a pas été dans l'instance précédente. La conclusion fondée sur son appréciation des applications raisonnablement

a significant change in the reasonably foreseeable applications of the law. In a nutshell, the normal rules of *stare decisis* answer the concern raised by the Attorney General of Ontario that "each subsequent trial court [will be asked] to duplicate the analysis": A.F. (Nur), at para. 39.

prévisibles de la disposition en cause n'empêche pas le tribunal de se pencher ultérieurement sur d'autres applications raisonnables (*Morrisey*, par. 89, la juge Arbour). Cela dit, les conditions auxquelles il peut y avoir réexamen de la constitutionnalité d'une peine minimale obligatoire sont strictes, et il doit s'être produit une modification substantielle des applications raisonnablement prévisibles de la disposition en cause. En somme, les règles habituelles du *stare decisis* permettent d'apaiser la crainte de la procureure générale de l'Ontario que, [TRADUCTION] « dans chacun des procès subséquents, le juge [soit appelé] à reprendre la même analyse » (m.a. (Nur), par. 39).

[72] A third ancillary question is whether reported cases should be considered in determining whether it is reasonably foreseeable that a mandatory minimum sentencing provision will result in cruel and unusual punishment, contrary to the s. 12 guarantee. The majority in *Morrisey* said reported cases should be excluded if the court considers them "marginal", and the minority, without qualification, said they may be considered. In my view, they can. Reported cases illustrate the range of real-life conduct captured by the offence. I see no principled reason to exclude them on the basis that they represent an uncommon application of the offence, provided that the relevant facts are sufficiently reported. Not only is the situation in a reported case reasonably foreseeable, it has happened. Reported cases allow us to know what conduct the offence captures in real life. However, they do not prevent the judge from having regard to other scenarios that are reasonably foreseeable: see *Morrisey*, at para. 33.

[72] Le troisième sujet de débat correspond aux cas répertoriés : doivent-ils être pris en considération pour déterminer s'il est raisonnablement prévisible que l'application d'une disposition prévoyant une peine minimale obligatoire emporte l'infliction d'une peine cruelle et inusitée contrairement à l'art. 12? Dans l'arrêt *Morrisey*, les juges majoritaires opinent que ces cas doivent être écartés lorsque, selon le tribunal, il s'agit de cas « limites »; les juges minoritaires affirment d'emblée qu'ils peuvent être pris en compte. J'estime qu'ils le peuvent. Les cas répertoriés montrent toute l'étendue des actes susceptibles de tomber concrètement sous le coup de la disposition. Je ne vois aucun motif rationnel de les écarter parce qu'ils correspondent à des applications peu fréquentes de la disposition créant l'infraction, à condition que les faits en cause soient suffisamment exposés. Non seulement les situations en cause sont raisonnablement prévisibles, mais elles se sont présentées. Les décisions rendues à leur sujet permettent de savoir comment la disposition s'applique dans la vraie vie. Elles n'empêchent toutefois pas le tribunal d'envisager d'autres scénarios qui sont raisonnablement prévisibles (voir *Morrisey*, par. 33).

[73] A fourth ancillary question concerns the personal characteristics of hypothetical offenders that should be considered. Some have suggested that the consideration must be generalized to the point where all personal characteristics are excluded, while others assert that any and all characteristics should be included. This debate is largely the result

[73] Le quatrième sujet de débat concerne les caractéristiques personnelles des délinquants hypothétiques qu'il faudrait considérer. D'aucuns ont laissé entendre qu'il fallait généraliser l'analyse au point d'exclure toute caractéristique personnelle, alors que d'autres ont préconisé la prise en considération de toutes les caractéristiques. Le débat est

of the reification of the notion of the reasonable hypothetical discussed earlier. It is answered by recognizing two aspects of the reasonably foreseeable application test.

en grande partie attribuable à la réification de la notion de situation hypothétique raisonnable examinée précédemment. Reconnaître deux volets au critère d'application de la prévisibilité raisonnable permet de rallier les uns et les autres.

[74] First, what is reasonably foreseeable necessarily requires consideration of the sort of situations that may reasonably be expected to be caught by the mandatory minimum, based on experience and common sense. This means that personal characteristics cannot be entirely excluded. For example, as we will see in applying the test to this case, it may be relevant to look at the fact that an offender at the licensing end of the spectrum caught by the mandatory minimum might come into innocent possession of the prohibited or restricted firearm, or be mistaken as to the scope of the prohibition.

[74] Premièrement, il faut nécessairement tenir compte, à partir de l'expérience et du bon sens, du genre de situation qui est raisonnablement susceptible de tomber sous le coup de la peine minimale obligatoire. Dès lors, les caractéristiques personnelles ne peuvent être totalement écartées. Nous verrons par exemple que, en appliquant le critère à la présente espèce, il peut être pertinent de tenir compte du fait que le délinquant qui a commis une infraction réglementaire et qui tombe sous le coup de la peine minimale obligatoire a pu se trouver en possession de l'arme à feu prohibée ou à autorisation restreinte sans dessein criminel ou se méprendre sur la portée de l'interdiction.

[75] Second, cutting the other way, is the admonition of *Goltz* that far-fetched or remotely imaginable examples should be excluded from consideration. This excludes using personal features to construct the most innocent and sympathetic case imaginable — on that basis almost any mandatory minimum could be argued to violate s. 12 and lawyerly ingenuity would be the only limit to findings of unconstitutionality. To repeat, the inquiry must be grounded in common sense and experience.

[75] Deuxièmement, dans l'arrêt *Goltz*, la Cour met cependant les tribunaux en garde contre la prise en compte d'exemples invraisemblables ou difficilement imaginables. Ainsi, les caractéristiques personnelles ne sauraient servir à constituer un dossier qui, par sa bénignité, inspirerait la plus grande sympathie possible (sur ce fondement, on pourrait en effet prétendre de presque toute peine minimale obligatoire qu'elle contrevient à l'art. 12, et la constitutionnalité d'une disposition ne tiendrait qu'aux aptitudes du plaideur). Je le répète, l'examen doit avoir pour assises le bon sens et l'expérience.

[76] Thus, the inquiry into reasonably foreseeable situations the law may capture may take into account personal characteristics relevant to people who may be caught by the mandatory minimum, but must avoid characteristics that would produce remote or far-fetched examples.

[76] En somme, l'examen des situations dont il est raisonnablement prévisible qu'elles tombent sous le coup de la loi peut tenir compte des caractéristiques personnelles des personnes auxquelles pourrait s'appliquer la peine minimale obligatoire, mais il doit écarter celles qui seraient propres à des situations invraisemblables ou n'ayant qu'un faible rapport avec l'espèce.

[77] In summary, when a mandatory minimum sentencing provision is challenged, two questions arise. The first is whether the provision results in a grossly disproportionate sentence on the individual before the court. If the answer is no, the second

[77] En résumé, lorsqu'une disposition prévoyant une peine minimale obligatoire est contestée, deux questions se posent. Premièrement, la disposition a-t-elle pour effet d'infliger une peine totalement disproportionnée à l'accusé? Si la réponse est négative,

question is whether the provision's reasonably foreseeable applications will impose grossly disproportionate sentences on others. This is consistent with the settled jurisprudence on constitutional review and rules of constitutional interpretation, which seek to determine the potential reach of a law; is workable; and provides sufficient certainty.

il faut se demander en deuxième lieu si les applications raisonnablement prévisibles de la disposition infligeront à d'autres personnes des peines totalement disproportionnées. La démarche s'harmonise avec la jurisprudence établie sur le contrôle constitutionnel, ainsi qu'avec les règles d'interprétation constitutionnelle, dont l'objet est de circonscrire la portée éventuelle d'une disposition; elle est applicable et elle assure une certitude suffisante.

(3) Application to *Nur*

[78] Nur does not argue that the mandatory minimum in s. 95(2)(*a*)(i) results in a grossly disproportionate sentence in his case. Rather, he argues it violates s. 12 in its reasonably foreseeable application to some other offenders. The question is whether the three-year minimum sentence imposed by s. 95(2)(*a*)(i) will result in grossly disproportionate sentences in reasonably foreseeable cases.

[79] I would answer this question in the affirmative. The Court of Appeal, using the language of "reasonable hypotheticals", described a situation at the licensing end of the spectrum of conduct caught by s. 95(1) for which a three-year sentence would be grossly disproportionate — where a person who has a valid licence for an unloaded restricted firearm at one residence, safely stores it with ammunition in another residence, e.g. at her cottage rather than her dwelling house.

[80] The Attorney General of Ontario objects that this is a speculative scenario. On the contrary, occurrences such as this are reasonably foreseeable. In *R. v. MacDonald*, 2014 SCC 3, [2014] 1 S.C.R. 37, this Court was concerned with a charge against a gun owner who, unaware that his licence was confined to his Calgary residence, had it in his possession at his Halifax residence. The Court (contrary to what the Ontario Court of Appeal assumed

(3) Application au dossier *Nur*

[78] M. Nur ne soutient pas que la peine minimale obligatoire prévue au sous-al. 95(2)*a*)(i) se traduit par une peine totalement disproportionnée en ce qui le concerne, mais bien que la disposition viole l'art. 12 dans son application raisonnablement prévisible à certains autres délinquants. La question qui se pose est celle de savoir si la peine minimale de trois ans d'emprisonnement que prévoit le sous-al. 95(2)*a*)(i) emportera l'infliction de peines totalement disproportionnées dans des situations raisonnablement prévisibles.

[79] Je réponds par l'affirmative. La Cour d'appel renvoie à une [TRADUCTION] « situation hypothétique raisonnable » où l'acte réprimé s'entend d'une infraction réglementaire tombant sous le coup du par. 95(1), une infraction pour laquelle une peine carcérale de trois ans serait totalement disproportionnée. La situation considérée est celle d'une personne qui détient un permis valide pour la possession d'une arme à feu à autorisation restreinte non chargée dans un lieu de résidence et qui l'entrepose de façon sécuritaire avec des munitions dans un autre (p. ex. à son chalet plutôt qu'à sa résidence principale).

[80] La procureure générale de l'Ontario reproche au scénario son caractère conjectural. Or, une telle situation est au contraire raisonnablement prévisible. Dans l'arrêt *R. c. MacDonald*, 2014 CSC 3, [2014] 1 R.C.S. 37, la Cour devait se prononcer sur une accusation portée contre le propriétaire d'un pistolet qui ignorait que son permis ne valait que pour sa résidence de Calgary et qui avait eu l'arme en sa possession à sa résidence d'Halifax.

in its example) took a broad view of the offence, holding that the Crown is not required to prove that the accused knew that possession in the place in question was unauthorized (para. 55), and upheld Mr. MacDonald's conviction. The Court commented that, "in ordinary circumstances, his mistake of law would be a mitigating factor to be considered in fashioning a sentence that is proportionate to his crime": para. 61.

Contrairement à ce que la Cour d'appel de l'Ontario avait tenu pour acquis dans son exemple, la Cour a interprété largement l'infraction, elle a estimé que le ministère public n'avait pas à prouver que l'accusé savait que la possession de l'arme dans le lieu en question n'était pas autorisée (par. 55) et elle a confirmé la déclaration de culpabilité de M. MacDonald. La Cour a ajouté que « son erreur de droit [celle de l'accusé] constituerait, dans des circonstances ordinaires, un facteur atténuant au moment de déterminer une peine proportionnelle à la gravité de son crime » (par. 61).

[81] The Attorney General of Ontario argues that the scenarios posited by the Court of Appeal are uncommon, and that few s. 95 cases do not warrant at least a three-year sentence: A.F. (Nur), at para. 72. But as discussed above, the test is not whether prosecutions at the lower end of the spectrum are common. Rather, the question is whether the provision would reasonably be expected to capture the conduct. The answer to this question is yes.

[81] Selon la procureure générale de l'Ontario, les scénarios avancés par la Cour d'appel se présentent rarement, et peu fréquentes sont les accusations fondées sur l'art. 95 qui ne justifient pas une peine d'au moins trois ans (m.a. (Nur), par. 72). Or, je le rappelle, la question n'est pas celle de savoir si les poursuites pour une infraction située à l'extrémité inférieure du continuum d'application sont fréquentes, mais bien si on peut raisonnablement s'attendre à ce que le comportement tombe sous le coup de la disposition. Je réponds par l'affirmative.

[82] Section 95(1) casts its net over a wide range of potential conduct. Most cases within the range may well merit a sentence of three years or more, but conduct at the far end of the range may not. At one end of the range, as Doherty J.A. observed, "stands the outlaw who carries a loaded prohibited or restricted firearm in public places as a tool of his or her criminal trade. . . . [T]his person is engaged in truly criminal conduct and poses a real and immediate danger to the public": para. 51. At this end of the range — indeed for the vast majority of offences — a three-year sentence may be appropriate. A little further along the spectrum stands the person whose conduct is less serious and poses less danger; for these offenders three years' imprisonment may be disproportionate, but not grossly so. At the far end of the range, stands the licensed and responsible gun owner who stores his unloaded firearm safely with ammunition nearby, but makes a mistake as to where it can be stored. For this offender, a three-year sentence is grossly disproportionate to the sentence the conduct would otherwise

[82] Le paragraphe 95(1) s'applique à une vaste gamme de comportements potentiels, dont la plupart peuvent fort bien justifier l'infliction d'une peine d'au moins trois ans, mais ce n'est peut-être pas le cas de comportements qui se situent à l'une des extrémités du continuum d'application. Ainsi que le fait observer le juge Doherty, on retrouve à l'une de ces extrémités [TRADUCTION] « le hors-la-loi qui, dans le cadre de ses activités criminelles, se rend dans un lieu public muni d'une arme à feu prohibée ou à autorisation restreinte chargée. [. . .] [S]on comportement est véritablement criminel et expose le public à un danger réel et immédiat » (par. 51). À cette extrémité — et pour la plupart des infractions d'ailleurs —, une peine carcérale de trois ans peut être indiquée. Un peu plus loin dans le continuum, on retrouve la personne dont les actes sont moins graves et qui expose ses concitoyens à un danger moins grand; pour elle, une peine carcérale de trois ans peut être disproportionnée sans l'être totalement. À l'autre extrémité du continuum, il y a le propriétaire responsable d'une arme, titulaire

merit under the sentencing provisions of the *Criminal Code*.

d'un permis, qui entrepose son arme à feu non chargée de façon sécuritaire avec des munitions à proximité, mais qui se méprend sur le lieu d'entreposage autorisé. Pour ce délinquant, une peine carcérale de trois ans est totalement disproportionnée à la peine qui serait infligée conformément aux dispositions du *Code criminel* sur la détermination de la peine.

[83] Given the minimal blameworthiness of the offender in this situation and the absence of any harm or real risk of harm flowing from the conduct (i.e. having the gun in one residence as opposed to another), a three-year sentence would be grossly disproportionate. Similar examples can be envisaged. A person inherits a firearm and before she can apprise herself of the licence requirements commits an offence. A spouse finds herself in possession of her husband's firearm and breaches the regulation. We need not focus on a particular hypothetical. The bottom line is that s. 95(1) foreseeably catches licensing offences which involve little or no moral fault and little or no danger to the public. For these offences three years' imprisonment is grossly disproportionate to a fit and fair sentence. Firearms are inherently dangerous and the state is entitled to use sanctions to signal its disapproval of careless practices and to discourage gun owners from making mistakes, to be sure. But a three-year term of imprisonment for a person who has essentially committed a licensing infraction is totally out of sync with the norms of criminal sentencing set out in the s. 718 of the *Criminal Code* and legitimate expectations in a free and democratic society. As the Court of Appeal concluded, there exists a "cavernous disconnect" between the severity of the licensing-type offence and the mandatory minimum three-year term of imprisonment: para. 176. Consequently, I conclude that s. 95(2)(*a*)(i) breaches s. 12 of the *Charter*.

[83] Vu la faible culpabilité morale du délinquant dans cette situation et l'absence de préjudice ou de risque réel qu'un préjudice découle du comportement (l'entreposage de l'arme à feu dans un lieu de résidence plutôt qu'un autre), une peine carcérale de trois ans serait totalement disproportionnée. D'autres cas semblables peuvent être envisagés. Une personne peut hériter d'une arme à feu et commettre une infraction avant qu'elle ne prenne connaissance des exigences en matière de permis. Une épouse peut se trouver en possession de l'arme à feu de son époux et enfreindre le règlement. Il n'est pas nécessaire de s'en tenir à une hypothèse en particulier. Essentiellement, on peut prévoir que le par. 95(1) s'applique à des infractions réglementaires qui comportent une culpabilité morale minime, voire nulle, et qui n'exposent le public à aucun danger ou presque. Dans le cas de ces infractions, une peine carcérale de trois ans est totalement disproportionnée à une peine juste et appropriée. Certes, les armes à feu sont foncièrement dangereuses, et l'État peut recourir à des sanctions pour signaler sa désapprobation des pratiques négligentes et décourager la méprise chez les propriétaires d'armes à feu. Or, infliger une peine de trois ans d'emprisonnement à une personne qui a essentiellement commis une infraction réglementaire déroge totalement aux normes de détermination de la peine énoncées à l'art. 718 du *Code criminel* et aux attentes légitimes des citoyens dans une société libre et démocratique. Comme le conclut la Cour d'appel, il y a [TRADUCTION] « discordance totale » entre la gravité de l'infraction de type réglementaire et la peine minimale obligatoire de trois ans d'emprisonnement (par. 176). Par conséquent, je conclus que le sous-al. 95(2)*a*)(i) contrevient à l'art. 12 de la *Charte*.

[84] It may be noted that the offence in s. 95(1) captures less serious conduct than other gun-related crimes that attract mandatory minimum terms of

[84] Signalons que l'infraction créée au par. 95(1) réprime des actes moins graves par rapport à d'autres crimes liés aux armes à feu qui appellent

imprisonment. For example, in *Morrisey*, the Court upheld a four-year mandatory minimum term of imprisonment for the offence of criminal negligence causing death with a firearm. Unlike the offence of criminal negligence causing death with a firearm, s. 95(1) does not require proof of harm — it is a simple possession offence.

l'imposition d'une peine minimale obligatoire. Par exemple, dans l'arrêt *Morrisey*, la Cour a confirmé une peine minimale obligatoire de quatre ans d'emprisonnement pour l'infraction de négligence criminelle causant la mort par suite de l'usage d'une arme à feu. Contrairement à la disposition qui crée cette infraction, le par. 95(1) n'exige pas la preuve d'un préjudice, car l'infraction créée s'entend de la seule possession.

[85] The Attorneys General of Canada and Ontario argue that the Court of Appeal erred by not taking into account the Crown's ability to elect to proceed summarily and thereby avoid the mandatory minimum sentence in the indictable offence. They argue that the hybrid nature of the offence should be taken into account as a factor when assessing the likelihood that a general application of the offence would result in a grossly disproportionate sentence being imposed. Put differently, they contend that the Crown's election to proceed summarily and thereby avoid a mandatory minimum prevents s. 95 from being grossly disproportionate when the conduct is at the less serious end of the spectrum.

[85] Les procureurs généraux du Canada et de l'Ontario soutiennent que la Cour d'appel a tort de ne pas tenir compte de la faculté du ministère public d'opter pour la procédure sommaire et d'écarter ainsi la peine minimale obligatoire applicable sur mise en accusation. Ils font valoir que la nature mixte de l'infraction constitue un élément à considérer pour apprécier le risque que l'application générale de la disposition donne lieu à l'infliction d'une peine totalement disproportionnée. En d'autres termes, ils prétendent que le fait que le ministère public opte pour la procédure sommaire et écarte du coup la peine minimale obligatoire empêche que soit infligée, en application de l'art. 95, une peine totalement disproportionnée lorsque le comportement se situe à l'extrémité du continuum qui correspond aux infractions les moins graves.

[86] I cannot agree. To accept this argument would result in replacing a public hearing on the constitutionality of s. 95 before an independent and impartial court with the discretionary decision of a Crown prosecutor, who is in an adversarial role to the accused.

[86] Je ne peux être d'accord. Faire droit à cette thèse revient à substituer à la tenue par un tribunal indépendant et impartial d'une audience publique sur la constitutionnalité de l'art. 95 la décision discrétionnaire d'un poursuivant dont les intérêts sont opposés à ceux de l'accusé.

[87] Sentencing is inherently a judicial function. It is the courts that are directed by Parliament to impose a mandatory minimum term of imprisonment, and it is the duty of the courts to scrutinize the constitutionality of the provision. The Crown's submission is in effect an invitation to delegate the courts' constitutional obligation to the prosecutors employed by the state, leaving the threat of a grossly disproportionate sentence hanging over an accused's head.

[87] La détermination de la peine relève foncièrement du pouvoir judiciaire. C'est aux tribunaux que le législateur dicte l'imposition d'une peine minimale obligatoire d'emprisonnement, et c'est à eux qu'il incombe d'examiner attentivement la constitutionnalité de la disposition. La prétention du ministère public invite en fait à déléguer l'obligation constitutionnelle des tribunaux aux poursuivants — des salariés de l'État —, ce qui ne soustrait pas l'accusé au risque de se voir infliger une peine totalement disproportionnée.

[88] Lamer J., for the majority of the Court, firmly rejected this argument in *Smith*, at p. 1078:

> In my view the section cannot be salvaged by relying on the discretion of the prosecution not to apply the law in those cases where, in the opinion of the prosecution, its application would be a violation of the *Charter*. To do so would be to disregard totally s. 52 of the *Constitution Act, 1982* which provides that any law which is inconsistent with the Constitution is of no force or effect to the extent of the inconsistency and the courts are duty bound to make that pronouncement, not to delegate the avoidance of a violation to the prosecution or to anyone else for that matter. [Emphasis added.]

[89] This Court recently considered the distinction between the prosecution's function in exercising its discretion to proceed summarily or by way of indictment and the courts' sentencing function in *R. v. Anderson*, 2014 SCC 41, [2014] 2 S.C.R. 167. The Court emphasized that sentencing is a judicial function, and opined that the fact a mandatory regime may require a judge to impose a disproportionate sentence does not alter the prosecutorial function in electing the mode of trial. As Moldaver J. explained for a unanimous Court:

> Mr. Anderson's argument in effect equates the duty of the judge and the prosecutor, but there is no basis in law to support equating their distinct roles in the sentencing process. It is *the judge's* responsibility to impose sentence; likewise, it is *the judge's* responsibility, within the applicable legal parameters, to craft a proportionate sentence. If a mandatory minimum regime requires a judge to impose a disproportionate sentence, the regime should be challenged. [Underlining added; para. 25.]

[90] This is not to say that the Crown election to proceed summarily is in itself problematic. It is entirely appropriate that the Crown should exercise its discretion in order to screen out some offences at the lower end of the spectrum captured by s. 95(1). Hybrid offences allow the Crown to take into account the variation that exists between cases. They recognize that the same offence can be committed in more and less serious ways, and allows

[88] Dans l'arrêt *Smith*, le juge Lamer, au nom des juges majoritaires de la Cour, rejette fermement la thèse avancée :

> À mon avis, l'article ne peut pas être sauvegardé en invoquant ce pouvoir discrétionnaire qu'a le ministère public de ne pas appliquer la loi dans les cas où il estime que son application entraînerait une violation de la *Charte*. Ce serait là ignorer totalement l'art. 52 de la *Loi constitutionnelle de 1982* qui porte que la Constitution rend inopérantes les dispositions incompatibles de toute autre règle de droit et les tribunaux ont le devoir de déclarer qu'il en est ainsi; ils ne peuvent laisser ni au ministère public ni à personne d'autre le soin d'éviter une violation. [Je souligne; p. 1078.]

[89] Récemment, dans l'arrêt *R. c. Anderson*, 2014 CSC 41, [2014] 2 R.C.S. 167, la Cour examinait la distinction entre la fonction du poursuivant qui exerce son pouvoir discrétionnaire d'opter pour la procédure sommaire ou la mise en accusation et la fonction du tribunal qui consiste à déterminer la peine. Elle a souligné que la détermination de la peine relève du judiciaire et affirmé que l'obligation faite au tribunal par un régime de peine minimale obligatoire d'infliger une peine disproportionnée ne modifie pas la fonction du poursuivant lorsqu'il s'agit de choisir le mode de poursuite. Voici les explications du juge Moldaver, au nom des juges unanimes de la Cour :

> L'argument de M. Anderson assimile le devoir du juge à celui du poursuivant, mais aucun principe de droit ne permet d'assimiler leurs rôles distincts dans le processus de détermination de la peine. Il appartient *au juge* d'infliger la peine; il *lui* appartient également d'établir une peine proportionnée, sans s'écarter des paramètres juridiques applicables. Si un régime de peine minimale obligatoire oblige un juge à infliger une peine disproportionnée, il y aurait lieu de contester le régime. [Je souligne; par. 25.]

[90] Pour autant, la décision du poursuivant d'opter pour la procédure sommaire n'est pas problématique en soi. Il est tout à fait indiqué d'exercer le pouvoir discrétionnaire qui permet de ne pas poursuivre les auteurs de certaines infractions qui se situent à l'extrémité inférieure du continuum d'application du par. 95(1). Dans le cas d'une infraction mixte, le poursuivant peut tenir compte de ce qui distingue une affaire d'une autre. C'est reconnaître

the Crown to take the specific circumstances of each case into account. As the trial judge noted in *Nur*, the "state interest, in enacting a hybrid offence, is to provide flexibility so that Crown prosecutors can adapt available procedures and sentences to the needs of a particular case": para. 126.

qu'une même infraction peut être commise d'une manière plus ou moins grave et permettre au poursuivant de tenir compte des circonstances propres à chacune des affaires. Comme le signale le juge du procès dans le dossier *Nur*, [TRADUCTION] « en créant une infraction mixte, l'État veut donner de la souplesse aux avocats du ministère public afin qu'ils adaptent les procédures et les peines prévues aux besoins d'une affaire donnée » (par. 126).

[91] The argument of the Attorneys General of Canada and Ontario, however, goes further. They seek to insulate otherwise unconstitutional laws through the exercise of prosecutorial discretion as to when and to whom the laws apply. But unconstitutional laws are null and void under s. 52 of the *Constitution Act, 1982*. The Attorneys General's argument is essentially the converse of a constitutional exemption. As I observed on behalf of a unanimous Court in *Ferguson*, "[t]he divergence between the law on the books and the law as applied — and the uncertainty and unpredictability that result — exacts a price paid in the coin of injustice": para. 72. It deprives citizens of the right to know what the law is in advance and to govern their conduct accordingly, and it encourages the uneven and unequal application of the law. To paraphrase *Ferguson*, bad law, fixed up on a case-by-case basis by prosecutors, does not accord with the role and responsibility of Parliament to enact constitutional laws for the people of Canada: paras. 72-73.

[91] La thèse des procureurs généraux du Canada et de l'Ontario va toutefois plus loin. Afin de protéger des dispositions qui sont par ailleurs inconstitutionnelles, ils invoquent le pouvoir discrétionnaire qui permet au poursuivant de choisir dans quelles circonstances et à quelles personnes les appliquer. Or, l'art. 52 de la *Loi constitutionnelle de 1982* dispose qu'une loi inconstitutionnelle est inopérante. Les procureurs généraux préconisent essentiellement l'inverse d'une exemption constitutionnelle. Comme je le fais observer au nom des juges unanimes de la Cour dans l'arrêt *Ferguson*, « [l]a divergence entre la disposition figurant dans le corpus législatif et la règle de droit appliquée — ainsi que l'incertitude et l'imprévisibilité qui en découlent — a pour conséquence de créer l'injustice » (par. 72). Elle prive les citoyens du droit de savoir d'avance ce que prévoit la loi et de la possibilité de se comporter en conséquence et elle invite à l'application inégale de la loi. Pour paraphraser l'arrêt *Ferguson*, l'existence d'une loi invalide dont le poursuivant corrige ponctuellement les défauts n'est pas compatible avec le rôle et la responsabilité du législateur d'édicter des règles législatives constitutionnelles pour le peuple canadien (par. 72-73).

[92] Since writing these reasons, I have had the opportunity to read the reasons of my colleague, Justice Moldaver, who concludes that s. 95(2) does not violate s. 12 of the *Charter* essentially on the ground that the prosecution may elect to proceed by summary conviction where the conduct at issue is such that imposing the mandatory minimum sentence would be grossly disproportionate. I do not agree that *Canada (Attorney General) v. PHS Community Services Society*, 2011 SCC 44, [2011] 3 S.C.R. 134, supports the rule that a mandatory minimum law that imposes grossly disproportionate sentences in foreseeable cases may be saved from

[92] Depuis la rédaction initiale des présents motifs, j'ai eu l'occasion de prendre connaissance de l'opinion de mon collègue le juge Moldaver. Il conclut que le par. 95(2) ne contrevient pas à l'art. 12 de la *Charte* parce que, essentiellement, le poursuivant peut opter pour la procédure sommaire lorsque la nature du comportement reproché fait en sorte que l'infliction de la peine minimale obligatoire serait totalement disproportionnée. Je disconviens que l'arrêt *Canada (Procureur général) c. PHS Community Services Society*, 2011 CSC 44, [2011] 3 R.C.S. 134, appuie la thèse selon laquelle la disposition qui prévoit une peine minimale obligatoire et

unconstitutionality by prosecutorial discretion to proceed by another route.

[93] *PHS* was concerned with the federal Minister of Health's decision not to grant a medical exemption to a safe-injection site from the application of the *Controlled Drugs and Substances Act*, S.C. 1996, c. 19. This was an administrative decision under a statutory exemption that was designed to promote public health. The essence of the challenge before the Court in *PHS* was whether the Minister's administrative law decision was compliant with the *Charter*. But the scenario in *PHS* is a far cry from the proposition advanced by the Attorneys General in the present appeals — that the exercise of a prosecutor's discretion as to whether to invoke the mandatory minimum sentence in an adversarial criminal trial can effectively insulate a legislated mandatory minimum term of imprisonment from review under s. 12 of the *Charter*.

[94] I add this about my colleague's proposed framework. The protection it offers against grossly disproportionate punishment is illusory: in practice it would create a situation where the exercise of the prosecutor's discretion is effectively immune from meaningful review. The abuse of discretion standard is a notoriously high bar and has no place in this Court's jurisprudence under s. 12 of the *Charter*. The proposed framework would be a radical departure from the constitutional framework in these cases, and offers scant protection from grossly disproportionate sentences being imposed on offenders.

[95] Two further objections may be raised against the argument that prosecutorial discretion can cure a sentencing provision that violates s. 12 of the *Charter*. The first is that one cannot be certain that the discretion will always be exercised in a way that would avoid an unconstitutional result. Nor can the constitutionality of a statutory provision rest

dont l'application entraîne l'imposition d'une peine totalement disproportionnée dans certains cas prévisibles peut échapper à l'inconstitutionnalité grâce au pouvoir discrétionnaire qui permet au poursuivant d'opter pour un autre mode de poursuite.

[93] Dans cette affaire, le ministre fédéral de la Santé avait refusé à un centre d'injection supervisé une exemption de l'application de la *Loi réglementant certaines drogues et autres substances*, L.C. 1996, c. 19. Il s'agissait d'une décision fondée sur le pouvoir légal d'accorder une exemption dans l'intérêt de la santé publique. La question en litige que la Cour devait trancher était celle de savoir si la décision du ministre relevant du droit administratif respectait la *Charte*. La situation alors considérée diffère toutefois considérablement de celle qui sous-tend la thèse avancée par les procureurs généraux dans les présents pourvois, à savoir que l'exercice du pouvoir discrétionnaire qui permet au poursuivant de ne pas requérir la peine minimale obligatoire dans une instance criminelle contradictoire peut de fait soustraire au contrôle constitutionnel fondé sur l'art. 12 de la *Charte* la peine minimale obligatoire d'emprisonnement établie par la loi.

[94] J'ajoute ce qui suit concernant le cadre d'analyse proposé par mon collègue. La protection qu'il offre contre la peine totalement disproportionnée est illusoire; dans les faits, il créerait une situation où l'exercice du pouvoir discrétionnaire du poursuivant serait en fait à l'abri de tout contrôle véritable. Il est bien connu que la norme applicable à l'abus du pouvoir discrétionnaire est très stricte, et la Cour ne saurait y avoir recours pour statuer sur l'application de l'art. 12 de la *Charte*. Le cadre d'analyse proposé s'éloigne radicalement du cadre d'analyse constitutionnelle retenu dans ces décisions et il protège insuffisamment contre l'infliction de peines totalement disproportionnées.

[95] Deux autres points peuvent être opposés à l'idée que le pouvoir discrétionnaire de la poursuite puisse remédier au fait qu'une disposition sur la détermination de la peine contrevient à l'art. 12 de la *Charte*. Premièrement, nul ne peut être assuré que ce pouvoir sera toujours exercé de manière à éviter un résultat inconstitutionnel. La constitutionnalité

on an expectation that the Crown will act properly: *Lavallee, Rackel & Heintz v. Canada (Attorney General)*, 2002 SCC 61, [2002] 3 S.C.R. 209, at para. 45. As Cory J., for the majority, stated in *R. v. Bain*, [1992] 1 S.C.R. 91, at pp. 103-4:

> Unfortunately it would seem that whenever the Crown is granted statutory power that can be used abusively then, on occasion, it will indeed be used abusively. The protection of basic rights should not be dependent upon a reliance on the continuous exemplary conduct of the Crown, something that is impossible to monitor or control. Rather the offending statutory provision should be removed.

[96] This leads to a related concern that vesting that much power in the hands of prosecutors endangers the fairness of the criminal process. It gives prosecutors a trump card in plea negotiations, which leads to an unfair power imbalance with the accused and creates an almost irresistible incentive for the accused to plead to a lesser sentence in order to avoid the prospect of a lengthy mandatory minimum term of imprisonment. As a result, the "determination of a fit and appropriate sentence, having regard to all of the circumstances of the offence and offender, may be determined in plea discussions outside of the courtroom by a party to the litigation": R. M. Pomerance, "The New Approach to Sentencing in Canada: Reflections of a Trial Judge" (2013), 17 *Can. Crim. L.R.* 305, at p. 313. We cannot ignore the increased possibility that wrongful convictions could occur under such conditions.

[97] Second, as noted by Doherty J.A. in the Court of Appeal below, the exercise of discretion typically occurs before the facts are fully known. An analysis that upholds s. 95(2) on the basis of the summary conviction option "does not come to grips with the timing of the Crown election and the factual basis upon which that election is made": para. 163. The existence of the summary conviction option is therefore not an answer to the respondents' s. 12 claim.

d'une disposition législative ne saurait non plus dépendre de la confiance qu'on peut avoir que le ministère public agira convenablement (*Lavallee, Rackel & Heintz c. Canada (Procureur général)*, 2002 CSC 61, [2002] 3 R.C.S. 209, par. 45). Comme le dit le juge Cory au nom des juges majoritaires dans l'arrêt *R. c. Bain*, [1992] 1 R.C.S. 91, p. 103-104 :

> Malheureusement, il semblerait que, chaque fois que le ministère public se voit accorder par la loi un pouvoir qui peut être utilisé de façon abusive, il le sera en effet à l'occasion. La protection des droits fondamentaux ne devrait pas être fondée sur la confiance à l'égard du comportement exemplaire permanent du ministère public, chose qu'il n'est pas possible de surveiller ni de maîtriser. Il serait préférable que la disposition législative incriminée soit abolie.

[96] Cette considération en appelle une autre, connexe, à savoir que l'octroi d'un tel pouvoir au poursuivant compromet l'équité de la procédure criminelle. Le poursuivant dispose dès lors d'un atout dans la négociation d'un plaidoyer, ce qui entraîne un déséquilibre inéquitable entre le pouvoir du poursuivant et celui de l'accusé et incite presque irrésistiblement ce dernier à reconnaître sa culpabilité à une infraction pour laquelle il encourt une peine moins lourde afin d'échapper à une longue peine minimale obligatoire. Il s'ensuit alors [TRADUCTION] « qu'une peine juste et appropriée tenant compte des circonstances de l'infraction et de la situation du délinquant peut être déterminée dans le cadre de la négociation d'un plaidoyer, hors de la salle d'audience, par l'une des parties à l'instance » (R. M. Pomerance, « The New Approach to Sentencing in Canada : Reflections of a Trial Judge » (2013), 17 *Rev. can. D.P.* 305, p. 313). Nous ne pouvons faire abstraction du risque alors accru de déclarations de culpabilité injustifiées.

[97] Deuxièmement, comme le signale en l'espèce le juge Doherty de la Cour d'appel, l'exercice du pouvoir discrétionnaire intervient généralement avant que tous les faits de l'affaire soient exposés. L'approche qui confirme la constitutionnalité du par. 95(2) sur la foi du choix éventuel de la procédure sommaire [TRADUCTION] « méconnaît le problème du moment auquel le poursuivant fait son choix et le fondement factuel à partir duquel il fait

As stated in *R. v. Smickle*, 2012 ONSC 602, 110 O.R. (3d) 25, at para. 110:

The Crown discretion is exercised at an early stage when all of the facts, particularly those favourable to the defence, are often not known. Often, the full facts will not be known until the trial judge delivers his or her reasons or the jury delivers a verdict.

[98] Finally, the Attorney General of Canada, relying on *Morrisey*, argues that parole eligibility reduces the actual impact of the three-year mandatory minimum penalty for an offence. We simply cannot know whether that is in fact the case. Nur correctly argues that parole is a statutory privilege rather than a right. The discretionary decision of the parole board is no substitute for a constitutional law. Canada's submission also misunderstands the role of the parole board — which is to ensure that an offender is safely released into the community, not to ensure that an offender serves a proportionate sentence. That is the function of one person alone — the sentencing judge.

(4) Application to *Charles*

[99] In *Charles*, the Court of Appeal modified the reasonably foreseeable application of the offence to take into account that it would be a second offence following a conviction under s. 117.01(1) of the *Criminal Code* for a breach of a prohibition order.

[100] Prohibition orders seek to protect the public by prohibiting a person from possessing certain weapons, firearms, ammunition or explosive substances. They are made by the courts in a number of situations, including as part of the conditions of bail

ce choix » (par. 163). La possibilité que le poursuivant opte pour la procédure sommaire ne permet donc pas de réfuter l'allégation des intimés fondée sur l'art. 12. Comme le tribunal l'a affirmé dans *R. c. Smickle*, 2012 ONSC 602, 110 O.R. (3d) 25, par. 110 :

[TRADUCTION] Le poursuivant exerce son pouvoir discrétionnaire en amont dans le processus, à un moment où tous les faits, en particulier ceux qui sont favorables à la défense, ne sont souvent pas connus. Il arrivera fréquemment que la totalité des faits ne sera connue que lorsque le juge du procès ou le jury se prononcera.

[98] Enfin, le procureur général du Canada invoque l'arrêt *Morrisey* pour faire valoir que l'admissibilité à la libération conditionnelle réduit l'effet réel de la peine minimale obligatoire de trois ans infligée pour une première infraction. Nous ne pouvons tout simplement pas savoir si tel est bien le cas. M. Nur soutient à raison que la libération conditionnelle est un privilège d'origine législative et non un droit. La décision discrétionnaire de la commission des libérations conditionnelles ne saurait se substituer à une loi constitutionnelle. Le procureur général du Canada se méprend aussi sur la fonction de la commission des libérations conditionnelles — qui est d'assurer la mise en liberté sécuritaire du délinquant dans la collectivité, non de veiller à ce que le délinquant purge une peine proportionnée. Cette dernière fonction n'incombe qu'à une seule personne, à savoir le juge qui détermine la peine.

(4) Application au dossier *Charles*

[99] Dans le dossier *Charles*, la Cour d'appel modifie l'application raisonnablement prévisible de la disposition en cause pour considérer le cas d'une récidive attribuable à une déclaration de culpabilité antérieure fondée sur le par. 117.01(1) du *Code criminel* pour le non-respect d'une ordonnance d'interdiction.

[100] L'ordonnance d'interdiction vise à protéger le public en interdisant à une personne d'avoir en sa possession certaines armes, armes à feu, munitions ou substances explosives. Le tribunal la rend dans un certain nombre de situations, notamment en

(s. 515(4.1)); they can be obtained preventatively (s. 111); they can be made following the conviction of an offender for certain offences (ss. 109 and 110); and they can also be made as part of the conditions of probation (s. 732.1), of a conditional sentence (s. 742.3), or of a peace bond (s. 810(3.1)). Some are mandatory and others discretionary.

l'intégrant aux conditions d'une mise en liberté sous caution (par. 515(4.1)), à titre préventif (art. 111) ou après qu'un délinquant a été reconnu coupable de certaines infractions (art. 109 et 110). Il peut aussi l'intégrer aux conditions d'une ordonnance de probation (art. 732.1), à une peine d'emprisonnement avec sursis (art. 742.3) ou à un engagement de ne pas troubler l'ordre public (par. 810(3.1)). L'ordonnance est soit obligatoire, soit discrétionnaire.

[101] The Court of Appeal acknowledged that the moral culpability of a repeat offender under s. 95(2)(*a*)(ii) is higher than that of a first-time offender. Even so, the Court of Appeal concluded that the five-year mandatory minimum term of imprisonment would be grossly disproportionate for a conviction under s. 95(1) where an offender was previously convicted and sentenced under s. 117.01(1) of the *Criminal Code* for a breach of a prohibition order.

[101] La Cour d'appel reconnaît que la culpabilité morale du récidiviste visé au sous-al. 95(2)*a*)(ii) est plus grande que celle du délinquant déclaré coupable d'une première infraction. Elle conclut néanmoins que la peine minimale obligatoire de cinq ans d'emprisonnement est totalement disproportionnée dans le cas du délinquant qui est déclaré coupable sur le fondement du par. 95(1) après l'avoir été sous le régime du par. 117.01(1) du *Code criminel* — et condamné en conséquence — pour le non-respect d'une ordonnance d'interdiction.

[102] The Attorney General of Ontario argues that the Court of Appeal erred in formulating a licensing offence under s. 95(1) where the offender had a prior conviction under s. 117.01(1) because such a prior conviction would trigger an automatic lifetime prohibition in relation to prohibited or restricted firearms under s. 109 of the *Criminal Code*. In Ontario's submission, this makes it virtually impossible that an offender convicted under s. 117.01(1) could have a licence and registration for a prohibited or restricted firearm. The prohibition order can be lifted under s. 113 of the *Criminal Code*, but only for sustenance or employment purposes, and a prohibited and restricted firearm, it is argued, will never be needed for hunting or trapping to sustain one's family.

[102] La procureure générale de l'Ontario fait valoir que la Cour d'appel considère à tort le cas de l'auteur d'une infraction réglementaire visée au par. 95(1) qui a auparavant été reconnu coupable de l'infraction prévue au par. 117.01(1), car la déclaration de culpabilité antérieure aurait automatiquement emporté une interdiction perpétuelle d'avoir en sa possession une arme à feu prohibée ou à autorisation restreinte (art. 109 du *Code criminel*). Selon sa thèse, il serait alors presque impossible à un délinquant déclaré coupable de l'infraction prévue au par. 117.01(1) d'obtenir un permis et un certificat d'enregistrement pour une arme à feu prohibée ou à autorisation restreinte. L'interdiction pourrait être levée suivant l'art. 113 du *Code criminel*, mais uniquement à des fins de subsistance ou pour le travail. On fait valoir que nul ne saurait établir la nécessité de posséder une arme à feu prohibée ou à autorisation restreinte pour la chasse ou le piégeage visant à assurer la subsistance de sa famille.

[103] I agree that the Court of Appeal erred in concluding that it was reasonably foreseeable that a repeat offender could be a licensed owner of a prohibited or restricted firearm. This does not end the

[103] Je conviens que la Cour d'appel a tort de conclure qu'il est raisonnablement prévisible qu'un récidiviste soit titulaire d'un permis de possession d'une arme à feu prohibée ou à autorisation restreinte.

analysis, however. The court must test the reasonably foreseeable applications of s. 95(2)(*a*)(ii). Under the impugned mandatory minimum, a five-year term of imprisonment could be imposed on an individual who breached a prohibition order imposed while on bail and who, some years later, innocently came into possession of a restricted or prohibited firearm without an authorization or a licence together with usable ammunition that he stored nearby and which was readily accessible.

L'analyse ne prend pas fin pour autant. Le tribunal doit mettre à l'épreuve les applications raisonnablement prévisibles du sous-al. 95(2)*a*)(ii). Suivant la disposition qui prévoit la peine minimale obligatoire contestée, une peine carcérale de cinq ans pourrait être infligée à la personne qui contrevient à l'ordonnance d'interdiction dont est assortie sa mise en liberté sous caution et qui, quelques années plus tard, sans dessein criminel, mais sans avoir obtenu au préalable une autorisation ou un permis, entre en possession d'une arme à feu prohibée ou à autorisation restreinte et de munitions facilement accessibles qu'il entrepose à proximité.

[104] A five-year minimum term of imprisonment for offenders such as these would be draconian. It goes far beyond what is necessary in order to protect the public, far beyond what is necessary to express moral condemnation of the offender, and far beyond what is necessary to discourage others from engaging in such conduct. In a phrase, such a sentence would be grossly disproportionate. An offender in these circumstances has not caused any harm, nor is there a real risk of harm to the public. Such an offender is not engaged in any criminal activity.

[104] Dans ce cas, cinq ans d'emprisonnement constitueraient une peine draconienne, une peine qui dépasse largement ce qu'exigent la protection du public, la réprobation morale du délinquant et la dissuasion d'autrui de faire de même. En bref, la peine serait totalement disproportionnée. Le délinquant n'a causé aucun préjudice ni exposé le public à un risque réel de préjudice. Le délinquant ne s'est livré à aucune activité criminelle.

[105] There is little doubt that in many cases those who commit second or subsequent offences for the purpose of s. 95(2)(*a*)(ii) should be sentenced to terms of imprisonment, and some for lengthy terms of imprisonment. The seven-year term of imprisonment imposed on Charles is an example. But the five-year minimum term of imprisonment would be grossly disproportionate for less serious offenders captured by the provision.

[105] Il ne fait aucun doute que, dans bien des cas, le délinquant qui récidive au sens du sous-al. 95(2)*a*)(ii) doit être condamné à une peine carcérale et que, parfois, il faut lui infliger une peine de longue durée. La peine de sept ans d'emprisonnement infligée à M. Charles constitue un bon exemple. Toutefois, il serait totalement disproportionné d'infliger une peine minimale de cinq ans d'emprisonnement à l'auteur d'une infraction de moindre gravité qui tombe sous le coup de la disposition.

[106] It follows that s. 95(2)(*a*)(ii) violates the guarantee against grossly disproportionate punishment in s. 12 of the *Charter*.

[106] Dès lors, le sous-al. 95(2)*a*)(ii) viole l'art. 12 de la *Charte* qui garantit la protection contre les peines totalement disproportionnées.

B. *Does the Mandatory Minimum Infringe Section 7 of the Charter?*

B. *La peine minimale obligatoire contrevient-elle à l'art. 7 de la Charte?*

[107] In addition to their challenges under s. 12, Nur and Charles also challenge s. 95(2)(*a*)(i) and

[107] MM. Nur et Charles contestent les sous-al. 95(2)*a*)(i) et (ii) sur le fondement non seulement

(ii) under s. 7 of the *Charter*. Section 7 guarantees everyone "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". Two principles of fundamental justice are invoked by Nur and Charles: the principle that a law which deprives a person of his liberty cannot be arbitrary — where there is no connection between the effect and the object of the law — and the principle that a law which deprives a person of his liberty cannot be overbroad — where the law goes too far and interferes with some conduct that bears no connection to its objective.

de l'art. 12 de la *Charte*, mais aussi de son art. 7. L'article 7 garantit à chacun le « 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 ». MM. Nur et Charles invoquent deux principes de justice fondamentale : la loi qui prive une personne de sa liberté ne doit pas être arbitraire (il doit exister un lien entre son effet et son objet) et la loi qui prive une personne de sa liberté ne doit pas avoir une portée excessive (sa portée ne doit pas être trop grande et faire ainsi obstacle à un comportement qui n'a aucun lien avec son objectif).

[108] Nur argues that the two-year gap between the one-year maximum sentence when the Crown proceeds summarily and the mandatory minimum of three years when the Crown proceeds by way of indictment is arbitrary, contrary to s. 7 of the *Charter*, because it frustrates the flexibility of the hybrid scheme by eliminating an entire two-year range of sentence if the Crown proceeds summarily. He argues that the two-year gap is not related to any legislative objective.

[108] Selon M. Nur, l'écart de deux ans entre la peine maximale d'un an qui peut être infligée lorsque le ministère public opte pour la procédure sommaire et la peine minimale obligatoire de trois ans infligée lorsque le ministère public opte pour la mise en accusation est arbitraire, contrairement à l'art. 7 de la *Charte*, parce qu'il nuit à la souplesse du régime mixte en supprimant une fourchette de deux années entières au titre de la peine lorsque le ministère public opte pour la procédure sommaire. M. Nur fait valoir que l'écart de deux ans n'est lié à aucun objectif législatif.

[109] Charles argues that s. 95(2)(*a*)(ii) includes less serious and non-firearm-related offences among the definition of "second or subsequent offence" in s. 84(5) and thus is arbitrary and overbroad, contrary to s. 7 of the *Charter*. He also argues that s. 84(6) — which provides that only the order of convictions, and not the order in which the offences were committed, is relevant to whether a person has committed a "second or subsequent offence" under s. 95(2)(*a*)(ii) — violates s. 7 of the *Charter* because it is arbitrary.

[109] M. Charles soutient que le sous-al. 95(2)*a*)(ii) inclut des infractions moins graves et non liées aux armes à feu dans la définition de la « récidive » au par. 84(5), de sorte qu'il est arbitraire et que sa portée est excessive, contrairement à l'art. 7 de la *Charte*. Il fait également valoir que le par. 84(6) — selon lequel il est tenu compte de l'ordre des déclarations de culpabilité, et non de l'ordre de perpétration des infractions, pour déterminer s'il y a « récidive » ou non pour les besoins du sous-al. 95(2)*a*)(ii) — viole l'art. 7 de la *Charte* parce qu'il est arbitraire.

[110] I do not rule out the possibility that despite the detailed sentencing jurisprudence that has developed under s. 12 of the *Charter*, situations may arise requiring recourse to s. 7 of the *Charter*. In this case, having concluded that the impugned provisions fail under s. 12 of the *Charter*, it

[110] Je n'écarte pas la possibilité que, malgré l'existence d'une jurisprudence détaillée sur l'application de l'art. 12 de la *Charte* à la détermination de la peine, certaines situations puissent justifier le recours à l'application de l'art. 7 de la *Charte*. En l'espèce, puisque je conclus que les dispositions

is unnecessary to consider whether they also violate s. 7 of the *Charter*.

C. *Is the Infringement Justified Under Section 1 of the Charter?*

[111] In order to justify the infringement of the respondents' s. 12 rights under s. 1 of the *Charter*, the Attorney General of Ontario must show that the law has a pressing and substantial objective and that the means chosen are proportional to that objective. A law is proportionate if (1) the means adopted are rationally connected to that objective; (2) it is minimally impairing of the right in question; and (3) there is proportionality between the deleterious and salutary effects of the law: *R. v. Oakes*, [1986] 1 S.C.R. 103. It will be difficult to show that a mandatory minimum sentence that has been found to be grossly disproportionate under s. 12 is proportionate as between the deleterious and salutary effects of the law under s. 1.

(1) Rational Connection

[112] The state bears the burden of showing that the mandatory minimum sentences of imprisonment found to violate s. 12 of the *Charter* are rationally connected to the goals of denunciation, deterrence, and retribution. To do so, the government must establish that there is a causal connection between the infringement and the benefit sought "on the basis of reason or logic": *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1995] 3 S.C.R. 199, at para. 153. Viewed thus, are the means the law adopts a rational way for Parliament to pursue its objective?

[113] The government has not established that mandatory minimum terms of imprisonment act as a deterrent against gun-related crimes. Doubts concerning the effectiveness of incarceration as a deterrent have been longstanding. *Sentencing Reform: A Canadian Approach — Report of The Canadian*

attaquées contreviennent à l'art. 12 de la *Charte* et sont donc inconstitutionnelles, point n'est besoin d'examiner s'il y a également violation de l'art. 7 de la *Charte*.

C. *L'atteinte est-elle justifiée par application de l'article premier de la Charte?*

[111] Pour que l'atteinte aux droits des intimés garantis par l'art. 12 soit justifiée au regard de l'article premier de la *Charte*, la procureure générale de l'Ontario doit démontrer que la loi a un objectif réel et urgent et que le moyen choisi est proportionnel à cet objectif. Une loi est proportionnelle (1) lorsqu'il existe un lien rationnel entre le moyen choisi et cet objectif, (2) que le moyen choisi est de nature à porter le moins possible atteinte au droit en question et (3) qu'il y a proportionnalité entre les effets préjudiciables de ses dispositions et leurs effets bénéfiques (*R. c. Oakes*, [1986] 1 R.C.S. 103). Il sera difficile de démontrer qu'une peine minimale obligatoire jugée totalement disproportionnée sur le fondement de l'art. 12 est proportionnelle pour ce qui est de ses effets préjudiciables et de ses effets bénéfiques aux fins de l'article premier.

(1) Le lien rationnel

[112] C'est à l'État qu'il incombe de démontrer qu'une peine minimale obligatoire d'emprisonnement jugée contraire à l'art. 12 de la *Charte* a un lien rationnel avec les objectifs de dénonciation, de dissuasion et de châtiment. Pour y arriver, il doit établir l'existence d'un lien causal « fondé sur la raison ou la logique » entre la violation et l'avantage recherché (*RJR-MacDonald Inc. c. Canada (Procureur général)*, [1995] 3 R.C.S. 199, par. 153). Sous cet angle, la mesure choisie par le législateur constitue-t-elle un moyen rationnel de poursuivre son objectif?

[113] L'État n'a pas établi que les peines minimales obligatoires d'emprisonnement décourageaient la perpétration de crimes liés aux armes à feu. On doute depuis longtemps de l'efficacité de l'incarcération à cet égard. Le rapport intitulé *Réformer la sentence : une approche canadienne — Rapport de*

Sentencing Commission (1987), concludes as follows:

a) Even if there seems to be little empirical foundation to the deterrent efficacy of legal sanctions, the assertion that the presence of some level of legal sanctions has no deterrent effects whatsoever, has no justification. The weight of the evidence and the exercise of common sense favour the assertion that, taken together, legal sanctions have an overall deterrent effect which is difficult to evaluate precisely.

b) The proper level at which to express strong reservations about the deterrence efficacy of legal sanctions is in their usage to produce particular effects with regard to a specific offence. For instance, in a recent report on impaired driving published by the Department of Justice, Donelson asserts that "law-based, punitive measures alone cannot produce large, sustained reductions in the magnitude of the problem" (Donelson, 1985; 221-222). Similarly, it is extremely doubtful that an exemplary sentence imposed in a particular case can have any perceptible effect in deterring potential offenders.

c) The old principle that it is more the certainty than the severity of punishment which is likely to produce a deterrent effect has not been invalidated by empirical research. In his extensive review of studies on deterrence, Beyleveld (1980; 306) concluded that "recorded offence rates do not vary inversely with the severity of penalties (usually measured by the length of imprisonment)" and that "inverse relations between crime and severity (when found) are usually smaller than inverse crime-certainty relations". [Emphasis added; pp. 136-37.]

[114] Empirical evidence suggests that mandatory minimum sentences do not, in fact, deter crimes: see, e.g., A. N. Doob and C. M. Webster, "Sentence Severity and Crime: Accepting the Null Hypothesis" (2003), 30 *Crime & Just.* 143; M. Tonry, "The Mostly Unintended Effects of Mandatory Penalties: Two Centuries of Consistent Findings" (2009), 38 *Crime & Just.* 65. The empirical evidence "is clear: mandatory minimum sentences do not deter more than less harsh, proportionate, sentences" (A. N. Doob and C. Cesaroni, "The Political Attractiveness of

la Commission canadienne sur la détermination de la peine (1987) conclut ce qui suit :

a) S'il est vrai qu'il existe peu de fondement empirique à l'appui de l'efficacité dissuasive des sanctions pénales, il ne serait pas justifié de dire que la présence d'un certain niveau de sanctions pénales n'a aucun effet dissuasif. Les preuves obtenues et le bon sens permettent de penser que, dans leur ensemble, les sanctions pénales ont un effet dissuasif global, qu'il est difficile de mesurer avec précision.

b) S'il y a un aspect de l'efficacité dissuasive des sanctions pénales qui justifie de sérieuses réserves, c'est celui de vouloir les utiliser pour produire des effets précis au sujet d'une infraction particulière. Ainsi, dans un rapport récent du ministère de la Justice sur la conduite en état d'ivresse, Donelson affirme que « les mesures punitives légales prévues par la loi ne sauraient à elles seules produire de réduction importante et durable de l'ampleur du problème » (1985, p. 221-222). De même, il est extrêmement douteux qu'une sentence exemplaire imposée dans une affaire particulière puisse avoir un effet dissuasif perceptible sur les contrevenants potentiels.

c) Le vieux principe selon lequel la certitude d'être puni est davantage susceptible d'avoir un effet dissuasif que la sévérité de la sanction n'a pas été contredit par les recherches empiriques. Dans son vaste examen des rapports sur la dissuasion, Beyleveld (1980, p. 306) conclut que « les taux d'infraction enregistrés ne sont pas inversement proportionnels à la sévérité des peines (généralement mesurée par la durée d'incarcération) » et que « le rapport inverse entre la criminalité et la sévérité des sanctions (lorsqu'il existe) est généralement plus petit que le rapport inverse entre la criminalité et la certitude d'être puni ». [Je souligne; p. 150.]

[114] La preuve empirique indique que, dans les faits, les peines minimales obligatoires ne sont pas dissuasives (voir p. ex. A. N. Doob et C. M. Webster, « Sentence Severity and Crime : Accepting the Null Hypothesis » (2003), 30 *Crime & Just.* 143; M. Tonry, « The Mostly Unintended Effects of Mandatory Penalties : Two Centuries of Consistent Findings » (2009), 38 *Crime & Just.* 65). La preuve empirique [TRADUCTION] « est claire : les peines minimales obligatoires d'emprisonnement ne sont pas plus dissuasives que les peines moins sévères, proportionnées »

Mandatory Minimum Sentences" (2001), 39 *Osgoode Hall L.J.* 287, at p. 291).

(A. N. Doob et C. Cesaroni, « The Political Attractiveness of Mandatory Minimum Sentences » (2001), 39 *Osgoode Hall L.J.* 287, p. 291).

[115] Despite the frailty of the connection between deterrence and mandatory minimum sentence provisions, a rational connection exists between mandatory minimum terms of imprisonment and the goals of denunciation and retribution. Therefore, this requirement of the s. 1 test is met.

[115] Malgré la fragilité du lien entre la dissuasion et les dispositions qui établissent des peines minimales obligatoires, il existe un lien rationnel entre les peines minimales obligatoires d'emprisonnement et les objectifs de dénonciation et de châtiment. Cette exigence de l'article premier est donc remplie.

(2) Minimal Impairment

(2) L'atteinte minimale

[116] The question at this stage is whether the limit on the right is reasonably tailored to the objective. A court asks "whether there are less harmful means of achieving the legislative goal": *Alberta v. Hutterian Brethren of Wilson Colony*, 2009 SCC 37, [2009] 2 S.C.R. 567, at para. 53. The government must show the absence of less drastic means of achieving the objective "in a real and substantial manner": para. 55. The impingement on the *Charter* right must be no more than what is reasonably necessary to achieve the state's objective.

[116] La question qui se pose ensuite est celle de savoir si la restriction du droit est raisonnablement bien adaptée à l'objectif. Le tribunal doit se demander s'il « exist[e] des moyens moins préjudiciables de réaliser l'objectif législatif » (*Alberta c. Hutterian Brethren of Wilson Colony*, 2009 CSC 37, [2009] 2 R.C.S. 567, par. 53). L'État doit démontrer qu'il n'existe pas un autre moyen moins attentatoire d'atteindre l'objectif « de façon réelle et substantielle » (par. 55). L'atteinte au droit garanti par la *Charte* ne doit pas aller au delà de ce qui est raisonnablement nécessaire pour atteindre l'objectif législatif.

[117] Parliament could have achieved its objective by drafting an offence with a close correspondence between conduct attracting significant moral blameworthiness — such as those engaged in criminal activity or conduct that poses a danger to others — and the mandatory minimum, rather than a sweeping law that includes in its ambit conduct attracting less blameworthiness for which the mandatory minimum sentence would be grossly disproportionate. The government has not discharged its burden on this branch of the *Oakes* test. There are less harmful means of achieving the legislative goal.

[117] Le législateur aurait pu atteindre son objectif en créant une infraction pour laquelle il existe un rapport étroit entre le comportement auquel est associée une grande culpabilité morale — p. ex. le comportement ou l'acte criminel qui présente un danger pour autrui — et la peine minimale obligatoire, au lieu d'une infraction qui ratisse large et qui englobe le comportement moins empreint de culpabilité morale et pour lequel la peine minimale obligatoire serait totalement disproportionnée. L'État ne s'est pas acquitté de son fardeau de preuve relativement à ce volet du critère de l'arrêt *Oakes*. Il existe des moyens moins préjudiciables d'atteindre l'objectif législatif.

(3) Proportionality

(3) Proportionnalité

[118] This stage of the analysis weighs the impact of the law on protected rights against the beneficial effect of the law in terms of the greater public

[118] À ce stade de l'analyse, on soupèse l'incidence de la loi sur les droits garantis et son effet bénéfique sur l'intérêt supérieur du public. Vu la

good. In light of the conclusion that the mandatory minimum terms of imprisonment in s. 95 when the Crown proceeds by indictment are grossly disproportionate, I do not find that the limits are a proportionate justification under s. 1.

VI. Conclusion

[119] I would dismiss the appeals. The mandatory minimum sentences imposed by s. 95(2)(*a*) are inconsistent with s. 12 of the *Charter* and are therefore declared of no force or effect under s. 52 of the *Constitution Act, 1982*.

[120] It remains appropriate for judges to continue to impose weighty sentences in other circumstances, such as those in the cases at bar. For this reason, I would decline to interfere with the sentences that the trial judges imposed on Nur and Charles.

The reasons of Rothstein, Moldaver and Wagner JJ. were delivered by

MOLDAVER J. (dissenting) —

I. Overview

[121] The Chief Justice observes that gun crimes pose a "grave danger to Canadians" (para. 1). She notes that Parliament, through a combination of regulatory provisions under the *Firearms Act*, S.C. 1995, c. 39, and criminal prohibitions under the *Criminal Code*, R.S.C. 1985, c. C-46, "has sought to protect the public from firearm-related injuries and to deter crimes involving firearms" (para. 6). To advance these goals, Parliament has enacted strict penalties for gun crimes. These include the mandatory minimum sentences under s. 95(2) of the *Criminal Code* for unlawful possession of loaded or readily loaded prohibited or restricted firearms — primarily handguns, machine guns, and sawed-off rifles and shotguns. These weapons have few legitimate purposes and are commonly used by criminals to devastating effect. Yet, despite Parliament's valid and important objectives, the majority would declare

conclusion selon laquelle les peines minimales obligatoires d'emprisonnement prévues à l'art. 95 lorsque le ministère public opte pour la mise en accusation sont totalement disproportionnées, je ne crois pas que la restriction puisse se justifier sur le fondement de la proportionnalité pour les besoins de l'article premier.

VI. Conclusion

[119] Je suis d'avis de rejeter les pourvois. Les peines minimales obligatoires prévues à l'al. 95(2)*a*) sont incompatibles avec l'art. 12 de la *Charte*. Je les déclare donc inopérantes en vertu de l'art. 52 de la *Loi constitutionnelle de 1982*.

[120] Il demeure approprié que les tribunaux continuent d'infliger de lourdes peines dans d'autres circonstances, comme celles des dossiers considérés en l'espèce. C'est pourquoi je m'abstiens de modifier les peines infligées par les juges du procès dans les dossiers de MM. Nur et Charles.

Version française des motifs des juges Rothstein, Moldaver et Wagner rendus par

LE JUGE MOLDAVER (dissident) —

I. Aperçu

[121] La Juge en chef fait observer que les crimes liés aux armes à feu « exposent les Canadiennes et les Canadiens à de graves dangers » (par. 1). Elle ajoute que, par l'adoption de dispositions réglementaires en vertu de la *Loi sur les armes à feu*, L.C. 1995, c. 39, et par l'établissement d'interdictions dans le *Code criminel*, L.R.C. 1985, c. C-46, le législateur « a voulu protéger la population contre les blessures par balle et décourager la perpétration de tel[s] [crimes] » (par. 6). En vue d'atteindre ces objectifs, il a prévu l'infliction de lourdes peines aux auteurs de crimes liés aux armes à feu. Au nombre de ces sanctions figurent les peines minimales obligatoires que prévoit le par. 95(2) du *Code criminel* pour la possession illégale d'une arme à feu prohibée ou à autorisation restreinte, chargée ou prête à l'être, soit principalement des armes de poing, des mitrailleuses, ainsi que des carabines ou des fusils de

these mandatory minimums unconstitutional on the basis that, in "reasonably foreseeable" cases, they could lead to grossly disproportionate sentences in violation of s. 12 of the *Canadian Charter of Rights and Freedoms*.

[122] With respect, I disagree. Parliament has crafted s. 95 as a hybrid offence. As such, it provides for mandatory minimum sentences when the Crown proceeds by way of indictment, but no mandatory minimum when the Crown proceeds summarily. In my view, this demonstrates Parliament's recognition that s. 95 captures a wide array of conduct, ranging from the "true crime" end of the spectrum to conduct that resembles a licensing infraction. I readily agree with the majority that the latter, least serious instances of the offence "involve little or no moral fault and little or no danger to the public", and manifestly do not warrant a lengthy term of incarceration (para. 83). However, in my view, allowing for summary proceedings under s. 95 all but ensures that the least serious instances of the offence referred to by the majority ("licensing-type offences") will *not* attract a mandatory minimum sentence. I address this issue in the first part of my reasons, at paras. 125-45. In short, I conclude that it is not reasonably foreseeable that the licensing-type offences about which the majority is concerned — to the point of striking down otherwise validly enacted legislation — would ever be prosecuted by way of indictment.

[123] In any event, as I will explain in the second part of my reasons, at paras. 146-88, the reasonable hypothetical approach is redundant in the context of hybrid sentencing schemes. I would adopt a different framework that is, in my view, better suited

chasse sciés. Ces armes sont rarement détenues à des fins légitimes, et leur utilisation fréquente par les criminels a des effets effroyables. Or, malgré des objectifs législatifs à la fois valables et importants, les juges majoritaires sont d'avis de déclarer ces peines minimales obligatoires inconstitutionnelles au motif que, dans certains cas « raisonnablement prévisibles », leur application pourrait mener à l'infliction de peines totalement disproportionnées, contrairement à l'art. 12 de la *Charte canadienne des droits et libertés*.

[122] Soit dit en tout respect, je ne suis pas d'accord. L'infraction créée à l'art. 95 est mixte. Il y a donc peines minimales obligatoires lorsque le poursuivant opte pour la mise en accusation, mais il n'y en a pas lorsqu'il opte pour la procédure sommaire. Selon moi, le législateur reconnaît que l'art. 95 vise une gamme étendue de comportements qui vont du « vrai crime », à l'extrémité supérieure du continuum, à ce qui s'apparente à l'infraction réglementaire, à l'extrémité inférieure. Je conviens d'emblée avec mes collègues que ce dernier type d'infraction, qui correspond au mode le moins grave de perpétration de l'infraction, « comport[e] une culpabilité morale minime, voire nulle, et [. . .] n'expos[e] le public à aucun danger ou presque », et ne justifie manifestement pas l'imposition d'une longue peine carcérale (par. 83). J'estime toutefois que l'art. 95, en permettant la poursuite par procédure sommaire, garantit presque que les cas les moins graves de perpétration de l'infraction auxquels renvoient les juges majoritaires (les « infractions de type réglementaire ») *n'*emporteront *pas* l'infliction d'une peine minimale obligatoire. J'examine ce point dans la première partie de mes motifs (par. 125-145). Je conclus en somme qu'il n'est pas raisonnablement prévisible que l'auteur d'une infraction de type réglementaire — dont se soucient les juges majoritaires au point d'invalider des dispositions par ailleurs validement adoptées — fasse un jour l'objet d'une mise en accusation.

[123] Quoi qu'il en soit, comme je l'explique en deuxième partie (par. 146-188), la démarche axée sur les situations hypothétiques raisonnables est redondante dans le contexte des infractions mixtes. Je retiens plutôt un autre cadre d'analyse qui, à mon

to that context. In the end, the framework I propose eliminates any theoretical risk of grossly disproportionate sentences.

sens, convient mieux dans le cas considéré et qui, au final, écarte tout risque théorique d'une peine totalement disproportionnée.

[124] In sum, whether applying the reasonable hypothetical approach or my proposed framework, I am satisfied that s. 95(2) does not violate s. 12 of the *Charter*. Nor, in my view, does it violate s. 7 of the *Charter*. I would therefore allow the appeals.

[124] En résumé, que l'on applique la démarche axée sur les situations hypothétiques raisonnables ou le cadre d'analyse que je préconise, je suis convaincu que le par. 95(2) ne contrevient pas à l'art. 12 de la *Charte*. Il ne porte pas non plus atteinte au droit garanti à l'art. 7 de la *Charte*. Je suis donc d'avis d'accueillir les pourvois.

II. Part 1: Section 12 Analysis Under the Reasonable Hypothetical Approach

II. Partie 1 : L'analyse au regard de l'art. 12 suivant la démarche axée sur les situations hypothétiques raisonnables

A. *The Reasonable Hypothetical Approach Does Not Justify Striking Down Section 95(2)*

A. *La démarche axée sur les situations hypothétiques raisonnables ne justifie pas l'invalidation du par. 95(2)*

[125] In finding s. 95(2) unconstitutional, the majority adopts the "reasonable hypothetical" approach first developed by this Court in *R. v. Smith*, [1987] 1 S.C.R. 1045, and subsequently applied in *R. v. Goltz*, [1991] 3 S.C.R. 485, and *R. v. Morrisey*, 2000 SCC 39, [2000] 2 S.C.R. 90. Tracing through these authorities, the Chief Justice states that reasonable hypotheticals should be "grounded in . . . experience and common sense" (para. 62). I agree. She then refers to s. 95(2) and expresses concern about imposing lengthy custodial sentences in certain hypothetical cases, namely "licensing offences which involve little or no moral fault and little or no danger to the public" — a concern which I share (para. 83). Where I part company with the majority is in treating these licensing-type cases as *reasonable* hypotheticals. With respect, experience and common sense provide proof positive that they are not.

[125] Pour conclure à l'inconstitutionnalité du par. 95(2), les juges majoritaires reprennent la démarche axée sur les « situations hypothétiques raisonnables » adoptée initialement par la Cour dans *R. c. Smith*, [1987] 1 R.C.S. 1045, puis appliquée dans les arrêts *R. c. Goltz*, [1991] 3 R.C.S. 485, et *R. c. Morrisey*, 2000 CSC 39, [2000] 2 R.C.S. 90. Faisant fond sur ces arrêts, la Juge en chef affirme que les situations hypothétiques raisonnables doivent « s'appuyer sur l'expérience [. . .] et le bon sens » (par. 62). J'en conviens. Elle renvoie ensuite au par. 95(2) et dit craindre l'infliction de longues peines carcérales dans certains cas hypothétiques, notamment pour des « infractions réglementaires qui comportent une culpabilité morale minime, voire nulle, et qui n'exposent le public à aucun danger ou presque » (par. 83). Je partage l'inquiétude des juges majoritaires, mais je crois qu'il n'y a pas lieu de voir dans ces cas hypothétiques des situations hypothétiques *raisonnables*. Avec tout le respect que je dois à mes collègues, l'expérience judiciaire et le bon sens confirment le caractère non raisonnable des situations hypothétiques considérées.

[126] I start with experience. Section 95 was enacted in 1995 and has been in force for nearly two decades. It has always included a mandatory minimum sentence for cases prosecuted by indictment.

[126] Commençons par l'expérience. Adopté en 1995, l'art. 95 s'applique depuis près de deux décennies. Il a toujours prévu une peine minimale obligatoire lorsque le poursuivant opte pour la mise

Since 2008, it has included the present three-year and five-year mandatory minimums. And yet, the respondents Mr. Nur and Mr. Charles are unable to point to a single licensing-type case over its entire history where a mandatory minimum imposed under s. 95(2) could be regarded as grossly disproportionate. Moreover, they cannot identify a single case where an offender who has committed a "licensing offenc[e] . . . involv[ing] little or no moral fault and little or no danger to the public" has been prosecuted by indictment, thus attracting a mandatory minimum (para. 83). In fact, in the only reported licensing-type case raised before this Court, the Crown proceeded summarily: *R. v. Snobelen*, [2008] O.J. No. 6021 (QL).[2]

en accusation. Depuis 2008, il prévoit les actuelles peines minimales obligatoires de trois et cinq ans. Pourtant, les intimés, MM. Nur et Charles, ne sont pas en mesure d'avancer une seule affaire d'infraction de type réglementaire où, depuis l'entrée en vigueur de la disposition, une peine minimale obligatoire infligée sur le fondement du par. 95(2) peut être tenue pour totalement disproportionnée. Qui plus est, ils ne peuvent citer un seul cas où l'auteur d'une « infractio[n] réglementair[e] qui comport[e] une culpabilité morale minime, voire nulle, et qui n'expos[e] le public à aucun danger ou presque » (par. 83) a été poursuivi par voie de mise en accusation, encourant ainsi une peine minimale obligatoire. En fait, dans la seule décision rendue sur une infraction de ce type et portée à la connaissance de la Cour, le poursuivant a opté pour la procédure sommaire (*R. c. Snobelen*, [2008] O.J. No. 6021 (QL))[2].

[127] In *Snobelen*, the accused pleaded guilty to an offence under s. 95(1), as well as careless storage of a firearm under s. 86. He admitted to possession of an unregistered semi-automatic handgun with readily accessible ammunition, for which he lacked a valid licence. The gun came into his possession when it was shipped to his home along with other property from his ranch in Oklahoma. He was aware of the gun's existence and intended to dispose of it — indeed, at the time of his arrest, he believed his wife had done so. Given the circumstances, the Crown elected to proceed summarily and sought a $750 fine on each count, a weapons prohibition order, and a term of probation. In light of the mitigating factors, the sentencing judge entered an absolute discharge.

[127] Dans *Snobelen*, l'accusé avait plaidé coupable à l'infraction prévue au par. 95(1), ainsi qu'à celle d'entreposage négligent d'une arme à feu prévue à l'art. 86. Il avait reconnu avoir été en possession d'un pistolet semi-automatique non enregistré et de munitions facilement accessibles sans avoir été titulaire d'un permis valide. L'arme lui était parvenue à sa résidence, avec d'autres biens, en provenance de son ranch en Oklahoma. Il connaissait l'existence de l'arme et comptait s'en départir; de fait, au moment de son arrestation, il croyait que son épouse avait fait le nécessaire pour s'en départir. Le poursuivant a donc opté pour la procédure sommaire et requis une amende de 750 $ par chef d'accusation, une ordonnance d'interdiction de posséder des armes à feu et une ordonnance de probation. Au vu des circonstances atténuantes, le juge appelé à déterminer la peine a prononcé une absolution inconditionnelle.

2 The majority, at para. 80, uses *R. v. MacDonald*, 2014 SCC 3, [2014] 1 S.C.R. 37, as an example that licensing-type cases are reasonably foreseeable. However, *MacDonald* cannot be characterized as a licensing-type case, given the aggravating factors involved. Mr. MacDonald's conduct went far beyond simply possessing the firearm in a place where he was not authorized to possess it under the terms of his licence. Indeed, the majority of this Court held that the arresting officer had reasonable grounds to believe that he posed an imminent threat to the safety of the public or the police: *MacDonald*, at para. 46.

2 Au par. 80 de leurs motifs, les juges majoritaires invoquent *R. c. MacDonald*, 2014 CSC 3, [2014] 1 R.C.S. 37, pour illustrer un cas raisonnablement prévisible d'infraction de type réglementaire. Or, on ne peut y voir l'illustration d'une telle infraction étant donné les circonstances aggravantes en cause. Les actes reprochés à M. MacDonald allait bien au delà de la possession d'une arme à feu à un autre endroit que celui précisé dans son permis. Les juges majoritaires statuent en effet que le policier qui l'a arrêté avait des motifs raisonnables de croire à l'existence d'une menace imminente pour sa sécurité ou celle du public (*MacDonald*, par. 46).

[128] If licensing-type cases like *Snobelen* are the "experience" on which this sentencing scheme is to be evaluated, I perceive no foreseeable risk, reasonable or otherwise, that grossly disproportionate sentences will result.

[129] I turn to common sense. In this regard, I endorse Code J.'s observation that

> as a matter of common sense it is hard to conceive of a "reasonable hypothetical" that depends on the Crown unreasonably electing to proceed by indictment, when the fair, just and appropriate election is to proceed summarily.

(2011 ONSC 4874, 241 C.R.R. (2d) 306 (the "*Nur*" sentencing reasons), at para. 110)

The reasonably foreseeable cases advanced by the majority assume that the Crown election is irrelevant. This perspective is at odds with Parliament's deliberate choice to structure s. 95 as a hybrid offence, recognizing its wide ambit and empowering prosecutors to separate licensing-type cases from instances of more serious misconduct. This legislative choice is hardly controversial — hybrid offences abound in the *Criminal Code*. Crown counsel are granted the discretion to make these elections and do so on a daily basis in accordance with their sworn duty to act in the public interest. With respect, an application of the reasonable hypothetical approach that denies this reality — and indeed assumes the opposite — does not accord with common sense.

[130] I should add that the Crown election under s. 95 differs from the prosecutorial discretion discussed in *Smith*. In that case, the Court rejected the argument that the Crown's discretion *not to apply the law* — that is, to charge a lesser offence or no offence at all — could salvage the impugned mandatory minimum. Here, the relevant discretion is the Crown election, which has been *purposely integrated into the legislative scheme*. Far from being a

[128] Si les affaires d'infractions de type réglementaire comme *Snobelen* constituent l'« expérience » à partir de laquelle il faut se prononcer sur le régime de détermination de la peine contesté en l'espèce, je ne perçois aucun risque prévisible, raisonnable ou autre, qu'une peine totalement disproportionnée résulte de l'application du régime.

[129] Je passe maintenant au bon sens. Je fais mienne la remarque suivante du juge Code sur ce point :

> [TRADUCTION] . . . le bon sens permet difficilement de concevoir une « situation hypothétique raisonnable » où le poursuivant opte de manière déraisonnable pour la mise en accusation, alors qu'il serait juste, équitable et approprié d'opter pour la procédure sommaire.

(2011 ONSC 4874, 241 C.R.R. (2d) 306 (motifs de détermination de la peine dans *Nur*), par. 110)

Les situations hypothétiques raisonnables avancées par les juges majoritaires supposent que le mode de poursuite choisi importe peu. Or, conscient de la grande portée qu'aurait l'art. 95, le législateur a délibérément créé une infraction mixte et permis au poursuivant de distinguer la simple infraction de type réglementaire de l'infraction plus grave. Ce choix législatif prête difficilement à controverse dans la mesure où les infractions mixtes abondent dans *Code criminel*. Le ministère public jouit d'un pouvoir discrétionnaire qui lui permet de faire un tel choix quotidiennement, conformément à son serment d'agir dans l'intérêt public. En tout respect, l'application de la démarche axée sur les situations hypothétiques raisonnables qui nie cette réalité — et suppose en fait le contraire — va à l'encontre du bon sens.

[130] En outre, le choix effectué suivant l'art. 95 diffère du pouvoir discrétionnaire en matière de poursuites examiné dans l'arrêt *Smith*. Dans ce dossier, la Cour rejette la thèse selon laquelle le pouvoir discrétionnaire qui permet au poursuivant de *ne pas appliquer la loi* — soit inculper pour une infraction moindre, soit ne pas inculper du tout — peut sauvegarder la peine minimale obligatoire contestée. Dans la présente affaire, le pouvoir discrétionnaire

discretion not to apply the law, the Crown election is a clear expression of Parliament's intent to confer on prosecutors the ability to divert the least serious cases into summary proceedings. It is a mistake, in my view, to shunt this factor aside when crafting reasonable hypotheticals.

exercé correspond au choix du mode de poursuite, lequel est *délibérément intégré au régime législatif*. Loin d'équivaloir au pouvoir d'appliquer ou non la loi, le choix du mode de poursuite traduit clairement l'intention du législateur de lui permettre de soumettre les cas les moins graves à la procédure sommaire. Il est à mon sens erroné d'écarter cette réalité au moment de concevoir des situations hypothétiques raisonnables.

B. *Respecting Parliament*

[131] Gun crime is a matter of grave and growing public concern. Successive Parliaments have responded by enacting laws designed to denounce and deter such crime. The mandatory minimums in s. 95(2) were part of a suite of legislative changes put forward as "a direct response to the scourge of handgun crime that plagues our country": House of Commons, Standing Committee on Justice and Human Rights, *Evidence*, No. 30, 1st Sess., 39th Parl., November 7, 2006, at p. 1. The parliamentary committee studying those changes heard compelling testimony from law enforcement about the devastating impact of gun violence across Canada. Toronto Police Chief William Blair noted a "significant increase in the number of shooting[s]" in Toronto and a rise in gun-related homicides in excess of 85 percent from 2004 to 2005: *ibid.*, No. 34, November 23, 2006, at p. 1. Due to the surge in shootings and gun deaths, 2005 was dubbed by local media as "the year of the gun" (*ibid.*).

B. *Respect du législateur*

[131] Les crimes liés aux armes à feu constituent de plus en plus un grave sujet d'intérêt public. Les formations successives du Parlement ont agi en adoptant des lois destinées à dénoncer ces crimes et à décourager leur perpétration. L'établissement de peines minimales obligatoires au par. 95(2) s'inscrit dans une série de mesures législatives se voulant « une réponse directe au fléau des actes criminels commis avec des armes de poing avec lequel notre pays est aux prises » (Chambre des communes, Comité permanent de la justice et des droits de la personne, *Témoignages*, n° 30, 1re sess., 39e lég., 7 novembre 2006, p. 1). Le comité parlementaire qui s'est penché sur les modifications a entendu les témoignages convaincants de responsables de l'application des lois sur les ravages causés par les crimes liés aux armes à feu à la grandeur du Canada. Le chef de la police de Toronto William Blair a relevé « une hausse considérable du nombre de fusillades » à Toronto, ainsi qu'une augmentation de plus de 85 p. 100 du nombre d'homicides commis à l'aide d'armes à feu de 2004 à 2005 (*ibid.*, n° 34, 23 novembre 2006, p. 1). D'ailleurs, les médias torontois ont qualifié 2005 d'« année de l'arme à feu » en raison de la vague de fusillades et de décès par balles qu'elle a connue (*ibid.*).

[132] This is the context in which Parliament's choice to raise the mandatory minimums in s. 95 must be understood. That choice reflects valid and pressing objectives, and it is not for this Court to frustrate the policy goals of our elected representatives based on questionable assumptions or loose conjecture. As LeBel J. observed in *R. v. Nasogaluak*, 2010

[132] C'est dans ce contexte qu'il faut considérer la décision du législateur de relever les peines minimales obligatoires prévues à l'art. 95, une décision motivée par des objectifs valables et urgents. Il n'appartient pas à la Cour de contrecarrer les objectifs de politique générale de nos élus sur la foi d'hypothèses discutables ou de vagues conjectures.

SCC 6, [2010] 1 S.C.R. 206, mandatory minimums are "a forceful expression of governmental policy in the area of criminal law" (para. 45).

Comme le fait observer le juge LeBel dans l'arrêt *R. c. Nasogaluak*, 2010 CSC 6, [2010] 1 R.C.S. 206, les peines minimales obligatoires sont « l'expression claire d'une politique générale dans le domaine du droit pénal » (par. 45).

[133] This Court in *Goltz* warned against the use of hypotheticals that are "far-fetched or only marginally imaginable" (p. 515). The Chief Justice echoes this point, stating that "[l]aws should not be set aside on the basis of mere speculation" (para. 62). Yet, I fear that the majority's approach does precisely that. Indeed, the jurisprudence does not reveal any licensing-type cases that have been prosecuted by indictment. Moreover, the confluence of events necessary for a licensing-type offender to face the prospect of a grossly disproportionate sentence strikes me as more imaginary than real. With respect, this hypothetical scenario stretches the bounds of credulity. It is not, in my view, a sound basis on which to nullify Parliament's considered response to a serious and complex issue.

[133] Dans l'arrêt *Goltz*, la Cour met les tribunaux en garde contre la prise en compte de situations hypothétiques qui sont « invraisemblables ou difficilement imaginables » (p. 515). La Juge en chef en convient en affirmant qu'« [u]ne loi ne saurait être rendue inopérante sur la base de pures conjectures » (par. 62). Je crains toutefois que ce soit précisément ce qui résulte de l'approche des juges majoritaires. La jurisprudence ne révèle en effet l'existence d'aucune affaire où l'auteur d'une infraction de type réglementaire a été poursuivi par voie de mise en accusation. De plus, il m'apparaît clairement que la conjonction d'événements qui est nécessaire pour que l'auteur d'une telle infraction encoure une peine totalement disproportionnée relève davantage de la fiction que de la réalité. Soit dit en tout respect, pareil scénario hypothétique est peu crédible. Il ne s'agit pas selon moi d'une assise valable pour réduire à néant la solution réfléchie apportée par le législateur à un problème à la fois grave et complexe.

[134] I believe the Chief Justice shares my concern that striking down the impugned mandatory minimums would, to some extent, frustrate Parliament's efforts to denounce and deter gun crime. She identifies an alternative scheme that, in her view, would accomplish Parliament's goals without offending s. 12 of the *Charter*:

> Parliament could have achieved its objective by drafting an offence with a close correspondence between conduct attracting significant moral blameworthiness — such as those engaged in criminal activity or conduct that poses a danger to others — and the mandatory minimum . . . . [para. 117]

[134] Je crois que la Juge en chef partage ma crainte que l'invalidation des peines minimales obligatoires contestées contrecarre jusqu'à un certain point les mesures prises par le législateur pour dénoncer les crimes liés aux armes à feu et décourager leur perpétration. Elle avance une solution de rechange qui, selon elle, permettrait la réalisation des objectifs du législateur sans contrevenir à l'art. 12 de la *Charte* :

> Le législateur aurait pu atteindre son objectif en créant une infraction pour laquelle il existe un rapport étroit entre le comportement auquel est associée une grande culpabilité morale — p. ex. le comportement ou l'acte criminel qui présente un danger pour autrui — et la peine minimale . . . [par. 117]

[135] If I understand the Chief Justice correctly, Parliament could enact the impugned mandatory

[135] Si je comprends bien, le législateur pourrait alors établir les peines minimales obligatoires dans

minimums as part of a revised offence containing an additional element beyond the existing elements of s. 95(1). For example, the offence could be limited to "those engaged in criminal activity" or to "conduct that poses a danger to others" (para. 117). Respectfully, the problem with this suggestion is twofold. First, it is discordant with Parliament's true objective in creating mandatory minimums for the unlawful *possession* of a loaded or readily loaded prohibited or restricted firearm. Second, as a practical matter, it may lead to an under-inclusive offence that fails to encompass certain conduct which Parliament sought to punish with mandatory terms of imprisonment.

[136] Section 95 targets the simple possession of guns that are frequently used in gang-related and other criminal activity: see *R. v. Nur*, 2013 ONCA 677, 117 O.R. (3d) 401, at paras. 54-57. Parliament has concentrated on simple possession for a reason: firearms — and particularly the firearms caught by s. 95 — are inherently dangerous. In *R. v. Felawka*, [1993] 4 S.C.R. 199, the Court recognized that "[a] firearm is expressly designed to kill or wound" and that "[n]o matter what the intention may be of the person carrying a gun, the firearm itself presents the ultimate threat of death to those in its presence" (p. 211). As the Attorney General of Canada observes in his factum, this sober reality resonates all the more for "restricted firearms (principally handguns) and prohibited firearms (principally machine guns and sawed-off rifles or shotguns)": A.F. (*Nur*), at para. 64. These firearms are "the most strictly regulated because they are either easily concealable or generally do not serve a legitimate hunting or target shooting purpose" (*ibid.*). Outside of law enforcement, these guns are primarily found in the hands of criminals who use them to intimidate, wound, maim, and kill.

le cadre d'une infraction révisée qui comporterait un élément en sus de ceux déjà présents au par. 95(1). Par exemple, seul le comportement qui constituerait un « acte criminel » ou qui « présente[rait] un danger pour autrui » tomberait sous le coup de la disposition (par. 117). La solution avancée présente malheureusement deux difficultés. Premièrement, elle va à l'encontre du véritable objectif de l'établissement de peines minimales obligatoires applicables à la *possession* illégale d'une arme à feu prohibée ou à autorisation restreinte, chargée ou prête à l'être. Deuxièmement, elle peut mener dans les faits à la création d'une infraction dont la portée est trop étroite pour englober certains des comportements que le législateur a voulu réprimer au moyen de peines carcérales obligatoires.

[136] L'article 95 criminalise la simple possession d'armes à feu qui sont fréquemment employées par des gangs ou d'autres délinquants dans leurs activités criminelles (voir *R. c. Nur*, 2013 ONCA 677, 117 O.R. (3d) 401, par. 54-57). Le législateur s'en prend à la simple possession pour une raison : les armes à feu — en particulier celles que vise l'art. 95 — sont dangereuses en soi. Dans l'arrêt *R. c. Felawka*, [1993] 4 R.C.S. 199, la Cour reconnaît que « [l]'arme à feu est expressément conçue pour tuer ou blesser » et que « [p]eu importe l'intention de la personne qui porte un fusil, l'arme à feu incarne en soi la menace suprême de mort aux yeux de ceux qui y font face » (p. 211). Le procureur général du Canada signale dans son mémoire que ce froid constat vaut d'autant plus pour [TRADUCTION] « les armes à feu à autorisation restreinte (surtout des armes de poing) et les armes à feu prohibées (principalement des mitrailleuses et des carabines ou des fusils de chasse sciés) » (m.a., *Nur*, par. 64). Il s'agit des armes à feu « les plus strictement réglementées soit parce qu'elles sont faciles à dissimuler, soit parce qu'elles ne servent généralement aucune fin légitime de chasse ou de tir sur cible » (*ibid.*). Exception faite des responsables de l'application de la loi, ce sont surtout des criminels qui s'en servent et qui intimident, blessent, mutilent et tuent.

[137] Courts have repeatedly emphasized the inherent danger associated with these types of firearms. In *R. v. Elliston*, 2010 ONSC 6492, 225 C.R.R. (2d) 109, Aston J. rejected the argument that simple possession of a prohibited or restricted firearm, absent a harmful outcome, is insufficient to warrant an exemplary sentence:

> The applicant submits that there are no actual adverse consequences that necessarily flow from the criminal conduct captured by s. 95 because the defined offence is simply the possession of the firearm as opposed to its actual use. It is true that adverse consequences do not *necessarily* flow from possession of a loaded handgun, but sometimes they do. And, because the risk is so grave that people will be seriously injured or killed, even when discharging the gun is not intentional, the gravity of the offence of simply possessing the weapon should not be underestimated . . . . [Emphasis in original; para. 15.]

Similarly, in *R. v. Chin*, 2009 ABCA 226, 457 A.R. 233, the Alberta Court of Appeal observed that "[m]ere possession of loaded firearms is inherently dangerous" (para. 10). The court underscored the reality that "[w]hen such weapons are allowed in the community, death and serious injury are literally at hand, only an impulse and trigger-pull away" (*ibid.*).

[138] Given this inherent danger, it was open to Parliament to conclude that simple possession of a loaded or readily loaded restricted or prohibited firearm should attract a significant mandatory custodial sentence. As the Minister of Justice stated when introducing the 2008 amendments to s. 95, "illegal possession of these firearms is becoming a growing concern" and "police especially are interested in the higher mandatory minimums for the possession of loaded or restricted firearms": *House of Commons Debates*, vol. 141, No. 33, 1st Sess., 39th Parl., June 5, 2006, at p. 1941 (emphasis added). Adding further elements to the offence beyond simple possession would, in my view, unduly limit the application of the mandatory minimums, and thereby undermine Parliament's objective to get dangerous

[137] Les tribunaux ont maintes fois mis en relief le danger inhérent à ces armes à feu. Dans *R. c. Elliston*, 2010 ONSC 6492, 225 C.R.R. (2d) 109, le juge Aston rejette la thèse voulant que la simple possession d'une arme à feu prohibée ou à autorisation restreinte, sans conséquence préjudiciable, ne justifie pas l'imposition d'une peine exemplaire :

> [TRADUCTION] Le demandeur fait valoir qu'aucune conséquence préjudiciable réelle ne découle nécessairement du comportement criminel visé à l'art. 95, car selon sa définition, l'infraction s'entend seulement de la possession de l'arme à feu, non de son emploi dans les faits. Certes, la possession d'une arme de poing chargée n'a pas *nécessairement* de conséquences préjudiciables, mais elle en a parfois. Et parce que le risque que des gens soient grièvement blessés ou tués est si grand, même lorsque le coup n'est pas tiré intentionnellement, la gravité de l'infraction consistant dans la simple possession de l'arme ne doit pas être sous-estimée . . . [Souligné dans l'original; par. 15.]

De même, dans l'arrêt *R. c. Chin*, 2009 ABCA 226, 457 A.R. 233, la Cour d'appel de l'Alberta relève que la [TRADUCTION] « [s]imple possession d'une arme à feu chargée est dangereuse en soi » (par. 10). Elle souligne que « [l]orsque l'on tolère la présence de telles armes dans la collectivité, la mort et les blessures graves sont littéralement à portée de main : il suffit de presser puis de relâcher la détente » (*ibid.*).

[138] Étant donné ce danger inhérent, le législateur pouvait fort bien conclure que la simple possession d'une arme à feu prohibée ou à autorisation restreinte, chargée ou prête à l'être, devait emporter l'infliction d'une longue peine minimale obligatoire d'emprisonnement. Comme l'a dit le ministre de la Justice d'alors au moment du dépôt des modifications apportées à l'art. 95 en 2008, « la possession illégale de ces armes à feu est de plus en plus préoccupante » et « [l]es services de police s'intéressent surtout à la hausse des peines d'emprisonnement minimales liées à la possession d'armes à feu chargées ou à autorisation restreinte » (*Débats de la Chambre des communes*, vol. 141, nº 33, 1re sess., 39e lég., 5 juin 2006, p. 1941 (je souligne)). Étoffer l'infraction de manière qu'elle ne

weapons off the streets *before* they generate a specific risk of harm.

[139] This is borne out by the committee testimony of Chief Blair, who stressed the importance of empowering police to target possession before a specific risk of harm materializes:

If you're not a police or security professional in the city of Toronto, the only reason to carry a loaded handgun in our streets is to kill people. When we apprehend those individuals for those offences who are in possession of those guns, we need to be able to intervene at that point. It is a significant and serious enough trigger that the individual represents an overwhelming threat to public safety, and the criminal justice system has to be able to deal effectively with that individual. [Emphasis added.]

(Standing Committee on Justice and Human Rights, *Evidence*, No. 34, at p. 4)

Chief Blair further noted that heightened mandatory minimums would play a vital role in deterring this dangerous conduct:

. . . there is certainly a perception of a lack of consequences for those very serious offences, and the sentences that people have been receiving for carrying firearms are more reflective of the carrying of a loaded handgun in the city of Toronto as if it were a regulatory problem as opposed to a significant public safety problem.

. . .

. . . I believe a rational person would be deterred by two things: first of all, the likelihood of being caught; and when caught, suffering with real consequences for their actions. I think both of those things would deter a rational person. [*ibid.*, at pp. 3 and 8]

[140] Based on this compelling testimony, Parliament chose to punish simple possession with significant custodial penalties, while leaving open the

s'entende plus de la seule possession réduirait selon moi indûment la portée de l'application des peines minimales obligatoires et contrecarrerait ainsi l'objectif du législateur de retirer de la circulation des armes dangereuses *avant* qu'elles ne créent un risque de préjudice précis.

[139] C'est ce que confirme le témoignage devant le comité du chef de police Blair, qui insiste sur l'importance d'habiliter les policiers à réprimer la possession avant qu'un risque de préjudice précis se concrétise :

Si la personne n'est pas un policier ou un agent de sécurité à Toronto, la seule raison qu'elle a de porter une arme de poing chargée dans la rue est de tuer quelqu'un. Alors, quand nous arrêtons quelqu'un qui est en possession d'une telle arme à feu, ce qui est une infraction, nous devons être en mesure d'intervenir à l'instant même. Il s'agit là d'un indicateur assez grave que cette personne présente une menace excessive pour la sécurité publique. Le système de justice pénale doit être en mesure d'intervenir adéquatement. [Je souligne.]

(Comité permanent de la justice et des droits de la personne, *Témoignages*, nº 34, p. 4)

M. Blair ajoute que des peines minimales obligatoires d'une durée accrue contribueraient grandement à décourager ce comportement dangereux :

. . . il règne certainement une impression d'inconséquence à l'égard de ces infractions très graves, et les peines qui sont infligées aux délinquants pris à porter une arme à feu chargée dans les rues de Toronto sont plus représentatives d'une infraction à un règlement que d'un problème important de sécurité publique.

. . .

. . . je suis d'avis qu'une personne rationnelle serait dissuadée par deux choses : la possibilité d'être appréhendée et les conséquences réelles qu'elle subirait dans ce cas. Je crois que ces deux éléments dissuaderaient une personne rationnelle. [*ibid.*, p. 3 et 8]

[140] Au vu de ce témoignage convaincant, le législateur a résolu de sanctionner la simple possession par des peines carcérales importantes tout

option of summary proceedings for the licensing-type offences about which the majority is rightly concerned. I would respect that legislative choice. In my view, sending our elected representatives back to the drawing board on s. 95 would impede the goals of deterring and denouncing the unlawful possession of deadly weapons and keeping them out of the hands of those who would use them as instruments of intimidation, death, and destruction.

[141] Moreover, I am concerned that adding new elements to the offence would render the mandatory minimums under-inclusive. The majority identifies two possible elements that could be added to s. 95. The first would limit the offence to "those engaged in criminal activity" (para. 117). As I understand it, this element would require the Crown to prove that the accused possessed the firearm for a criminal purpose — a high bar for prosecutors to meet. Even on the facts of Mr. Nur's case, it does not appear that the Crown could prove this element beyond a reasonable doubt: *Nur* sentencing reasons, at paras. 61, 66 and 68-69. Incorporating a criminal purpose element could thus exclude cases like Mr. Nur's, where the imposition of a mandatory minimum sentence is uncontroversial.

[142] The second suggestion would limit the offence to "conduct that poses a danger to others" (para. 117). I understand this element to mean something more than the inherent danger posed by all instances of possession contrary to s. 95. The element would therefore require the Crown to prove a *specific* risk of harm. In my view, the addition of this element would again render the offence under-inclusive.

[143] A simple example illustrates this point. A police officer stops a vehicle in a remote, unpopulated area and sees a handgun in plain view on the back seat. The driver is cooperative, but does not have a licence for the firearm. The officer suspects that he may be involved in gang-related activity.

en permettant au poursuivant d'opter pour la procédure sommaire dans le cas des infractions de type réglementaire, dont se préoccupent à juste titre les juges majoritaires. Je suis d'avis de respecter ce choix législatif. J'estime que renvoyer les élus à leur planche à dessin et leur demander de reformuler l'art. 95 irait à l'encontre des objectifs qui consistent à décourager et à dénoncer la possession illégale d'armes mortelles et à les retirer des mains de ceux qui s'en servent pour intimider, tuer et détruire.

[141] En outre, je crains que l'ajout de nouveaux éléments à l'infraction ne fasse indûment en sorte que les peines minimales obligatoires ne s'appliquent pas à certains actes auxquels le législateur a voulu qu'elles s'appliquent. Les juges majoritaires font état de deux éléments qui pourraient être intégrés à la disposition. Premièrement, la précision que seul est visé « le comportement ou l'acte criminel » (par. 117). Selon mon interprétation, le poursuivant devrait alors prouver que l'accusé avait l'arme à feu en sa possession dans un dessein criminel, ce qui est très ardu. Même dans le cas de M. Nur, il n'est pas évident que le poursuivant pourrait s'acquitter de ce fardeau de preuve hors de tout doute raisonnable (motifs de détermination de la peine dans *Nur*, par. 61, 66 et 68-69). Exiger la preuve d'un dessein criminel pourrait donc soustraire des délinquants comme M. Nur à l'application de la disposition même lorsque l'imposition d'une peine minimale obligatoire n'est pas contestée.

[142] Deuxièmement, ne serait visé que le comportement ou l'acte criminel « qui présente un danger pour autrui » (par. 117). Je vois dans cet élément quelque chose de plus que le danger inhérent à tous les cas de possession contraire à l'art. 95. Dès lors, le poursuivant devrait prouver l'existence d'un risque de préjudice *précis*. J'estime que, là encore, cette exigence supplémentaire réduirait indûment la portée de la disposition.

[143] Considérons un simple exemple. Dans un endroit reculé et peu habité, après avoir enjoint à une personne d'immobiliser son véhicule, un policier aperçoit une arme de poing bien en vue sur le siège arrière. Le conducteur se montre coopératif, mais il n'est pas titulaire d'un permis pour l'arme.

In these circumstances, it is unclear whether the Crown could prove, beyond a reasonable doubt, that the driver's possession of the firearm created a specific risk of harm. Yet, this is precisely the type of situation to which the mandatory minimums in s. 95 are intended to apply. Indeed, the Minister specifically indicated that "increasing numbers of handguns [are being] found in cars", and that "it is very important to have . . . higher minimum penalties" to address such situations: *House of Commons Debates*, vol. 141, at pp. 1943 and 1941.

Le policier le soupçonne d'appartenir à un gang. Dans de telles circonstances, on ne saurait dire si le poursuivant serait en mesure de prouver hors de tout doute raisonnable que la possession de l'arme à feu par le conducteur créait un risque de préjudice précis. Pourtant, c'est là précisément le genre de situation à laquelle sont censées s'appliquer les peines minimales obligatoires que prévoit l'art. 95. Le ministre a d'ailleurs dit expressément qu'« un nombre croissant d'armes de poing [sont] trouvées dans les voitures » et qu'« [i]l est très important que l'on puisse imposer des peines minimales plus sévères » pour remédier à ce problème (*Débats de la Chambre des communes*, vol. 141, p. 1943 et 1941).

[144] The record plainly demonstrates that, after lengthy debate and study, Parliament responded to the pressing issue of gun crime by enacting the heightened mandatory minimums in s. 95(2). In my view, that policy choice merits considerable deference. Where matters of public safety are implicated, we should be wary of second-guessing the choices of our elected representatives, absent a compelling justification.

[144] Il appert clairement du dossier qu'après de longs débats et une étude approfondie, le législateur a décidé de s'attaquer au problème urgent des crimes liés aux armes à feu par le relèvement des peines minimales obligatoires prévues au par. 95(2). À mon avis, cette décision de politique générale justifie une grande déférence. En matière de sécurité publique, il faut se garder de remettre en question les choix des élus, sauf justification valable.

[145] For these reasons, I see no basis for striking down s. 95(2) using the reasonable hypothetical approach.

[145] Pour ces motifs, je ne vois aucune raison d'invalider le par. 95(2) par application de la démarche axée sur les situations hypothétiques raisonnables.

III. Part 2: Section 12 Analysis Under a Different Framework

III. Partie 2 : L'analyse au regard de l'art. 12 suivant une démarche différente

A. *Hybrid Offences Call for a Different Analytical Framework Under Section 12 of the Charter*

A. *Le contrôle des infractions mixtes au regard de l'art. 12 de la Charte exige un cadre d'analyse différent*

[146] As I have explained, the reasonable hypothetical approach does not justify striking down the impugned mandatory minimums. The scenarios contemplated by the majority — sending someone to jail for three years for what amounts to a licensing-type offence — are, in my respectful view, speculative and strain the bounds of credulity. They are not grounded in experience or common sense.

[146] Comme je l'ai expliqué, la démarche axée sur les situations hypothétiques raisonnables ne justifie pas l'invalidation des peines minimales obligatoires contestées. Soit dit en tout respect, les scénarios envisagés par les juges majoritaires — la condamnation d'une personne à trois ans d'emprisonnement pour un acte qui équivaut à une infraction de type réglementaire — relèvent de la conjecture et sont peu crédibles. Ils ne s'appuient ni sur l'expérience ni sur le bon sens.

[147] In any event, I believe that a different analytical framework is required here. Why? Because, to date, our s. 12 jurisprudence from *Smith* to *Morrisey* has only considered the constitutionality of mandatory minimum sentences in the context of straight indictable offences. This is the first time we have examined their constitutionality in a hybrid scheme. As I will explain, that makes a world of difference and justifies a different analytical framework under s. 12.

[147] Quoi qu'il en soit, je crois qu'un cadre d'analyse différent s'impose en l'espèce. La raison en est que, à ce jour, dans ses décisions relatives à l'art. 12 — de l'arrêt *Smith* à l'arrêt *Morrisey* —, la Cour s'est penchée uniquement sur la constitutionnalité des peines minimales obligatoires dans le contexte d'infractions qui ne se prêtaient qu'à la poursuite sur mise en accusation. C'est la première fois qu'elle est appelée à examiner la constitutionnalité de telles peines dans le cadre d'un régime mixte. Comme je l'explique ci-après, cela change complètement la donne et commande un cadre d'analyse différent pour l'application de l'art. 12.

[148] Section 95 is a hybrid offence that carries no minimum sentence when the Crown proceeds summarily. When the Crown proceeds by indictment, there is a mandatory minimum of three years for a first offence, and five years for a second or subsequent offence. The legislative intent underlying this hybrid scheme is evident. Section 95 captures a wide array of conduct involving varying degrees of moral blameworthiness. The least blameworthy conduct — licensing-type cases — is meant to be prosecuted summarily, thereby avoiding the application of the mandatory minimum.

[148] L'article 95 crée une infraction mixte qui n'expose le délinquant à aucune peine minimale lorsque le ministère public opte pour la procédure sommaire. Lorsqu'il y a mise en accusation, la peine minimale obligatoire est de trois ans pour une première infraction et de cinq ans en cas de récidive. L'intention du législateur qui sous-tend ce régime mixte est évidente. L'article 95 vise une vaste gamme de comportements auxquels sont associés divers degrés de culpabilité morale. Les comportements les moins répréhensibles — les infractions de type réglementaire — sont censés faire l'objet d'une procédure sommaire et échapper ainsi à l'application de la peine minimale obligatoire.

[149] Parliament's intention to divert the least serious cases into summary proceedings is critical to assessing the constitutionality of s. 95(2). By creating a "safety valve" to shield licensing-type cases from the reach of the mandatory minimum, Parliament has effectively *conceded* the existence of reasonably foreseeable cases in which a mandatory minimum would be grossly disproportionate. Given this concession, the reasonable hypothetical approach is redundant.

[149] L'intention du législateur de faire en sorte que les infractions les moins graves fassent l'objet d'une procédure sommaire est cruciale lorsqu'il s'agit de se prononcer sur la constitutionnalité du par. 95(2). En créant une « soupape » pour empêcher l'application des peines minimales obligatoires aux infractions de type réglementaire, le législateur a effectivement *reconnu* l'existence de situations raisonnablement prévisibles dans lesquelles la peine minimale obligatoire serait totalement disproportionnée. Étant donné cette reconnaissance, la démarche axée sur les situations hypothétiques raisonnables est redondante.

[150] Rather, the proper analytical framework should focus on the safety valve — the Crown's discretion to elect summary proceedings in the least serious cases. I will describe that framework in detail below. Briefly, it has two stages. First, the

[150] L'analyse qui convient devrait plutôt être axée sur cette soupape, soit le pouvoir discrétionnaire qui permet au ministère public d'opter pour la procédure sommaire dans les cas les moins graves. J'en ferai état plus en détail ci-après. En résumé,

court must determine whether the hybrid scheme adequately protects against the imposition of grossly disproportionate sentences *in general*. Second, the court must determine whether the Crown has exercised its discretion in a manner that results in a grossly disproportionate sentence *for a particular offender*.

elle comporte deux étapes. Premièrement, le tribunal doit se demander si le régime mixte en question assure *de façon générale* une protection adéquate contre l'imposition de peines totalement disproportionnées. Deuxièmement, il doit se demander si le ministère public a exercé son pouvoir discrétionnaire de manière qu'une peine totalement disproportionnée soit infligée *à un délinquant en particulier*.

[151] This Court adopted a similar framework in *Canada (Attorney General) v. PHS Community Services Society*, 2011 SCC 44, [2011] 3 S.C.R. 134, where the analysis turned on the existence of a safety valve in the *Controlled Drugs and Substances Act*, S.C. 1996, c. 19 ("*CDSA*"). Section 4(1) of the *CDSA* prohibits possession of certain controlled substances, but s. 56 empowers the Minister of Health to grant exemptions from this prohibition where necessary for a medical or scientific purpose. In *PHS*, the claimants were clients of Vancouver's safe injection facility who challenged the constitutionality of the drug possession prohibition, arguing that it violated their rights under s. 7 of the *Charter*. The facility had previously been granted an exemption under s. 56, but the Minister had declined to renew it.

[151] Dans l'arrêt *Canada (Procureur général) c. PHS Community Services Society*, 2011 CSC 44, [2011] 3 R.C.S. 134, où l'analyse repose sur l'existence d'une soupape dans la *Loi réglementant certaines drogues et autres substances*, L.C. 1996, c. 19 (la « *Loi* »), la Cour adopte un cadre d'analyse semblable. Le paragraphe 4(1) de cette loi interdit la possession de certaines substances désignées, mais son art. 56 autorise le ministre de la Santé à accorder des exemptions lorsque des raisons médicales ou scientifiques le justifient. Dans cette affaire, les demandeurs, des clients d'un centre d'injection supervisé situé à Vancouver, contestaient la constitutionnalité de l'interdiction de possession de drogues au motif qu'elle violait les droits que leur garantissait l'art. 7 de la *Charte*. Une exemption fondée sur l'art. 56 avait auparavant été accordée au centre, mais le ministre avait refusé de la renouveler.

[152] The Chief Justice dealt with the constitutional challenge in two stages. First, she examined whether the prohibition in s. 4(1) was unconstitutional. In her view, the availability of a ministerial exemption was crucial to this analysis. She noted that "[t]he constitutional validity of s. 4(1) of the [*CDSA*] cannot be determined without considering" the exemption in s. 56, which is "designed to relieve against unconstitutional or unjust applications of that prohibition" (para. 109). Ultimately, she concluded that s. 4(1) was constitutional because "[t]he availability of exemptions acts as a safety valve that prevents the *CDSA* from applying where such application would be [unconstitutional]" (para. 113 (emphasis added)). Second, the Chief Justice inquired into whether the Minister had exercised his discretion in a manner that violated the claimants' s. 7 rights. She found that he had, and granted a remedy under s. 24(1) of the *Charter*. In my view,

[152] La Juge en chef examine la contestation constitutionnelle en deux étapes. Premièrement, elle s'interroge sur la constitutionnalité de l'interdiction prévue au par. 4(1). La possibilité d'obtenir une exemption ministérielle joue, à son avis, un rôle crucial à cet égard : « On ne peut apprécier la validité constitutionnelle [de la *Loi*] sans tenir compte » de l'exemption prévue au par. 56 « conçu[e] pour remédier aux applications inconstitutionnelles ou inéquitables de cette interdiction » (par. 109). Elle conclut finalement à la constitutionnalité du par. 4(1) parce que « [l]a possibilité d'accorder des exemptions sert de soupape empêchant l'application de la *Loi* dans les cas où son application serait [inconstitutionnelle] » (par. 113 (je souligne)). Deuxièmement, la Juge en chef se demande si le ministre a exercé son pouvoir discrétionnaire de manière attentatoire aux droits que garantit l'art. 7 aux demandeurs. Elle répond par l'affirmative et accorde une

this two-stage approach offers a more compelling framework than the use of reasonable hypotheticals to resolve a s. 12 constitutional challenge to a mandatory minimum sentence in a hybrid scheme.

réparation sur le fondement du par. 24(1) de la *Charte*. À mon avis, cette démarche en deux étapes offre un cadre d'analyse plus convaincant que la démarche axée sur les situations hypothétiques raisonnables lorsqu'il s'agit de statuer sur une contestation constitutionnelle qui se fonde sur l'art. 12 et qui vise une peine minimale obligatoire applicable dans le cadre d'un régime mixte.

[153] The majority states that the use of reasonable hypotheticals to evaluate mandatory minimums is settled law and necessarily applies here. It characterizes my proposed framework as "a radical departure from the constitutional framework" that has animated this Court's s. 12 jurisprudence (para. 94). With respect, I disagree with this assessment. Parliament's choice to craft s. 95 as a hybrid offence distinguishes the present context from our previous s. 12 jurisprudence. None of those cases involved a hybrid sentencing scheme that effectively conceded the existence of reasonably foreseeable cases where the mandatory minimum would be grossly disproportionate.

[153] Les juges majoritaires affirment que le recours aux situations hypothétiques raisonnables pour se prononcer sur une peine minimale obligatoire est un principe juridique établi qui vaut nécessairement en l'espèce. Ils disent du cadre d'analyse que je propose qu'il « s'éloigne radicalement du cadre d'analyse constitutionnelle » qui sous-tend la jurisprudence de la Cour relative à l'art. 12 (par. 94). Soit dit en tout respect, je ne partage pas leur opinion. Le choix du législateur de créer une infraction mixte à l'art. 95 fait en sorte que la présente espèce se distingue des affaires antérieures dans lesquelles la Cour a statué sur l'application de l'art. 12. Aucune de ces autres affaires ne porte sur un régime mixte de détermination de la peine qui reconnaît effectivement l'existence de situations raisonnablement prévisibles où la peine minimale obligatoire serait totalement disproportionnée.

[154] By way of example, s. 95 is markedly different from the offence in *Smith*. In that case, the narcotics importing offence was a straight indictable offence carrying a seven-year mandatory minimum. Like s. 95, it covered a wide array of conduct, from large-scale drug smuggling to the hypothetical "young person who, while driving back into Canada from a winter break in the U.S.A., is caught with . . . his or her first 'joint of grass'" (p. 1053). However, unlike s. 95, that offence did not include the option for prosecutors to proceed summarily. Parliament had not turned its mind to the possibility that the offence might catch less serious cases that would not merit a seven-year custodial sentence. Rather, Parliament targeted the problem of narcotics importation with the blunt instrument of a straight indictable offence carrying a long mandatory term of imprisonment. The scheme did not adequately protect against the imposition of grossly

[154] À titre d'exemple, l'infraction créée à l'art. 95 est très différente de celle dont il est question dans l'arrêt *Smith*, à savoir l'importation de stupéfiants, un acte qui commande la poursuite sur mise en accusation et qui est punissable d'une peine minimale obligatoire de sept ans d'emprisonnement. Tout comme l'infraction prévue à l'art. 95, cette autre infraction visait une vaste gamme de comportements, allant de la contrebande de drogues à grande échelle à la situation hypothétique de « la jeune personne qui, à son retour en voiture au Canada après avoir passé son congé de mi-session d'hiver aux États-Unis, aurait été surprise en possession [. . .] de son premier "joint de mari" » (p. 1053). Cependant, contrairement à l'infraction prévue à l'art. 95, elle n'offrait pas au poursuivant la possibilité d'opter pour la procédure sommaire. Le législateur n'avait pas envisagé la possibilité que l'infraction s'applique à des cas moins graves qui

disproportionate sentences, and the Court rightly struck it down.

ne justifiaient pas une peine d'emprisonnement de sept ans. Il s'était plutôt attaqué au problème de l'importation de stupéfiants au moyen de l'instrument sans nuance qu'est la création d'un acte criminel qui commande la poursuite par mise en accusation et qui est punissable d'une longue peine d'emprisonnement obligatoire. Le régime en place n'assurait pas une protection adéquate contre l'infliction de peines totalement disproportionnées, et la Cour l'a à juste titre invalidé.

[155] However, if *Smith* had involved a hybrid offence like s. 95, I believe that the Court's analysis would have been different. A hybrid offence would have signalled Parliament's intention to shield the least serious cases from the mandatory minimum. In such circumstances, Lamer J.'s hypothetical would have had little persuasive force. Simply put, it is virtually impossible to imagine Crown counsel proceeding by indictment against a young person caught bringing a single joint of marijuana across the border, especially when he or she would face a minimum penalty of seven years' imprisonment.

[155] Toutefois, si, dans l'affaire *Smith*, il avait été question d'une infraction mixte comme celle que crée l'art. 95, l'analyse de la Cour aurait selon moi été différente. La création d'une infraction mixte aurait traduit l'intention du législateur de soustraire les cas les moins graves à l'application de la peine minimale obligatoire. Le cas échéant, l'hypothèse considérée par le juge Lamer aurait été peu convaincante. En d'autres mots, il est pratiquement impossible de concevoir que le ministère public opte pour la mise en accusation dans le cas d'une jeune personne surprise en possession d'un seul joint de marijuana lors d'un contrôle à la frontière, en particulier lorsque cette personne s'exposerait à une peine minimale de sept ans d'emprisonnement.

[156] In sum, I am not persuaded that the reasonable hypothetical approach is binding or even useful in this context. The legislative intent in enacting a hybrid sentencing scheme points to a different analytical framework.

[156] En bref, je ne suis pas convaincu que la démarche axée sur les situations hypothétiques raisonnables lie la Cour ou soit même utile en l'espèce. L'intention du législateur qui adopte un régime mixte de détermination de la peine milite en faveur du recours à un cadre d'analyse différent.

B. *The Proper Analytical Framework Under Section 12 for Hybrid Offences Containing a Mandatory Minimum Sentence*

B. *Le bon cadre d'analyse pour le contrôle au regard de l'art. 12 d'une infraction mixte assortie d'une peine minimale obligatoire*

[157] I would adopt a two-stage framework to evaluate whether a mandatory minimum sentence in a hybrid scheme complies with s. 12. First, the court must determine whether the scheme adequately protects against grossly disproportionate sentences *in general*. Second, the court must determine whether the Crown has exercised its discretion in a manner that results in a grossly disproportionate sentence *for the particular offender* before the court.

[157] Il convient à mon avis de recourir à une analyse en deux étapes pour déterminer si, dans un régime mixte, une peine minimale obligatoire respecte ou non l'art. 12. Premièrement, le tribunal se demande si, *de façon générale*, le régime assure une protection adéquate contre l'infliction de peines totalement disproportionnées. Deuxièmement, il doit se demander si le poursuivant a exercé son pouvoir discrétionnaire de manière qu'une peine totalement disproportionnée soit infligée *au délinquant en cause*.

(1) Determining Whether the Scheme Adequately Protects Against Grossly Disproportionate Sentences in General

[158] This stage of the analysis has two parts. First, the court must determine the sentencing range for indictable convictions under the sentencing regime that existed prior to the enactment of the impugned mandatory minimum.[3] This is done with reference to actual sentences found in reported cases. The court must then isolate the low end of that sentencing range. By "low end", I do not mean the absolute lowest sentence that can be found in the reported cases. Rather, I refer to the types of sentences that are generally imposed on the least blameworthy offenders in the indictable category. This low end serves as an objective indicator of appropriate sentences for the least serious instances of the offence that would realistically be prosecuted by indictment.

[159] Second, the court must compare the impugned mandatory minimum with the low end of the prior range. If the mandatory minimum is grossly disproportionate to sentences at the low end, then the scheme does not adequately protect against the imposition of grossly disproportionate sentences *in general*. On the contrary, it puts an identifiable set of offenders directly at risk of cruel and unusual punishment in violation of s. 12. The proper remedy here lies under s. 52(1) of the *Constitution Act, 1982*, and the mandatory minimum must be struck down.

[3] This will be the case even when the prior regime included a mandatory minimum. For example, where an offence previously carried a mandatory minimum of two years that was later raised to four years, the sentencing range under the prior sentencing regime will be the range of sentences imposed while the two-year mandatory minimum was in effect. Where an offence is newly enacted such that no prior sentencing range exists, the court would look to sentences imposed for similar offences to construct a plausible sentencing range.

(1) Le régime assure-t-il de façon générale une protection adéquate contre l'infliction de peines totalement disproportionnées?

[158] Cette étape de l'analyse comporte deux volets. Le tribunal doit d'abord établir la fourchette des peines infligées sur déclaration de culpabilité à l'issue d'une mise en accusation suivant le régime de détermination de la peine qui existait avant l'adoption de la peine minimale obligatoire contestée[3]. Pour le faire, il s'en remet aux peines effectivement imposées dans les cas répertoriés. Il circonscrit alors l'extrémité inférieure de cette fourchette. Je n'entends pas par « extrémité inférieure » la peine la moins sévère que l'on puisse recenser, mais bien les peines généralement infligées pour les actes les moins répréhensibles dans la catégorie des infractions punissables par voie de mise en accusation. Cette extrémité inférieure constitue un indicateur objectif des peines qui conviennent dans les cas les moins graves de perpétration de l'infraction où il serait réaliste que le poursuivant opte pour la mise en accusation.

[159] Ensuite, le tribunal compare la peine minimale obligatoire contestée et l'extrémité inférieure de la fourchette antérieure. Si la peine minimale obligatoire est totalement disproportionnée aux peines situées à l'extrémité inférieure de cette fourchette, le régime n'assure pas *de façon générale* une protection adéquate contre l'infliction de peines totalement disproportionnées. Au contraire, il expose directement un groupe déterminable de délinquants au risque de se voir infliger une peine cruelle et inusitée en violation de l'art. 12. La réparation qui s'impose alors relève du par. 52(1) de la *Loi constitutionnelle de 1982*, et la peine minimale obligatoire doit être invalidée.

[3] Ce sera le cas même lorsque le régime antérieur prévoyait une peine minimale obligatoire. Par exemple, lorsqu'une infraction appelait auparavant l'imposition d'une peine minimale obligatoire de deux ans d'emprisonnement, peine qui est passée par la suite à quatre ans, la fourchette des peines imposées suivant le régime antérieur constituera la fourchette des peines appliquées lorsque la peine minimale obligatoire de deux ans était en vigueur. Lorsqu'il s'agit d'une nouvelle infraction et qu'aucune fourchette antérieure n'existe, le tribunal examinera les peines infligées pour des infractions semblables afin d'établir une fourchette plausible.

(2) Determining Whether the Crown Has Exercised Its Discretion in a Manner That Results in a Grossly Disproportionate Sentence for the Particular Offender

[160] If the scheme itself is upheld, the court must move on to the second stage and determine whether the Crown has exercised its discretion in a manner that results in a grossly disproportionate sentence for the particular offender before the court. In those rare cases where the Crown's decision to proceed by indictment leads to a grossly disproportionate sentence, a remedy will lie under s. 24(1) of the *Charter*.

[161] As noted, the focus here is on the constitutionality of state action, and not the law itself. Specifically, the state action at issue is the Crown election. The decision to proceed summarily or by indictment is a matter of core prosecutorial discretion, reviewable only for abuse of process: *R. v. Anderson*, 2014 SCC 41, [2014] 2 S.C.R. 167, at paras. 44 and 48. In my view, a decision to prosecute by indictment that would give rise to a grossly disproportionate sentence represents a *per se* abuse of process in violation of s. 12. Generally, the appropriate and just remedy in the circumstances will be a sentence reduction below the mandatory minimum.

(a) *Applying the Abuse of Process Doctrine Under the Proposed Framework*

[162] The abuse of process jurisprudence under s. 7 of the *Charter* is consistent with my proposed framework. In *R. v. Nixon*, 2011 SCC 34, [2011] 2 S.C.R. 566, the Court described two categories of abuse of process. The first category involves "prosecutorial conduct affecting the fairness of the trial" (para. 36). The second, residual category relates to "conduct that 'contravenes fundamental notions of justice and thus undermines the integrity of the judicial process'": *ibid.*, quoting *R. v. O'Connor*, [1995] 4 S.C.R. 411, at para. 73.

(2) Le poursuivant a-t-il exercé son pouvoir discrétionnaire de manière qu'une peine totalement disproportionnée soit infligée au délinquant en cause?

[160] Si le régime comme tel est maintenu, le tribunal passe à la deuxième étape de l'analyse et se demande si le poursuivant a exercé son pouvoir discrétionnaire de manière qu'une peine totalement disproportionnée soit infligée au délinquant en cause. Dans les rares cas où la décision d'opter pour la mise en accusation mènera à l'imposition d'une peine totalement disproportionnée, une réparation pourra être obtenue sur le fondement du par. 24(1) de la *Charte*.

[161] Comme nous l'avons vu, l'accent est alors mis sur la constitutionnalité non pas de la loi comme telle, mais bien de l'acte de l'État, à savoir le choix du mode de poursuite. La décision d'opter pour la procédure sommaire ou la mise en accusation relève du pouvoir discrétionnaire essentiel en matière de poursuites, un pouvoir susceptible de contrôle uniquement en cas d'abus de procédure (*R. c. Anderson*, 2014 CSC 41, [2014] 2 R.C.S. 167, par. 44 et 48). À mon sens, lorsque le choix de la mise en accusation entraînerait l'imposition d'une peine totalement disproportionnée, il y a abus de procédure en soi contrairement à l'art. 12. En général, la réparation convenable et juste dans les circonstances consiste à réduire la durée de la peine de façon qu'elle soit inférieure à la peine minimale obligatoire.

a) *Application de la notion d'abus de procédure suivant le cadre d'analyse proposé*

[162] La jurisprudence relative à l'abus de procédure au regard de l'art. 7 de la *Charte* est compatible avec le cadre d'analyse que je propose. Dans l'arrêt *R. c. Nixon*, 2011 CSC 34, [2011] 2 R.C.S. 566, la Cour renvoie à deux catégories d'abus de procédure. La première concerne « les cas où la conduite du poursuivant porte atteinte à l'équité du procès » (par. 36). La seconde — résiduelle — vise « les cas où la conduite [. . .] "contre[vient] aux notions fondamentales de justice et [mine] ainsi l'intégrité du processus judiciaire" » (*ibid.*, citant *R. c. O'Connor*, [1995] 4 R.C.S. 411, par. 73).

[163] I rely on this residual category to address Crown conduct that would lead to a grossly disproportionate sentence. State action that puts an offender at risk of cruel and unusual punishment necessarily "contravenes fundamental notions of justice" and "undermines the integrity of the judicial process" (*ibid.*). Although the Court in *Nixon* was discussing s. 7 of the *Charter*, I am satisfied that an abuse of process in the residual category may lie under s. 12 as well.

[164] Abuse of process is typically characterized by intentional misconduct or bad faith. However, in *R. v. Babos*, 2014 SCC 16, [2014] 1 S.C.R. 309, the Court held that

> while it is generally true that the residual category [of abuse of process] will be invoked as a result of state *misconduct*, this will not always be so. Circumstances may arise where the integrity of the justice system is implicated in the absence of misconduct. [Emphasis in original; para. 37.]

Charron J. made a similar point in *Nixon*, noting that "proof of prosecutorial misconduct, while relevant, is not a prerequisite" to finding an abuse of process (para. 39).

[165] This is a long-standing principle. Indeed, in *Nixon*, Charron J. cites *R. v. Keyowski*, [1988] 1 S.C.R. 657, in which the Court observed that "requiring misconduct or an improper motive would . . . unduly restrict the operation of the doctrine", and that "[p]rosecutorial misconduct and improper motivation are but two of many factors to be taken into account" (p. 659). Nothing in our subsequent jurisprudence has altered this principle.

[166] By way of example, this principle was applied in *R. v. Jack* (1996), 113 Man. R. (2d) 260 (C.A.). In that case, the Manitoba Court of Appeal considered whether it would constitute an abuse of process for the Crown to subject the accused to a

[163] Les cas où la conduite du poursuivant mènerait à l'imposition d'une peine totalement disproportionnée relèvent, à mon avis, de cette catégorie résiduelle. L'acte de l'État qui expose le délinquant au risque de subir une peine cruelle et inusitée contrevient nécessairement aux « notions fondamentales de justice » et « [mine] [. . .] l'intégrité du processus judiciaire » (*ibid.*). Même si, dans l'arrêt *Nixon*, l'analyse de la Cour se fonde sur l'art. 7 de la *Charte*, je suis convaincu qu'il peut également y avoir abus de procédure de nature résiduelle au regard de l'art. 12.

[164] L'abus de procédure se caractérise habituellement par une conduite répréhensible intentionnelle ou par la mauvaise foi. Cependant, dans *R. c. Babos*, 2014 CSC 16, [2014] 1 R.C.S. 309, la Cour affirme :

> bien qu'il soit généralement vrai que l'on invoque la catégorie résiduelle [de l'abus de procédure] à la suite d'une *conduite répréhensible* de l'État, il n'en est pas toujours ainsi. Il peut y avoir des situations où l'intégrité du système de justice est en jeu en l'absence d'une conduite répréhensible. [En italique dans l'original; par. 37.]

La juge Charron exprime un point de vue semblable dans l'arrêt *Nixon* et signale que « la preuve d'une conduite répréhensible du poursuivant, quoique pertinente, n'est pas une condition préalable » pour conclure à l'abus de procédure (par. 39).

[165] Ce principe est établi depuis longtemps. En fait, dans *Nixon*, la juge Charron cite l'arrêt *R. c. Keyowski*, [1988] 1 R.C.S. 657, où la Cour fait remarquer qu'« exige[r] qu'il y ait une conduite blâmable ou un motif illégitime limiterait indûment l'application du principe » et que « [l]a conduite blâmable de la poursuite et l'existence d'un motif illégitime ne sont que deux des nombreux facteurs [à] prendre en considération » (p. 659). Aucune décision ultérieure n'a modifié ce principe.

[166] À titre d'exemple, le principe a été appliqué dans *R. c. Jack* (1996), 113 Man. R. (2d) 260 (C.A.), où la Cour d'appel du Manitoba s'est demandé si la tenue d'un quatrième procès pour la même accusation constituait un abus de procédure

fourth trial on the same charge. Citing *Keyowski*, the court observed that a series of trials, absent any prosecutorial misconduct, could be characterized as a *per se* abuse of process. In the circumstances, the court held that a stay of proceedings would be appropriate, since a fourth trial would be an affront to the community's sense of fair play and decency. Lamer C.J. upheld the finding on abuse of process and entered a stay of proceedings: *R. v. Jack*, [1997] 2 S.C.R. 334. The law is clear. An accused need not demonstrate prosecutorial misconduct in order to establish an abuse of process.

de la part du poursuivant. Prenant appui sur l'arrêt *Keyowski*, elle a opiné que, même en l'absence d'une conduite blâmable de la part du poursuivant, une série de procès pouvait constituer en soi un abus de procédure. Elle a donc estimé que l'arrêt des procédures était indiqué, car un quatrième procès aurait heurté le sens collectif du franc-jeu et de la décence. Le juge en chef Lamer a confirmé la conclusion selon laquelle il y avait eu abus de procédure et il a ordonné l'arrêt des procédures (*R. c. Jack*, [1997] 2 R.C.S. 334). Le droit applicable est clair. L'accusé n'a pas à prouver la conduite blâmable du poursuivant pour établir l'abus de procédure.

[167] Accordingly, to find an abuse of process under s. 12, I would not require proof of bad faith or malicious intent on the part of the Crown. Rather, an abuse of process will lie, regardless of intent, where the Crown's decision to proceed by indictment "tend[s] to undermine society's expectations of fairness in the administration of justice": *Nixon*, at para. 41.

[167] En conséquence, point n'est besoin d'une preuve de mauvaise foi ou d'une intention malveillante du poursuivant pour conclure à un abus de procédure au regard de l'art. 12. Peu importe l'intention, il y aura abus de procédure lorsque le choix de la mise en accusation « ten[dra] à miner les attentes de la société sur le plan de l'équité en matière d'administration de la justice » (*Nixon*, par. 41).

[168] While proof of bad faith or malicious intent is not necessary, it would certainly suffice to establish an abuse of process under s. 12. For example, if the Crown election was influenced by discriminatory factors such as the race of the offender, this would be an abuse of process: see *Anderson*, at para. 50.

[168] Bien qu'elle ne soit pas nécessaire, la preuve de mauvaise foi ou d'intention malveillante suffirait certainement pour établir l'abus de procédure au regard de l'art. 12. À titre d'exemple, si le choix du mode de poursuite était influencé par des éléments discriminatoires, telle la race du délinquant, il y aurait abus de procédure (voir *Anderson*, par. 50).

[169] Similarly, an improper use of the mandatory minimum in plea bargaining — a concern raised by the majority, which I share — would also warrant the court's intervention. Thus, if a prosecutor proceeded by indictment in order to use the threat of a mandatory minimum to extort a guilty plea, this would likely qualify as an abuse of process and justify a s. 24(1) remedy: see *Babos*, at paras. 58-61. It follows that we do not need to strike down the sentencing scheme to guard against these concerns. To the extent that the majority holds otherwise, I respectfully disagree.

[169] De même, l'instrumentalisation de la peine minimale obligatoire lors de la négociation relative à l'inscription d'un plaidoyer — une crainte exprimée par les juges majoritaires et que je partage — justifierait une cour de justice d'intervenir. Partant, si le poursuivant optait pour la mise en accusation afin que la peine minimale obligatoire alors encourue lui permette d'extorquer un plaidoyer de culpabilité, il y aurait vraisemblablement abus de procédure justifiant une réparation fondée sur le par. 24(1) (voir *Babos*, par. 58-61). Il s'ensuit que point n'est besoin d'invalider le régime de détermination de la peine pour contrer une telle dérive. Soit dit en tout respect, dans la mesure où les juges majoritaires croient le contraire, je me dissocie de leur point de vue.

[170] The offender bears the burden of proof to show an abuse of process at the sentencing phase, after evidence of mitigating or aggravating factors has been put before the court. He or she must demonstrate that the mandatory minimum would be grossly disproportionate in his or her case. Imposing such a sentence would "undermine society's expectations of fairness in the administration of justice": *Nixon*, at para. 41. Grossly disproportionate sentences are "so excessive as to outrage standards of decency" and are "abhorrent or intolerable" to society: *R. v. Wiles*, 2005 SCC 84, [2005] 3 S.C.R. 895, at para. 4, citing *Smith*, at p. 1072, and *Morrisey*, at para. 26. They constitute a breach of an accused's fundamental right to be free from cruel and unusual punishment, and are incompatible with the integrity of our justice system. An exercise of prosecutorial discretion — be it by design or effect — that leads to such an outcome must be regarded as a *per se* abuse of process.

[170] Il incombe au délinquant de prouver l'abus de procédure à l'étape de la détermination de la peine, après que le tribunal a été saisi d'une preuve de circonstances atténuantes ou aggravantes. Il doit démontrer que la peine minimale obligatoire serait totalement disproportionnée dans son cas. S'il y parvient, la lui imposer « miner[ait] les attentes de la société sur le plan de l'équité en matière d'administration de la justice » (*Nixon*, par. 41). La peine totalement disproportionnée est « excessi[ve] au point de ne pas être compatible avec la dignité humaine » et elle est « odieuse ou intolérable » pour la société (*R. c. Wiles*, 2005 CSC 84, [2005] 3 R.C.S. 895, par. 4, citant *Smith*, p. 1072, et *Morrisey*, par. 26). Elle porte atteinte au droit fondamental de l'accusé à la protection contre les peines cruelles et inusitées et elle est incompatible avec l'intégrité de notre système de justice. Si, par son objet ou son effet, l'exercice du pouvoir discrétionnaire en matière de poursuites mène à un tel résultat, il faut y voir un abus de procédure en soi.

[171] If the offender discharges this burden of proof, he or she is entitled to a remedy under s. 24(1). In most cases, the appropriate and just remedy would be a sentence reduction below the mandatory minimum.

[171] Le délinquant qui s'acquitte de ce fardeau de preuve a droit à une réparation en vertu du par. 24(1). Dans la plupart des cas, la réparation convenable et juste consiste à réduire la peine de façon qu'elle soit inférieure à la peine minimale obligatoire.

[172] For these reasons, I am unable to agree with the majority's assertion that the abuse of process doctrine creates "a notoriously high bar" and "offers scant protection from grossly disproportionate sentences" (para. 94). With respect, this contention misconstrues how the doctrine operates under my proposed framework. Far from offering *scant* protection, my proposal offers *total* protection from grossly disproportionate sentences. If an offender can show that a mandatory minimum would be grossly disproportionate in his or her case, the judge must declare a *per se* abuse of process and grant a s. 24(1) remedy.

[172] C'est pourquoi je ne peux convenir avec les juges majoritaires qu'« [il] est bien connu que la norme » applicable à l'abus de procédure « est très stricte » et que le principe de l'abus de procédure « protège insuffisamment contre l'infliction de peines totalement disproportionnées » (par. 94). Soit dit en tout respect, ils se méprennent sur l'application du principe dans le cadre d'analyse que je propose. Loin d'offrir une protection *insuffisante*, il assure une protection *totale* contre l'infliction de peines totalement disproportionnées. Lorsque le délinquant peut démontrer que la peine minimale obligatoire est totalement disproportionnée en ce qui le concerne, le tribunal doit conclure à l'abus de procédure et accorder réparation sur le fondement du par. 24(1).

(b) *The Proposed Framework Is Consistent With This Court's Rejection of Constitutional Exemptions*

[173] In *R. v. Ferguson*, 2008 SCC 6, [2008] 1 S.C.R. 96, this Court held that where a mandatory minimum sentencing scheme is found to violate s. 12, the proper remedy lies under s. 52 and the law must be struck down. The Court expressly rejected the possibility that the law could be saved by granting case-by-case exemptions for any unconstitutional applications.

[174] I agree that constitutional exemptions are not an appropriate response to unconstitutional laws. My proposed framework is consistent with this principle. The remedy it contemplates is *not* a response to an unconstitutional law. Rather, the remedy is a response to a state actor's *exercise of discretion* under a law which a judge has held to be constitutionally compliant at stage one of the framework. As the Chief Justice explained in *Ferguson*:

> Section 24(1) . . . is generally used as a remedy, not for unconstitutional laws, but for <u>unconstitutional government acts committed under the authority of legal regimes which are accepted as fully constitutional</u> . . . . The acts of government agents acting under such regimes are not the necessary result or "effect" of the law, <u>but of the government agent's applying a discretion conferred by the law in an unconstitutional manner</u>. Section 52(1) is thus not applicable. The appropriate remedy lies under s. 24(1). [Emphasis added; para. 60.]

This logic applies to the acts of prosecutors making an election under s. 95. In my view, once a court has determined that a sentencing scheme itself is constitutional, it is entirely appropriate to guard against its rare unconstitutional application by providing a case-by-case s. 24(1) remedy.

b) *Le cadre d'analyse proposé est compatible avec le rejet par la Cour de l'exemption constitutionnelle*

[173] Selon l'arrêt *R. c. Ferguson*, 2008 CSC 6, [2008] 1 R.C.S. 96, lorsque le tribunal conclut qu'un régime de détermination de la peine prévoyant l'imposition de peines minimales obligatoires porte atteinte à l'art. 12, la réparation convenable réside dans l'application de l'art. 52, et la loi doit être invalidée. La Cour écarte expressément la possibilité que la loi puisse être sauvegardée ponctuellement par l'octroi d'une exemption en cas d'application inconstitutionnelle.

[174] Je conviens que l'exemption constitutionnelle ne constitue pas une mesure appropriée pour pallier l'inconstitutionnalité d'une loi. Mon cadre d'analyse le reconnaît. La réparation qu'il prévoit vise *non pas* une loi inconstitutionnelle, mais bien l'*exercice* par un représentant de l'État *d'un pouvoir discrétionnaire* accordé par une loi ayant été jugée constitutionnelle à la première étape de l'analyse. Comme l'explique la Juge en chef dans l'arrêt *Ferguson* :

> . . . on a généralement recours au par. 24(1) pour accorder réparation non pas lorsque des dispositions législatives sont inconstitutionnelles, mais lorsque <u>des actes gouvernementaux inconstitutionnels sont commis en vertu de régimes légaux reconnus comme parfaitement constitutionnels</u> [. . .] Les actes des mandataires du gouvernement qui agissent en vertu de ces régimes ne sont pas le résultat ou l'« effet » obligatoire de la loi, <u>mais plutôt du fait que les mandataires du gouvernement ont exercé d'une manière inconstitutionnelle le pouvoir discrétionnaire que leur conférait la loi</u>. Le paragraphe 52(1) ne s'applique donc pas. Le recours approprié est prévu au par. 24(1). [Je souligne; par. 60.]

La même logique vaut pour les actes du poursuivant appelé à choisir un mode de poursuite sur le fondement de l'art. 95. À mon avis, après avoir établi que le régime de détermination de la peine est constitutionnel, le tribunal peut tout à fait légitimement empêcher ses rares applications inconstitutionnelles par l'octroi ponctuel d'une réparation fondée sur le par. 24(1).

C. *The Responsibility for Ensuring Constitutional Compliance Under My Proposed Framework Lies With Judges, Not Prosecutors*

[175] The Chief Justice states that reliance on the Crown election to uphold the impugned mandatory minimums effectively "replac[es] a public hearing on the constitutionality of s. 95 before an independent and impartial court with the discretionary decision of a Crown prosecutor" (para. 86). She emphasizes that it is incumbent on courts to scrutinize the constitutionality of the sentencing schemes they apply.

[176] I agree that the responsibility to ensure constitutional compliance rests with judges, and not with prosecutors. The framework I propose places that responsibility squarely in the hands of judges. In this respect, it is consistent with the admonition in *Smith* that "courts are duty bound" to evaluate whether a law is constitutional, and must not "delegate the avoidance of a [*Charter*] violation to the prosecution" (p. 1078).

[177] Specifically, the framework includes two checks to ensure compliance with s. 12, neither of which relies on prosecutorial discretion. First, if the sentencing scheme itself is challenged, the judge may strike it down as unconstitutional. Second, if an offender argues that the mandatory minimum would be grossly disproportionate in his or her case, the judge may find a *per se* abuse of process and grant a sentence reduction under s. 24(1).

[178] I repeat and emphasize that the Crown election under s. 95 does not require prosecutors to go outside the law. Rather, it is a discretion built into the legislative scheme that acts as a safety valve to guard against unconstitutional applications of the law. In my view, any meaningful assessment

C. *Selon le cadre d'analyse que je propose, il incombe au tribunal et non au poursuivant de s'assurer du respect des exigences de la Constitution*

[175] Pour la Juge en chef, compter sur le bon choix du mode de poursuite pour conclure à la constitutionnalité des peines minimales obligatoires contestées revient dans les faits « à substituer à la tenue par un tribunal indépendant et impartial d'une audience publique sur la constitutionnalité de l'art. 95 la décision discrétionnaire d'un poursuivant » (par. 86). Elle souligne qu'il incombe aux tribunaux d'examiner attentivement la constitutionnalité des régimes de détermination de la peine qu'ils appliquent.

[176] Je reconnais qu'il incombe au tribunal, et non au poursuivant, de s'assurer du respect des exigences de la Constitution. Suivant le cadre d'analyse que je propose, cette responsabilité demeure entièrement celle du tribunal. Mon approche est compatible sur ce point avec la mise en garde de la Cour dans l'arrêt *Smith*, à savoir que « les tribunaux ont le devoir » de se demander si une loi est constitutionnelle et qu'ils ne peuvent « laisser [. . .] au ministère public [. . .] le soin d'éviter une violation [de la *Charte*] » (p. 1078).

[177] Plus précisément, mon cadre d'analyse comporte deux éléments de contrôle de la conformité à l'art. 12, et aucun ne tient à l'exercice du pouvoir discrétionnaire en matière de poursuites. Premièrement, lorsque le régime même de détermination de la peine est contesté, le tribunal peut le déclarer inconstitutionnel. Deuxièmement, lorsque le délinquant prétend que la peine minimale obligatoire serait totalement disproportionnée dans son cas, le tribunal peut conclure à un abus de procédure en soi et accorder une réduction de peine en vertu du par. 24(1).

[178] Je le répète — et j'insiste —, le choix du mode de poursuite suivant l'art. 95 ne l'oblige pas à sortir du cadre de la disposition. Celle-ci confère en effet un pouvoir discrétionnaire dont l'exercice est intégré au régime législatif pour servir de soupape contre les applications inconstitutionnelles. À mon

of the law's constitutionality must take this factor into account: *PHS*, at paras. 109-14. However, in recognizing the relevance of the Crown election, I should not be taken as saying that this safety valve insulates the law from *Charter* scrutiny. Rather, it simply informs *how* that scrutiny should be applied.

avis, tout examen valable de la constitutionnalité de la loi doit en tenir compte (*PHS*, par. 109-114). En reconnaissant l'importance du choix du mode de poursuite, je ne laisse toutefois pas entendre que cette soupape soustrait la loi à l'examen fondé sur la *Charte*, mais bien qu'elle influe sur les *modalités* de cet examen.

[179] Nor does my framework conflate the respective functions of prosecutors and judges. The majority, citing *Anderson*, insists that "sentencing is a judicial function" (para. 89). In its view, the fact that "a mandatory [minimum] regime may require a judge to impose a disproportionate sentence does not alter the prosecutorial function in electing the mode of trial" (*ibid.*). I agree. In prosecuting an accused under a hybrid offence, it is the *Crown's* responsibility to elect a mode of proceedings bearing in mind the gravity of the conduct. Where an election would lead to a grossly disproportionate sentence, it is the *judge's* responsibility to avoid that outcome.

[179] Mon cadre d'analyse ne confond pas non plus les fonctions respectives du poursuivant et du tribunal. Citant l'arrêt *Anderson*, les juges majoritaires insistent sur le fait que « la détermination de la peine relève du judiciaire » (par. 89). À leur avis, « l'obligation faite au tribunal par un régime de peine minimale obligatoire d'infliger une peine disproportionnée ne modifie pas la fonction du poursuivant lorsqu'il s'agit de choisir le mode de poursuite » (*ibid.*). Je suis d'accord. Lorsqu'une personne est accusée d'une infraction mixte, il incombe au *ministère public* de choisir le mode de poursuite en tenant compte de la gravité de l'acte reproché. Lorsque le mode de poursuite choisi est susceptible de mener à une peine totalement disproportionnée, il appartient au *tribunal* d'éviter ce résultat.

[180] In light of these checks, I cannot accept the majority's suggestion that my framework insulates mandatory minimums from *Charter* scrutiny. With respect, that is just not so. The two checks I have described ensure that judges make the ultimate call as to the constitutionality of the law itself, as well as its application to a particular offender. The majority, relying on *R. v. Bain*, [1992] 1 S.C.R. 91, states that "one cannot be certain that [prosecutorial] discretion will always be exercised in a way that would avoid an unconstitutional result" (para. 95). I agree. It is precisely for this reason that my proposed framework empowers judges to intervene where the Crown election puts an offender at risk of a grossly disproportionate sentence. In my view, this is a full answer to the majority's concerns.

[180] À la lumière de ces éléments de contrôle, je ne puis souscrire à la thèse des juges majoritaires selon laquelle mon cadre d'analyse soustrait les peines minimales obligatoires à l'examen fondé sur la *Charte*. Soit dit en tout respect, ce n'est tout simplement pas le cas. Les deux éléments de contrôle susmentionnés garantissent que ce sont les tribunaux qui ont le dernier mot sur la constitutionnalité de la loi comme telle et sur son application à un délinquant en particulier. Se fondant sur l'arrêt *R. c. Bain*, [1992] 1 R.C.S. 91, mes collègues affirment que « nul ne peut être assuré que [l]e pouvoir [discrétionnaire en matière de poursuites] sera toujours exercé de manière à éviter un résultat inconstitutionnel » (par. 95). J'en conviens. C'est précisément pour cette raison que mon cadre d'analyse permet au tribunal d'intervenir lorsque le choix du mode de poursuite fait encourir au délinquant une peine totalement disproportionnée. À mon avis, l'approche que je préconise répond entièrement aux préoccupations des juges majoritaires.

[181] I wish to add one further point. The Chief Justice notes that the Crown election is exercised at an early stage of the proceedings before all of the facts related to an offence have emerged. It follows that the Crown might make an inappropriate election prior to discovering mitigating circumstances. As a result, she contends that "[t]he existence of the summary conviction option is therefore not an answer to the respondents' s. 12 claim" (para. 97).

[182] With respect, I disagree for two reasons. First, if Crown counsel becomes aware of facts suggesting that the initial election was not appropriate, he or she can stay the indictment and initiate summary proceedings: see *Criminal Code*, ss. 579 and 786(2).[4] Second, even if Crown counsel does not re-elect in this manner, it is always open to the judge to find a *per se* abuse of process where the mandatory minimum would be grossly disproportionate for a particular offender.

D. *Applying the Section 12 Framework*

[183] I now apply this framework to each of the cases before us.

(1) Application to Mr. Nur

[184] Code J. found that, prior to the enactment of the three-year mandatory minimum, the sentencing range for a first offence under s. 95 was a term of imprisonment between two years less a day and three years: *Nur* sentencing reasons, at para. 42. Thus, the low end of the range is around two years less a day. The three-year mandatory minimum for a first offence under s. 95(2) is not, in my view, grossly disproportionate to this low end. Therefore,

[4] Within six months of the date of the offence, the Crown may do so unilaterally; if six months have passed, the consent of the accused would be required: see *Criminal Code*, s. 786(2).

[181] Je tiens à clarifier un autre point. La Juge en chef souligne que le ministère public effectue son choix tôt dans le processus, à un moment où tous les faits liés à l'infraction ne sont pas encore connus. La poursuite pourrait donc faire un choix inapproprié pour découvrir ensuite l'existence de circonstances atténuantes. Selon la Juge en chef, « [l]a possibilité que le poursuivant opte pour la procédure sommaire ne permet donc pas de réfuter l'allégation des intimés fondée sur l'art. 12 » (par. 97).

[182] Sauf le respect dû à ma collègue, je diffère d'opinion pour deux raisons. Premièrement, si le ministère public apprend l'existence de faits indiquant que le choix initial n'était pas le bon, il peut ordonner l'arrêt des procédures et engager une procédure sommaire (voir l'art. 579 et le par. 786(2) du *Code criminel*[4]). Deuxièmement, même si le ministère public ne revient pas ainsi sur sa décision, le tribunal peut toujours conclure à l'abus de procédure en soi lorsque la peine minimale obligatoire est totalement disproportionnée en ce qui concerne le délinquant en cause.

D. *L'application du cadre d'analyse relatif à l'art. 12*

[183] Appliquons maintenant ce cadre d'analyse à chacune des affaires dont nous sommes saisis.

(1) Application à M. Nur

[184] Le juge Code conclut qu'avant l'application de la peine minimale obligatoire de trois ans, la fourchette des peines infligées pour une première infraction à l'art. 95 allait de deux ans moins un jour à trois ans d'emprisonnement (motifs de détermination de la peine dans *Nur*, par. 42). La peine correspondant à l'extrémité inférieure de la fourchette était donc d'environ deux ans moins un jour d'emprisonnement. La peine minimale obligatoire

[4] Le ministère public peut le faire de façon unilatérale dans les six mois suivant l'infraction; après ce délai, le consentement de l'accusé est nécessaire (voir le par. 786(2) du *Code criminel*).

at the first stage, the mandatory minimum does not violate s. 12.

de trois ans que prévoit actuellement le par. 95(2) pour une première infraction n'est pas, à mon sens, totalement disproportionnée à la peine qui correspondait auparavant à l'extrémité inférieure de la fourchette. La peine minimale obligatoire ne viole donc pas l'art. 12 à la première étape du contrôle.

[185] Mr. Nur's concession that a three-year sentence is not grossly disproportionate in his case disposes of the second stage.

[185] Comme M. Nur reconnaît qu'une peine de trois ans d'emprisonnement n'est pas totalement disproportionnée dans son cas, la deuxième étape du contrôle est aussi franchie.

(2) Application to Mr. Charles

(2) Application à M. Charles

[186] In her oral reasons for sentencing, Backhouse J. did not refer to the sentencing range for a second or subsequent offence prior to the enactment of the five-year mandatory minimum: 2010 ONSC 5437, 262 C.C.C. (3d) 120. However, as noted by Code J., while the sentencing range for a first offence was between two years less a day and three years, "[m]uch longer sentences were imposed for recidivists": *Nur* sentencing reasons, at para. 42. It is clear, then, that a second or subsequent offence would have attracted a sentence considerably longer than three years — at the very least, in the range of four or five years. The present five-year mandatory minimum is not grossly disproportionate to the previous low end of the range for second or subsequent offences under s. 95.

[186] Dans ses motifs de détermination de la peine prononcés à l'audience, la juge Backhouse ne fait pas état de la fourchette des peines infligées en cas de récidive avant l'application de la peine minimale obligatoire de cinq ans (2010 ONSC 5437, 262 C.C.C. (3d) 120). Cependant, comme le souligne le juge Code, même si la fourchette des peines infligées pour une première infraction allait de deux ans moins un jour à trois ans d'emprisonnement, [TRADUCTION] « [d]es peines beaucoup plus longues étaient imposées aux récidivistes » (motifs de détermination de la peine dans *Nur*, par. 42). Il est donc clair qu'une récidive aurait entraîné une peine d'emprisonnement de bien plus de trois ans — à tout le moins quatre ou cinq ans. La peine minimale obligatoire actuelle de cinq ans d'emprisonnement n'est pas totalement disproportionnée aux peines de l'extrémité inférieure de la fourchette qui étaient auparavant infligées sous le régime de l'art. 95 en cas de récidive.

[187] Like Mr. Nur, Mr. Charles concedes that the mandatory minimum is not grossly disproportionate in his case.

[187] À l'instar de M. Nur, M. Charles reconnaît que la peine minimale obligatoire n'est pas totalement disproportionnée en ce qui le concerne.

[188] I thus conclude that neither the sentencing scheme itself, nor its application to Mr. Nur or Mr. Charles, offends s. 12 of the *Charter*.

[188] J'estime donc que ni le régime de détermination de la peine comme tel, ni son application à M. Nur ou à M. Charles ne contreviennent à l'art. 12 de la *Charte*.

IV. Part 3: Analysis Under Section 7

[189] I now turn to the s. 7 arguments raised in each of the cases before us.

A. *Mr. Nur*

[190] Mr. Nur challenges the sentencing scheme in s. 95(2) as arbitrary in violation of s. 7. His challenge relates to the two-year "gap" between the maximum penalty of one year where the Crown proceeds summarily, and the minimum penalty of three years where the Crown proceeds by indictment. Mr. Nur concedes that the purpose of the three-year mandatory minimum is to denounce and deter gun crime: R.F., at para. 76. Nevertheless, he submits that the gap is arbitrary because it "frustrates the flexibility of the hybrid scheme and . . . is not related to any identifiable legislative objective" (para. 77). Specifically, it "undermines . . . flexibility by constraining Crown discretion and driving more offences into the indictable category" (para. 83).

[191] With respect, I am not persuaded by this submission. I do not gainsay the possibility that, in other circumstances, this type of gap might raise s. 7 concerns. However, no such concerns arise here. As Mr. Nur acknowledges, Parliament's primary objective is to denounce and deter gun crime. The legislative history and the jurisprudence on s. 95 make clear that the vast majority of conduct captured by this offence is inherently dangerous and warrants a significant term of imprisonment. Yet, Parliament has also recognized the possibility of rare, licensing-type cases, and created a safety valve which provides the option of summary proceedings.

[192] Seen in this light, there is nothing arbitrary about the sentencing scheme. On the contrary, the

IV. Partie 3 : L'analyse au regard de l'art. 7

[189] Passons maintenant aux prétentions relatives à l'art. 7 formulées dans chacun des pourvois.

A. *M. Nur*

[190] M. Nur conteste le régime de détermination de la peine établi au par. 95(2) au motif qu'il est arbitraire et viole ainsi l'art. 7. Il dénonce l'« écart » de deux ans entre la peine maximale d'un an qui peut être imposée lorsque le ministère public opte pour la procédure sommaire, et la peine minimale de trois ans qui s'applique lorsqu'il opte pour la mise en accusation. M. Nur reconnaît que la peine minimale obligatoire de trois ans d'emprisonnement vise à dénoncer les crimes liés aux armes à feu et à décourager leur perpétration (m.i., par. 76). Il soutient néanmoins que cet écart est arbitraire en ce qu'il [TRADUCTION] « nuit à la souplesse du régime mixte et [. . .] n'est lié à aucun objectif législatif déterminable » (par. 77). Plus précisément, il « compromet cette souplesse en limitant le pouvoir discrétionnaire du ministère public et en faisant en sorte que plus d'infractions soient punissables par voie de mise en accusation » (par. 83).

[191] Soit dit en tout respect, cet argument ne me convainc pas. Je ne nie pas qu'un tel écart puisse, dans d'autres circonstances, soulever des préoccupations fondées sur l'art. 7. Ce n'est toutefois pas le cas en l'espèce. Comme le reconnaît M. Nur, l'objectif principal du législateur est de dénoncer les crimes liés aux armes à feu et de décourager leur perpétration. L'historique législatif de l'art. 95 et la jurisprudence relative à cette disposition indiquent clairement que la vaste majorité des actes visés par cette infraction sont dangereux en soi et justifient une peine d'emprisonnement importante. Toutefois, le législateur a également reconnu que, dans de rares cas, la disposition peut s'appliquer à une infraction de type réglementaire, de sorte qu'il a créé une soupape qui permet alors d'opter pour la procédure sommaire.

[192] Considéré sous cet angle, le régime de détermination de la peine n'a rien d'arbitraire. Au

scheme has a clear connection to Parliament's objectives. It reserves more lenient sentences for the least blameworthy offenders. At the same time, for the vast majority of offenders, it imposes strict mandatory minimum penalties which are consistent with the goals of denunciation and deterrence. Accordingly, the two-year gap in s. 95(2) does not offend s. 7 of the *Charter*.

B. *Mr. Charles*

[193] For his part, Mr. Charles makes two additional s. 7 arguments. He is subject to a five-year mandatory minimum under s. 95(2)(*a*)(ii) since his s. 95(1) conviction constitutes a "second or subsequent offence". Section 84(5) provides a list of offences that may trigger the application of this five-year mandatory minimum. A prior conviction for any of the listed offences makes a later s. 95(1) conviction a "second or subsequent offence". Section 84(6) specifies that, for the purposes of s. 84(5), "the only question to be considered is the sequence of convictions and no consideration shall be given to the sequence of commission of offences".

[194] Mr. Charles's first argument pertains to the list of offences in s. 84(5). He argues that the inclusion of "less serious" or "non-firearm offences" in this list renders the provision overbroad in violation of s. 7. In particular, he points to two listed offences which he considers to be examples of "less serious" and "non-firearm offences": committing an indictable offence using an imitation firearm contrary to s. 85(2), and breaching a prohibition order contrary to s. 117.01(1).

[195] I would not give effect to this submission. On this point, I am substantially in agreement with Cronk J.A.'s reasons at the Court of Appeal: *R. v. Charles*, 2013 ONCA 681, 117 O.R. (3d) 456. As she notes, Mr. Charles's assertion "minimizes the seriousness of the conduct prohibited by" ss. 85(2) and 117.01(1), and "ignores the purpose of the provisions and their role in Parliament's firearms control scheme" (para. 94). These offences are serious,

contraire, il a un lien manifeste avec les objectifs du législateur. Il réserve des peines plus clémentes aux délinquants les moins blâmables, tout en imposant à la vaste majorité des délinquants des peines minimales obligatoires strictes qui sont compatibles avec les objectifs de dénonciation et de dissuasion. En conséquence, l'écart de deux ans que comporte le par. 95(2) ne porte pas atteinte au droit garanti à l'art. 7 de la *Charte*.

B. *M. Charles*

[193] Pour sa part, M. Charles avance deux autres arguments liés à l'art. 7. Il encourt la peine minimale obligatoire de cinq ans d'emprisonnement prévue au sous-al. 95(2)*a*)(ii) du fait que sa déclaration de culpabilité fondée sur le par. 95(1) emporte « récidive ». Le paragraphe 84(5) énumère les infractions susceptibles d'entraîner l'application de la peine minimale obligatoire de cinq ans. La personne déclarée coupable de l'infraction prévue au par. 95(1) est en état de « récidive » lorsqu'elle a précédemment été déclarée coupable de l'une ou l'autre des infractions énumérées au par. 84(5). Le paragraphe 84(6) précise que, pour l'application du par. 84(5), « il est tenu compte de l'ordre des déclarations de culpabilité et non de l'ordre de perpétration des infractions ».

[194] Le premier argument de M. Charles a trait aux infractions énumérées au par. 84(5). Il soutient que certaines d'entre elles sont [TRADUCTION] « moins graves » ou « non liées aux armes à feu », ce qui confère à la disposition une portée excessive, contrairement à l'art. 7. Il en relève deux en particulier : usage d'une fausse arme à feu lors de la perpétration d'un acte criminel, contrairement au par. 85(2), et non-respect d'une ordonnance d'interdiction, contrairement au par. 117.01(1).

[195] Je ne puis lui donner raison. Sur ce point, je souscris pour l'essentiel aux motifs de la juge Cronk de la Cour d'appel (*R. c. Charles*, 2013 ONCA 681, 117 O.R. (3d) 456). Comme elle le fait remarquer, M. Charles [TRADUCTION] « minimise la gravité du comportement qu'interdisent » les par. 85(2) et 117.01(1) et « fait abstraction de l'objet de ces dispositions et de leur rôle dans le régime législatif de contrôle des armes à feu » (par. 94). Ces

even when they do not involve the use of a firearm. Their inclusion in s. 84(5) does not, in my view, result in overbreadth.

infractions sont graves, même si elles ne comportent pas l'utilisation d'une arme à feu. J'estime que leur inclusion au par. 84(5) ne confère pas une portée excessive à cette disposition.

[196] Second, Mr. Charles submits that the application of s. 84(6) may be unconstitutionally arbitrary in some situations. Under that provision, it is the order of convictions, and not the order in which offences are committed, that determines whether an offence counts as "second or subsequent". Thus, an offender who *first* commits a s. 95(1) offence and *later* commits a listed offence under s. 84(5) could still be subject to the five-year mandatory minimum if the conviction for the later offence happens to be entered first. In his view, this leads to an arbitrary result.

[196] Deuxièmement, M. Charles soutient que l'application du par. 84(6) peut parfois être arbitraire au point d'être inconstitutionnelle. Suivant cette disposition, c'est l'ordre des déclarations de culpabilité, et non l'ordre de perpétration des infractions, qui détermine si une infraction constitue ou non une « récidive ». Ainsi, le délinquant qui commet *d'abord* l'infraction prévue au par. 95(1), *puis* une infraction énumérée au par. 84(5), peut encourir la peine minimale obligatoire de cinq ans même si la déclaration de culpabilité relative à la seconde infraction intervient en premier. Le résultat est selon lui arbitraire.

[197] This argument is purely hypothetical. The two offences that trigger the five-year mandatory minimum in Mr. Charles's case were both committed and had convictions registered prior to his commission of the s. 95 offence. Assuming without deciding that s. 84(6) is unconstitutional, Mr. Charles's situation would remain the same. If s. 84(6) were struck down, this would revive the long-standing common law rule described in *R. v. Skolnick*, [1982] 2 S.C.R. 47:

> The general rule is that before a severer penalty can be imposed for a second or subsequent offence, the second or subsequent offence must have been committed after the first or second conviction, as the case may be . . . . [p. 58]

Applying this common law rule, Mr. Charles would still be subject to a five-year mandatory minimum. As such, I would respectfully decline to pronounce on the constitutionality of s. 84(6).

[197] L'argument est purement hypothétique. Dans le cas de M. Charles, les deux infractions qui emportent l'application de la peine minimale obligatoire de cinq ans d'emprisonnement ont été commises — et ont donné lieu à des déclarations de culpabilité — avant la perpétration de l'infraction prévue à l'art. 95. À supposer, sans en décider, que le par. 84(6) est inconstitutionnel, la situation de M. Charles reste la même. L'invalidation du par. 84(6) redonnerait vie à la règle de common law établie de longue date et définie dans l'arrêt *R. c. Skolnick*, [1982] 2 R.C.S. 47 :

> La règle générale veut que pour qu'on puisse imposer une sentence plus sévère pour une deuxième infraction ou une infraction subséquente, la deuxième infraction ou l'infraction subséquente doit avoir été commise après la première ou la deuxième condamnation, selon le cas . . . [p. 58]

Si l'on appliquait cette règle de common law, M. Charles demeurerait passible d'une peine minimale obligatoire de cinq ans d'emprisonnement. Je ne me prononce donc pas sur la constitutionnalité du par. 84(6).

[198] In sum, I would not accede to any of the s. 7 arguments. The sentencing scheme in s. 95(2) passes constitutional muster.

[198] En somme, je ne puis faire droit à aucun des arguments relatifs à l'art. 7. Le régime de détermination de la peine établi au par. 95(2) est bel et bien constitutionnel.

V. Conclusion

[199] Section 95 represents Parliament's considered response to the pressing problem of gun violence in our communities. Parliament chose to craft a wide-reaching offence to denounce and deter serious criminal activity with lengthy mandatory minimums. At the same time, it provided a safety valve to divert the least serious cases into summary proceedings carrying no minimum sentence. With respect, I see no reason to second-guess Parliament based on hypotheticals that do not accord with experience or common sense. Nor, on my proposed framework, is there any sound basis for disturbing the extensive deliberations of our elected representatives on this important issue. I would allow the appeals, and uphold the constitutional validity of s. 95(2).

Appeals dismissed, ROTHSTEIN, MOLDAVER *and* WAGNER JJ. *dissenting.*

Solicitor for the appellant Her Majesty The Queen: Attorney General of Ontario, Toronto.

Solicitor for the appellant the Attorney General of Canada: Attorney General of Canada, Toronto.

Solicitors for the respondent Hussein Jama Nur: Derstine Penman, Toronto.

Solicitors for the respondent Sidney Charles: Edward H. Royle & Associates, Toronto; Dawe & Dineen, Toronto.

Solicitor for the intervener the Attorney General of Quebec: Attorney General of Quebec, Québec.

Solicitor for the intervener the Attorney General of British Columbia: Attorney General of British Columbia, Victoria.

Solicitor for the intervener the Attorney General of Alberta: Attorney General of Alberta, Calgary.

V. Conclusion

[199] L'article 95 représente la solution que le législateur a apportée après mûre réflexion au problème urgent que constituent dans nos collectivités les crimes violents perpétrés avec des armes à feu. Afin de dénoncer des actes criminels graves et de décourager leur perpétration, le législateur a créé une infraction de large portée assortie de longues peines minimales obligatoires. Parallèlement, il a prévu une soupape qui permet d'aiguiller les cas les moins graves vers la procédure sommaire, laquelle n'expose à aucune peine minimale. Soit dit en tout respect, je ne vois aucune raison de remettre en question cette mesure législative sur le fondement d'hypothèses qui ne s'appuient ni sur l'expérience ni sur le bon sens. Rien ne justifie non plus, suivant le cadre d'analyse que je propose, de revenir sur les longues délibérations de nos élus sur cet enjeu important. Je suis d'avis d'accueillir les pourvois et de confirmer la constitutionnalité du par. 95(2).

Pourvois rejetés, les juges ROTHSTEIN, MOLDAVER *et* WAGNER *sont dissidents.*

Procureur de l'appelante Sa Majesté la Reine : Procureur général de l'Ontario, Toronto.

Procureur de l'appelant le procureur général du Canada : Procureur général du Canada, Toronto.

Procureurs de l'intimé Hussein Jama Nur : Derstine Penman, Toronto.

Procureurs de l'intimé Sidney Charles : Edward H. Royle & Associates, Toronto; Dawe & Dineen, Toronto.

Procureur de l'intervenant le procureur général du Québec : Procureur général du Québec, Québec.

Procureur de l'intervenant le procureur général de la Colombie-Britannique : Procureur général de la Colombie-Britannique, Victoria.

Procureur de l'intervenant le procureur général de l'Alberta : Procureur général de l'Alberta, Calgary.

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Procureurs de l'intervenante la Société John Howard du Canada : Barnes Sammon, Ottawa.

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Procureurs de l'intervenante l'Association canadienne des libertés civiles : Fasken Martineau DuMoulin, Toronto.

Solicitors for the intervener the British Columbia Civil Liberties Association: Ruby Shiller Chan Hasan, Toronto.

Procureurs de l'intervenante l'Association des libertés civiles de la Colombie-Britannique : Ruby Shiller Chan Hasan, Toronto.

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Solicitors for the intervener the Canadian Bar Association: Peck and Company, Vancouver.

Procureurs de l'intervenante l'Association du Barreau canadien : Peck and Company, Vancouver.

Solicitors for the intervener Canada's National Firearms Association: Edelson Clifford D'Angelo Friedman, Ottawa.

Procureurs de l'intervenante l'Association canadienne pour les armes à feu : Edelson Clifford D'Angelo Friedman, Ottawa.

Solicitors for the intervener the Canadian Association for Community Living: Ursel Phillips Fellows Hopkinson, Toronto.

Procureurs de l'intervenante l'Association canadienne pour l'intégration communautaire : Ursel Phillips Fellows Hopkinson, Toronto.

Solicitors for the intervener the African Canadian Legal Clinic: Faisal Mirza Professional Corporation, Toronto; African Canadian Legal Clinic, Toronto.

Procureurs de l'intervenante la Clinique juridique africaine canadienne : Faisal Mirza Professional Corporation, Toronto; Clinique juridique africaine canadienne, Toronto.

1986 CarswellOnt 95
Supreme Court of Canada

R. v. Oakes

Please see in particular para. 35, 72

1986 CarswellOnt 1001, 1986 CarswellOnt 95, [1986] 1 S.C.R. 103, [1986] S.C.J. No. 7, 14 O.A.C. 335, 16 W.C.B. 73, 19 C.R.R. 308, 24 C.C.C. (3d) 321, 26 D.L.R. (4th) 200, 50 C.R. (3d) 1, 53 O.R. (2d) 719 (note), 65 N.R. 87, J.E. 86-272, EYB 1986-67556

R. v. OAKES

Dickson C.J.C., Estey, McIntyre, Chouinard, Lamer, Wilson and Le Dain JJ.

Heard: March 12, 1985
Judgment: February 28, 1986
Docket: 17550

Counsel: *J. Isaac, Q.C., M.R. Dambrot* and *D.C. McGillis*, for the Crown.
G.A. Beasley, for respondent.

Subject: Criminal; Constitutional; Criminal; Human Rights
Headnote
Criminal law --- Illegal drugs — Offences — Possession for purpose of trafficking — Narcotic Control Act [repealed]
Reverse onus provisions — Under s. 8 of Act, if accused found to be in possession of narcotic, accused presumed to be in possession for purpose of trafficking unless accused able to establish otherwise — Right to be presumed innocent as guaranteed by s. 11(d) of Charter rendering reverse onus in s. 8 of Act inoperative.
Criminal law --- Charter of Rights and Freedoms — Principles of interpretation
Although there are important lessons to be learned from Bill of Rights jurisprudence, it does not constitute binding authority in relation to the constitutional interpretation of the Charter — The Charter, as a constitutional document, is fundamentally different from the statutory Bill of Rights, which was interpreted as simply recognizing and declaring existing rights.
Criminal law --- Charter of Rights and Freedoms — Demonstrably justified reasonable limit [Oakes test] [s. 1]
The onus of proving that a limit on a right or freedom guaranteed by the Charter is reasonable and demonstrably justified in a free and democratic society rests upon the party seeking to uphold the limitation. It is clear from the text of s. 1 that limits on the rights and freedoms enumerated in the Charter are exceptions to their general guarantee — The presumption is that the rights and freedoms are guaranteed unless the party invoking s. 1 can bring itself within the exceptional criteria which justify their being limited — The standard of proof under s. 1 is the civil standard,

namely, proof by a preponderance of probability — The alternative criminal standard, proof beyond a reasonable doubt, would be unduly onerous on the party seeking to limit — To establish that a limit is reasonable and demonstrably justified, two central criteria must be satisfied. First, the objective, which the measures responsible for a limit on a Charter right or freedom are designed to serve, must be of sufficient importance to warrant overriding a constitutionally protected right or freedom — Second, once a sufficiently significant objective is recognized, the party invoking s. 1 must show that the means chosen are reasonable and demonstrably justified — The means must be rationally connected to the objective in question and should impair as little as possible the right or freedom in question — Furthermore, there must be proportion between the effects of the measures which are responsible for limiting the Charter right or freedom and the objective Constitution Act, 1982, s 1.

Criminal law --- Charter of Rights and Freedoms — Presumption of innocence [s. 11(d)] — Presumptions

Accused charged with possession of narcotic for purpose of trafficking — Under s. 8 of Narcotic Control Act, if accused found to be in possession of narcotic, accused presumed to be in possession for purpose of trafficking unless accused able to establish otherwise — Accused bringing motion to challenge constitutional validity of s. 8 of Act on basis of presumption of innocence in s. 11(d) of Canadian Charter of Rights and Freedoms — Trial Judge holding that s. 8 of Act invalid — Court of Appeal dismissing Crown's appeal — Crown's appeal to Supreme Court of Canada dismissed — Reverse onus provision in s. 8 of Act offending right to be presumed innocent — Section 8 of Act not reasonable limit on that right pursuant to s. 1 of Charter — Reverse onus in s. 8 of Act not rationally related to objective of curbing drug trafficking — Possession of very small quantity of narcotics not supporting inference of trafficking — Section 8 of Act containing overinclusive presumption Constitution Act, 1982, s 11(d).

Constitutional law --- Charter of Rights and Freedoms — General principles of interpretation

Although there are important lessons to be learned from Bill of Rights jurisprudence, it does not constitute binding authority in relation to the constitutional interpretation of the Charter — The Charter, as a constitutional document, is fundamentally different from the statutory Bill of Rights, which was interpreted as simply recognizing and declaring existing rights.

The accused was charged with unlawful possession of a narcotic for the purposes of trafficking, contrary to s. 4(2) of the Narcotic Control Act. After the trial judge had found that there had been proof beyond a reasonable doubt of possession, the accused brought a motion to challenge the constitutional validity of s. 8, which provides that, if the court finds the accused in possession of a narcotic, the accused is presumed to be in possession for the purpose of trafficking unless he establishes that he had no intent to traffic. The trial judge ruled that s. 8 was inoperative because it violated the presumption of innocence in s. 11(*d*) of the Canadian Charter of Rights and Freedoms, and convicted the accused only of unlawful possession. This was confirmed on a Crown appeal by the Ontario Court of Appeal, which held that the reason for the unconstitutionality was the lack of a rational connection between the proved fact (possession) and the presumed fact (an intention to traffic). The Crown appealed.

Held:

Appeal dismissed.

Per Dickson C.J.C. (Chouinard, Lamer, Wilson and Le Dain JJ. concurring)

The presumption of innocence lies at the very heart of the criminal law and is protected expressly by s. 11(*d*), but is also integral to the general protection of life, liberty and security of the person in s. 7. The presumption of innocence has enjoyed long-standing recognition at common law and in major international human rights documents. The right to be presumed innocent until proven guilty requires, at a minimum, that an individual be proven guilty beyond a reasonable doubt, that the state bear the burden of proof and that criminal prosecutions be carried out in accordance with lawful procedures and fairness. A provision which requires an accused to disprove on a balance of probabilities the existence of a presumed fact which is an important element of the offence violates the presumption of innocence in s. 11(*d*). Here, s. 8 infringed s. 11(*d*) in requiring the accused to prove no purpose of trafficking once the basic fact of possession is proven.

The rational connection test of whether there is a rational connection between the basic fact and the presumed fact is not appropriate in considering whether s. 11(*d*) has been violated. A basic fact may rationally tend to prove a presumed fact, but not prove its existence beyond a reasonable doubt. An accused could thereby be convicted despite the presence of a reasonable doubt. This would violate the presumption of innocence. The appropriate stage for invoking the rational connection test was under s. 1. It was vital to keep s. 1 and s. 11(*d*) analytically distinct.

Section 1 has two functions: it guarantees the rights and freedoms set out in the provisions which follow it; and it states explicitly the exclusive justificatory criteria (outside of s. 33) against which limitations on those rights and freedoms may be measured. The onus of proving that a limitation on any Charter right is reasonable and demonstrably justified in a free and democratic society rests upon the party seeking to uphold the limitation. The standard of proof is a preponderance of probabilities.

Two central criteria must be satisfied to establish that a limit is reasonable and demonstrably justified in a free and democratic society. First, the objective to be served by the measures limiting a Charter right must be sufficiently important to warrant overriding a constitutionally-protected right or freedom. The standard must be high to ensure that trivial objectives or those discordant with the principles of a free and democratic society do not gain protection. At a minimum, an objective must relate to societal concerns which are pressing and substantial in a free and democratic society before it can be characterized as sufficiently important. Second, the party invoking s. 1 must show the means to be reasonable and demonstrably justified. This involves a form of proportion ality test involving three important components. To begin with, the measures must be fair and not arbitrary, carefully designed to achieve the objective in question, and rationally connected to that objective. In addition, the means should impair the right in question as little as possible. Lastly, there must be a proportionality between the effects of the limiting measure and the objective — the more severe the deleterious effects of a measure, the more important the objective must be.

Parliament's concern with decreasing drug trafficking was substantial and pressing. Its objective of protecting society from the grave ills of drug trafficking was self-evident, for the purposes of s. 1, and could potentially in certain cases warrant the overriding of a constitutionally-protected right. There was, however, no rational connection between the basic fact of possession and the presumed fact of possession for the purpose of trafficking. The possession of a small or negligible quantity of narcotics would not support the inference of trafficking.

Per Estey J. (McIntyre J. concurring)

The reasons of Dickson C.J.C. were adopted with respect to the relationship between s. 11(*d*) and s. 1 of the Charter, but the reasons of Martin J.A. in the court below for the disposition of all other issues.

Table of Authorities

Cases considered:

Bater v. Bater, [1951] P. 35, [1950] 2 All E.R. 458 (C.A.) — *considered*

Boyle and R., Re (1983), 41 O.R. (2d) 713, 35 C.R. (3d) 34, 5 C.C.C. (3d) 193, 148 D.L.R. (3d) 449 (C.A.) — *referred to*

Co. Ct. of Ulster v. Allen, 442 U.S. 140, 60 L. Ed. 2d 777, 99 S. Ct. 2213 (1979) — *considered*

Dubois v. R., [1985] 2 S.C.R. 350, 48 C.R. (3d) 193, [1986] 1 W.W.R. 193, 41 Alta. L.R. (2d) 97, 22 C.C.C. (3d) 513, 66 A.R. 202, 62 N.R. 50 — *applied*

Hanes v. Wawanesa Mut. Ins. Co., [1963] S.C.R. 154, [1963] 1 C.C.C. 321, 36 D.L.R. (2d) 718 [Ont.] — *considered*

Hunter v. Southam Inc., [1984] 2 S.C.R. 145, (sub nom. *Dir. of Investigation & Research, Combines Investigation Branch v. Southam Inc.)* 41 C.R. (3d) 97, [1984] 6 W.W.R. 577, 33 Alta. L.R. (2d) 193, 27 B.L.R. 297, 84 D.T.C. 6467, 14 C.C.C. (3d) 97, 11 D.L.R. (4th) 641, 2 C.P.R. (3d) 1, 9 C.R.R. 355, 55 A.R. 291, 55 N.R. 241 — *referred to*

L.S.U.C. v. Skapinker, [1984] 1 S.C.R. 357, 11 C.C.C. (3d) 481, 9 D.L.R. (4th) 161, 8 C.R.R. 193, 3 O.A.C. 321, 53 N.R. 169 — *referred to*

Leary v. U.S., 395 U.S. 6, 23 L. Ed. 2d 57, 89 S. Ct. 1532 (1969) — *considered*

Manchuk v. R., [1938] S.C.R. 341, 70 C.C.C. 161, [1938] 3 D.L.R. 693 [Ont.] — *referred to*

Ong Ah Chuan v. Pub. Prosecutor; Koh Chai Cheng v. Pub. Prosecutor, [1981] A.C. 648 (P.C.) — *considered*

Pfunders Case (Austria v. Italy) (1963), 6 Yearbook of E.C.H.R. 740 — *considered*

Pub. Prosecutor v. Yuvaraj, [1970] A.C. 913, [1970] 2 W.L.R. 226 (P.C.) — *considered*

Ref. re S. 94(2) of Motor Vehicle Act, [1985] 2 S.C.R. 486, 48 C.R. (3d) 289, (sub nom. *Ref. re Constitutional Question Act)* [1986] 1 W.W.R. 481, 69 B.C.L.R. 145, 36 M.V.R. 240, 63 N.R. 266*referred to*

R. v. Anson, 35 C.R. (3d) 179, [1983] 3 W.W.R. 366, 42 B.C.L.R. 282, 4 C.C.C. (3d) 119, 146 D.L.R. (3d) 661, (sub nom. *Anson v. A.G. Can.)* 4 C.R.R. 332 (C.A.) — *distinguished*

R. v. Appleby, [1972] S.C.R. 303, 16 C.R.N.S. 35, [1971] 4 W.W.R. 601, 3 C.C.C. (2d) 354, 21 D.L.R. (3d) 325 [B.C.] — *not followed*

R. v. Babcock, [1967] 2 C.C.C. 235 (B.C.C.A.) — *applied*

R. v. Big M Drug Mart Ltd., [1985] 1 S.C.R. 295, [1985] 3 W.W.R. 481, 37 Alta. L.R. (2d) 97, 85 C.L.L.C. 14,023, 18 C.C.C. (3d) 385, 18 D.L.R. (4th) 321, 13 C.R.R. 64, 60 A.R. 161, 58 N.R. 81 — *applied*

R. v. Carroll (1983), 32 C.R. (3d) 235, 4 C.C.C. (3d) 131, 147 D.L.R. (3d) 92, 40 Nfld. & P.E.I.R. 147, 115 A.P.R. 147 (P.E.I. C.A.) — *followed*

R. v. Cook (1983), 4 C.C.C. (3d) 419, 147 D.L.R. (3d) 687, 56 N.S.R. (2d) 449, 117 A.P.R. 449 (C.A.) — *followed*

R. v. Erdman (1971), 24 C.R.N.S. 216 (B.C.C.A.) — *referred to*

R. v. Fraser (1982), 68 C.C.C. (2d) 433, 138 D.L.R. (3d) 488, 21 Sask. R. 227 (Q.B.) — *referred to*

R. v. Holmes (1983), 41 O.R. (2d) 250, 32 C.R. (3d) 322, 4 C.C.C. (3d) 440, 145 D.L.R. (3d) 689, 4 C.R.R. 222 (C.A.) — *referred to*

R. v. Kowalczuk, [1983] 3 W.W.R. 694, 5 C.C.C. (3d) 25, 147 D.L.R. (3d) 735, 20 Man. R. (2d) 379 (C.A.) — *referred to*

R. v. Kupczyniski, Ont. Co. Ct., 23rd June 1982 (unreported) — *not followed*

R. v. Landry, [1983] Que. C.A. 408, 7 C.C.C. (3d) 555, 2 D.L.R. (4th) 518 — *followed*

R. v. Lee's Poultry Ltd. (1985), 43 C.R. (3d) 289, 17 C.C.C. (3d) 539, 12 C.R.R. 125, 7 O.A.C. 100 (C.A.) — *referred to*

R. v. O'Day (1983), 5 C.C.C. (3d) 227, 148 D.L.R. (3d) 371, 46 N.B.R. (2d) 77, 121 A.P.R. 77 (C.A.) — *followed*

R. v. Sault Ste. Marie, [1978] 2 S.C.R. 1299, 3 C.R. (3d) 30, 7 C.E.L.R. 53, 40 C.C.C. (2d) 353, 85 D.L.R. (3d) 161, 21 N.R. 295 [Ont.] — *referred to*

R. v. Schwartz (1983), 10 C.C.C. (4th) 34, 5 D.L.R. (4th) 524, 25 Man. R. (2d) 295 (C.A.) [leave to appeal to S.C.C. granted 5 D.L.R. (4th) 524n, 26 Man. R. (2d) 159] — *referred to*

R. v. Sharpe, [1961] O.W.N. 261, 35 C.R. 375, 131 C.C.C. 75 (C.A.) — *not followed*

R. v. Shelley, [1981] 2 S.C.R. 196, 21 C.R. (3d) 354, 26 C.R. (3d) 150, [1981] 5 W.W.R. 481, 3 C.E.R. 217, 59 C.C.C. (2d) 292, 123 D.L.R. (3d) 748, 9 Sask. R. 338, 37 N.R. 320 — *considered*

R. v. Silk, 9 C.R.N.S. 277, 71 W.W.R. 481, [1970] 3 C.C.C. (2d) 1 (B.C.C.A.) — *not followed*

R. v. Stanger, [1983] 5 W.W.R. 331, 26 Alta. L.R. (2d) 193, 7 C.C.C. (3d) 337, 2 D.L.R. (4th) 121, (sub nom. *R. v. Bramwell; R. v. Kerr; R. v. Leskosek)* 46 A.R. 241 (C.A.) — *followed*

R. v. Stock (1983), 10 C.C.C. (3d) 319 (B.C.C.A.) — *referred to*

R. v. T. (S.D.) (1985), 43 C.R. (3d) 307, 33 M.V.R. 148, 18 C.C.C. (3d) 125, 16 D.L.R. (4th) 753, 68 N.S.R. (2d) 311, 152 A.P.R. 311 (C.A.) — *referred to*

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R. v. Therrien (1982), 67 C.C.C. (2d) 31 (Ont. Co. Ct.) — *not followed*

R. v. Whyte (1983), 38 C.R. (3d) 24, 25 M.V.R. 22, 10 C.C.C. (3d) 277, 6 D.L.R. (4th) 263, leave to appeal to S.C.C. granted 43 C.R. (3d) xxvii, 10 C.C.C. (3d) 277n, 6 D.L.R. (4th) 263n [B.C.] — *referred to*
Smith v. Smith, [1952] 2 S.C.R. 312, [1952] 3 D.L.R. 449 [B.C.] — *considered*
Singh v. Min. of Employment & Immigration; Thandi v. Min. of Employment & Immigration; Mann 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 [Fed.] — *referred to*
Tot v. U.S.; U.S. v. Delia, 319 U.S. 463, 87 L. Ed. 1519, 63 S. Ct. 1241 (1943) — *considered*
Winship, Re, 397 U.S. 358, 25 L. Ed. 2d 368, 90 S. Ct. 1068 (1970) — *considered*
Woolmington v. D.P.P., [1935] A.C. 462, 25 Cr. App. R. 72 (H.L.) — *considered*
X v. U.K., Application 5124/71, Collection of Decisions of E.C.H.R. 135 — *considered*

Statutes considered:

Canadian Bill of Rights, R.S.C. 1970, App. III, s. 2(*f*).

Canadian Charter of Rights and Freedoms, ss. 1, 7, 11(*d*), 33.

Criminal Code, 1953-54 (Can.), c. 51 [now R.S.C. 1970, c. C-34], s. 224A(1)(*a*) [en. 1968-69, c. 38, s. 16; now s. 237(1)(*a*)].

Criminal Code, R.S.C. 1970, c. C-34, s. 237(1)(*a*).

Food and Drugs Act, 1952-53 (Can.), c. 38 [now R.S.C. 1970, c. F-27], s. 33 [en. 1960-61, c. 37, s. 1; am. 1968-69, c. 41, s. 8; now s. 35].

Food and Drugs Act, R.S.C. 1970, c. F-27, s. 35.

Misuse of Drugs Act, 1971 (Eng.), c. 38.

Misuse of Drugs Act, 1975 (New Zealand), no. 116.

Narcotic Control Act, R.S.C. 1970, c. N-1, ss. 3, 4, 8.

Opium and Narcotic Drug Act, R.S.C. 1952, c. 201 [Act repealed 1960-61, c. 35, s. 20].

United States Constitution, Fifth and Fourteenth Amendments.

Words and phrases considered:

FREE AND DEMOCRATIC SOCIETY

. . . Canadian society is to be free and democratic. The Court must be

guided by the values and principles essential to a free and democratic society [*Charter*,

s. 1] which I believe embody, to name but a few, respect for the inherent dignity of the human person, commitment to social justice and equality, accommodation of a wide variety of beliefs, respect for cultural and group identity, and faith in social and political institutions which enhance the participation of individuals and groups in society. The underlying values and principles of a free and democratic society are the genesis of the rights and freedoms guaranteed by the *Charter* and the ultimate standard against which a limit on a right or freedom must be shown, despite its effect, to be reasonable and demonstrably justified.

MANDATORY PRESUMPTION

A mandatory presumption requires that the inference be made.

PERMISSIVE PRESUMPTION

A permissive presumption leave it optional as to whether the inference of the presumed fact is drawn following proof of the basic fact.

PRESUMPTION OF INNOCENCE

On the meaning of s. 11(d) of the [Charter], Stevenson J.A., writing for the majority [in R. v. Stanger (1983), 6 C.R.R. 257 (Alta. C.A.)], paraphrased Martin J.A.'s comment in R. v. Oakes (1983), [3 C.R.R. 289 (Ont. C.A.)] and stated at p. 266 C.R.R. . . . that the presumption of innocence meant "first, that an accused is innocent until proven guilty in accordance with established procedure, and secondly, that guilt must be proven beyond a reasonable doubt." Mr Justice Stevenson also cited Macdonald J.'s comment in [R. v. Carrol (1983), 10 C.R.R. 202 at 208 (P.E.I. C.A.)] that the presumption of innocence is maintained "as long as the prosecution has the final burden of establishing guilt, on any element of the offence charged, beyond a reasonable doubt" . . .

PRESUMPTION WITHOUT BASIC FACTS

Presumptions can be classified into two general categories: presumptions without basic facts and presumptions with basic facts. A presumption without a basic fact is simply a conclusion that is to be drawn until the contrary is proved. A presumption with a basic fact entails a conclusion to be drawn upon proof of the basic fact (see Cross On Evidence, 5th ed., at pp. 122-23).

PRESUMPTIONS OF LAW

. . . presumptions are often referred to as either presumptions of law or presumptions of fact. The latter entail "frequently recurring examples of circumstantial evidence" (Cross on Evidence, at p. 124) while the former involve actual legal rules.

TO ESTABLISH

As Ritchie J. found in [*R. v. Appleby*, [1972] S.C.R. 303] (though addressing a different statutory provision), the phrase "to establish" [in s. 8 of the *Narcotic Control Act*, R.S.C. 1970, c. N-1] is the equivalent of "to prove". The Legislature, by using the word "establish" in s. 8 of the *Narcotic Control Act*, intended to impose a legal burden on the accused.

Appeal by Crown from judgment of Ontario Court of Appeal, 40 O.R. (2d) 660, 32 C.R. (3d) 193, 2 C.C.C. (3d) 339, 145 D.L.R. (3d) 123, affirming accused's acquittal in Provincial Court, 38 O.R. (2d) 598, of possession of narcotic for purpose of trafficking.

International conventions considered:

European Convention for the Protection of Human Rights and Fundamental Freedoms (1950), art. 6(2).

International Covenant on Civil and Political Rights (1966), art. 14(2).

Protocol for Limiting and Regulating the Cultivation of the Poppy Plant, the Production of, International and Wholesale Trade in, and Use of Opium (1953).

Single Convention on Narcotic Drugs (1961), preamble.

Universal Declaration of Human Rights (1948), art. 11(1).

***Dickson C.J.C. (Chouinard, Lamer, Wilson* and *Le Dain JJ.* concurring):**

1 This appeal [from 40 O.R. (2d) 660, 32 C.R. (3d) 193, 2 C.C.C. (3d) 339, 145 D.L.R. (3d) 123, affirming 38 O.R. (2d) 598] concerns the constitutionality of s. 8 of the Narcotic Control Act, R.S.C. 1970, c. N-1. The section provides, in brief, that if the court finds the accused in possession of a narcotic he is presumed to be in possession for the purpose of trafficking. Unless the accused can establish the contrary, he must be convicted of trafficking. The Ontario Court of Appeal held that this provision constitutes a "reverse onus" clause and is unconstitutional because it violates one

of the core values of our criminal justice system, the presumption of innocence, now entrenched in s. 11(*d*) of the Canadian Charter of Rights and Freedoms. The Crown has appealed.

I. Statutory and Constitutional Provisions

2 Before reviewing the factual context, I will set out the relevant legislative and constitutional provisions:

Narcotic Control Act

3

> 3. (1) Except as authorized by this Act or the regulations, *no person shall have a narcotic in his possession*.
>
> (2) *Every person who violates subsection (1) is guilty of an indictable offence and is liable*
>
> (*a*) upon summary conviction for a first offence, to a fine of one thousand dollars or to imprisonment for six months or to both fine and imprisonment, and for a subsequent offence, to a fine of two thousand dollars or to imprisonment for one year or to both fine and imprisonment; or
>
> (*b*) *upon conviction on indictment, to imprisonment for seven years*.
>
> 4. (1) No person shall traffic in a narcotic or any substance represented or held out by him to be a narcotic.
>
> (2) *No person shall have in his possession a narcotic for the purpose of trafficking*.
>
> (3) *Every person who violates subsection (1) or (2) is guilty of an indictable offence and is liable to imprisonment for life* ...
>
> 8. *In any prosecution for a violation of subsection 4(2)*, if the accused does not plead guilty, *the trial shall proceed as if it were a prosecution for an offence under section 3*, and after the close of the case for the prosecution and after the accused has had an opportunity to make full answer and defence, *the court shall make a finding as to whether or not the accused was in possession of the narcotic contrary to section 3*; if the court finds that the accused was not in possession of the narcotic contrary to section 3, he shall be acquitted but *if the court finds that the accused was in possession of the narcotic contrary to section 3, he shall be given an opportunity of establishing that he was not in possession of the narcotic for the purpose of trafficking*, and thereafter the prosecutor shall be given an opportunity of adducing evidence to establish that the accused was in possession of the narcotic for the purpose of trafficking; *if the accused establishes that he was not in possession of the narcotic for the purpose of trafficking, he shall be acquitted of the offence* as charged but he shall be convicted of an

offence under section 3 and sentenced accordingly; and *if the accused fails to establish that he was not in possession of the narcotic for the purpose of trafficking, he shall be convicted of the offence as charged and sentenced accordingly*. [The italics are mine.]

Canadian Charter of Rights and Freedoms

4

11. Any person charged with an offence has the right ...

(*d*) to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal ...

1. The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

II. Facts

5 The respondent, David Edwin Oakes, was charged with unlawful possession of a narcotic for the purpose of trafficking, contrary to s. 4(2) of the Narcotic Control Act. He elected trial by magistrate without a jury. At trial, the Crown adduced evidence to establish that Mr. Oakes was found in possession of eight 1-gram vials of cannabis resin in the form of hashish oil. Upon a further search conducted at the police station, $619.45 was located. Mr. Oakes told the police that he had bought ten vials of hashish oil for $150 for his own use, and that the $619.45 was from a workers' compensation cheque. He elected not to call evidence as to possession of the narcotic. Pursuant to the procedural provisions of s. 8 of the Narcotic Control Act, the trial judge proceeded to make a finding that it was beyond a reasonable doubt that Mr. Oakes was in possession of the narcotic.

6 Following this finding, Mr. Oakes brought a motion to challenge the constitutional validity of s. 8 of the Narcotic Control Act, which he maintained imposes a burden on an accused to prove that he or she was not in possession for the purpose of trafficking. He argued that s. 8 violates the presumption of innocence contained in s. 11(*d*) of the Charter.

III. Judgments

(a) Ontario Provincial Court

7 At trial, Walker Prov. J. borrowed the words of Laskin C.J.C. in *R. v. Shelley*, [1981] 2 S.C.R. 196 at 202, 21 C.R. (3d) 354, 26 C.R. (3d) 150, [1981] 5 W.W.R. 481, 3 C.E.R. 217, 59 C.C.C. (2d) 292, 123 D.L.R. (3d) 748, 9 Sask. R. 338, 37 N.R. 320, and found that there was no rational or necessary connection between the fact proved, i.e., possession of the drug, and the

conclusion asked to be drawn, namely, possession for the purpose of trafficking. Walker Prov. J. held that, to the extent that s. 8 of the Narcotic Control Act requires this presumption and the resultant conviction, it is inoperative as a violation of the presumption of innocence contained in s. 11(*d*) of the Charter.

8 Walker Prov. J. added that the reverse onus in s. 8 would not be invalid if the Crown had adduced evidence of possession as well as evidence from which it could be inferred beyond a reasonable doubt that the possession was for the purpose of trafficking. If this were done, there would be a sufficient rational connection between the fact of possession and the presumed fact of trafficking.

(b) Ontario Court of Appeal

9 Martin J.A., writing for a unanimous court, dismissed the appeal and held the reverse onus provision in s. 8 of the Narcotic Control Act unconstitutional.

10 Martin J.A. stated that, as a general rule, a reverse onus clause which places a burden on the accused to disprove on a balance of probabilities an essential element of an offence contravenes the right to be presumed innocent. Nevertheless, he held that some reverse onus provisions may be constitutionally valid provided they constitute reasonable limitations on the right to be presumed innocent and are demonstrably justified in a free and democratic society.

11 To determine whether a particular reverse onus provision is legitimate, Martin J.A. outlined a two-pronged inquiry. First, it is necessary to pass a threshold test, which he explained as follows, at p. 146:

> The threshold question in determining the legitimacy of a particular reverse onus provision is whether the reverse onus clause is justifiable in the sense that it is reasonable for Parliament to place the burden of proof on the accused in relation to an ingredient of the offence in question. In determining the threshold question consideration should be given to a number of factors, including such factors as: (a) the magnitude of the evil sought to be suppressed, which may be measured by the gravity of the harm resulting from the offence or by the frequency of the occurrence of the offence or by both criteria; (b) the difficulty of the prosecution making proof of the presumed fact, and (c) the relative ease with which the accused may prove or disprove the presumed fact. Manifestly, a reverse onus provision placing the burden of proof on the accused with respect to a fact which it is not rationally open to him to prove or disprove cannot be justified.

12 If the reverse onus provision meets these criteria, due regard having been given to Parliament's assessment of the need for the provision, a second test must then be satisfied. This second test was described by Martin J.A. as the "rational connection test". According to it, to be reasonable, the

proven fact (e.g., possession) must rationally tend to prove the presumed fact (e.g., an intention to traffic). In other words, the proven fact must raise a probability that the presumed fact exists.

13 In considering s. 8 of the Narcotic Control Act, Martin J.A. focussed primarily on the second test at p. 147:

> I have reached the conclusion that s. 8 of the *Narcotic Control Act* is constitutionally invalid because of the lack of a rational connection between the proved fact (possession) and the presumed fact (an intention to traffic) ... Mere possession of a small quantity of a narcotic drug does not support an inference of possession for the purpose of trafficking or even tend to prove an intent to traffic. Moreover, upon proof of possession, s. 8 casts upon the accused the burden of disproving not some formal element of the offence but the burden of disproving the very essence of the offence.

14 Martin J.A. added that it is not for courts to attempt to rewrite s. 8 by applying it on a case-by-case basis. Furthermore, where a rational connection does exist between possession and the presumed intention to traffic, such as [pp. 147-48]:

> Where the possession of a narcotic drug is of such a nature as to be indicative of trafficking, the common sense of a jury can ordinarily be relied upon to arrive at a proper conclusion.

There would not, therefore, be any need for a statutory presumption.

15 One final note should be made regarding Martin J.A.'s judgment. In assessing whether or not s. 8 was a reasonable limitation on the constitutional protection of the presumption of innocence, Martin J.A. combined the analysis of s. 11(*d*) with s. 1. He held that the requirements of s. 1, that a limitation be reasonable and demonstrably justified in a free and democratic society, provided the standard for interpreting the phrase "according to law" in s. 11(*d*).

IV. The Issues

16 The constitutional question in this appeal is stated as follows:

> Is s. 8 of the *Narcotic Control Act* inconsistent with s. 11(d) of the *Canadian Charter of Rights and Freedoms* and thus of no force and effect?

Two specific questions are raised by this general question: (1) Does s. 8 of the Narcotic Control Act violate s. 11(*d*) of the Charter?; and (2) If it does, is s. 8 a reasonable limit prescribed by law as can be demonstrably justified in a free and democratic society for the purpose of s. 1 of the Charter? If the answer to Q. 1 is affirmative and the answer to Q. 2 negative, then the constitutional question must be answered in the affirmative.

V. Does S. 8 of the Narcotic Control Act Violate S. 11(d) of the Charter?

17

(a) The Meaning of S. 8

18 Before examining the presumption of innocence contained in s. 11(*d*) of the Charter, it is necessary to clarify the meaning of s. 8 of the Narcotic Control Act. The procedural steps contemplated by s. 8 were clearly outlined by Branca J.A. in *R. v. Babcock*[1967] 2 C.C.C. 235 at 247B(.C.C.A.):

> (A) The accused is charged with possession of a forbidden drug for the purpose of trafficking.
>
> (B) The trial of the accused on this charge then proceeds as if it was a prosecution against the accused on a simple charge of possession of the forbidden drug ...
>
> (C) When the Crown has adduced its evidence on the basis that the charge was a prosecution for simple possession, the accused is then given the statutory right or opportunity of making a full answer and defence to the charge of simple possession ...
>
> (D) When this has been done the Court must make a finding as to whether the accused was in possession of narcotics contrary to s. 3 of the new Act. (Unlawful possession of a forbidden narcotic drug).
>
> (E) Assuming that the Court so finds, it is then that an onus is placed upon the accused in the sense that an opportunity must be given to the accused of establishing that he was not in possession of a narcotic for the purpose of trafficking.
>
> (F) When the accused has been given this opportunity the prosecutor may then establish that the possession of the accused was for the purpose of trafficking ...
>
> (G) It is then that the Court must find whether or not the accused has discharged the onus placed upon him under and by the said section.
>
> (H) If the Court so finds, the accused must be acquitted of the offence as charged, namely, possession for the purpose of trafficking, but in that event the accused must be convicted of the simple charge of unlawful possession of a forbidden narcotic.
>
> (I) If the accused does not so establish he must then be convicted of the full offence as charged.

Branca J.A. then added at pp. 247-48:

> It is quite clear to me that under s. 8 of the new Act the trial must be divided into two phases. In the first phase the sole issue to be determined is whether or not the accused is guilty of

> simple possession of a narcotic. This issue is to be determined upon evidence relevant only to the issue of possession. In the second phase the question to be resolved is whether or not the possession charged is for the purpose of trafficking.

19 Against the backdrop of these procedural steps, we must consider the nature of the statutory presumption contained in s. 8 and the type of burden it places on an accused. The relevant portions of s. 8 read:

> 8. ... if the court finds that the accused was in possession of the narcotic ... he shall be given an opportunity of establishing that he was not in possession of the narcotic for the purpose of trafficking, ... if the accused fails to establish that he was not in possession of the narcotic for the purpose of trafficking, he shall be convicted of the offence as charged ...

20 In determining the meaning of these words, it is helpful to consider in a general sense the nature of presumptions. Presumptions can be classified into two general categories: presumptions *without* basic facts and presumptions *with* basic facts. A presumption without a basic fact is simply a conclusion which is to be drawn until the contrary is proved. A presumption with a basic fact entails a conclusion to be drawn upon proof of the basic fact: see Cross on Evidence, 5th ed. (1979), at pp. 122-23.

21 Basic fact presumptions can be further categorized into permissive and mandatory presumptions. A permissive presumption leaves it optional as to whether the inference of the presumed fact is drawn following proof of the basic fact. A mandatory presumption requires that the inference be made.

22 Presumptions may also be either rebuttable or irrebuttable. If a presumption is rebuttable, there are three potential ways the presumed fact can be rebutted. First, the accused may be required merely to raise a reasonable doubt as to its existence. Secondly, the accused may have an evidentiary burden to adduce sufficient evidence to bring into question the truth of the presumed fact. Thirdly, the accused may have a legal or persuasive burden to prove on a balance of probabilities the non-existence of the presumed fact.

23 Finally, presumptions are often referred to as either presumptions of law or presumptions of fact. The latter entail "frequently recurring examples of circumstantial evidence" (Cross on Evidence at p. 124), while the former involve actual legal rules.

24 To return to s. 8 of the Narcotic Control Act, it is my view that, upon a finding beyond a reasonable doubt of possession of a narcotic, the accused has the legal burden of proving on a balance of probabilities that he or she was not in possession of the narcotic for the purpose of trafficking. Once the basic fact of possession is proven, a mandatory presumption of law arises against the accused that he or she had the intention to traffic. Moreover, the accused will be found guilty of the offence of trafficking unless he or she can rebut this presumption on a balance of

probabilities. This interpretation of s. 8 is supported by the courts in a number of jurisdictions: *R. v. Carroll* (1983), 32 C.R. (3d) 235, 4 C.C.C. (3d) 131, 147 D.L.R. (3d) 92, 40 Nfld. & P.E.I.R. 147, 115 A.P.R. 147(P.E.I. C.A.); *R. v. Cook* (1983), 4 C.C.C. (3d) 419, 147 D.L.R. (3d) 687, 56 N.S.R. (2d) 449, 117 A.P.R. 449 (C.A.); *R. v. O'Day* (1983), 5 C.C.C. (3d) 227, 148 D.L.R. (3d) 371, 46 N.B.R. (2d) 77, 121 A.P.R. 77 (C.A.) ; *R. v. Landry*, [1983] Que. C.A. 408, 7 C.C.C. (3d) 555, 2 D.L.R. (4th) 518; *R. v. Stanger*, [1983] 5 W.W.R. 331, 26 Alta. L.R. (2d) 193, 7 C.C.C. (3d) 337, 2 D.L.R. (4th) 121, *(*sub nom. *R. v. Bramwell; R. v. Kerr; R. v. Leskosek)* 46 A.R. 241 (C.A.).

25 In some decisions it has been held that s. 8 of the Narcotic Control Act is constitutional because it places only an evidentiary burden rather than a legal burden on the accused. The ultimate legal burden to prove guilt beyond a reasonable doubt remains with the Crown and the presumption of innocence is not offended: *R. v. Therrien* (1982), 67 C.C.C., (2d) 31 (Ont. Co. Ct.); *R. v. Fraser* (1982), 68 C.C.C. (2d) 433, 138 D.L.R. (3d) 488, 21 Sask. R. 227 (Q.B.); *R. v. Kupczyniski* [1982 CarswellOnt 4078, 8 W.C.B. 157], Ont. Co. Ct., 23rd June 1982 (unreported).

26 This same approach was relied on in *R. v. Sharpe*, [1961] O.W.N. 261, 35 C.R. 375, 131 C.C.C. 75 (C.A.), a Canadian Bill of Rights decision on the presumption of innocence. In that case, a provision in the Opium and Narcotic Drug Act, R.S.C. 1952, c. 201, similar to s. 8 of the Narcotic Control Act, was interpreted as shifting merely the secondary burden of adducing evidence onto the accused. The primary onus remained with the Crown. In *R. v. Silk*, 9 C.R.N.S., 277, 71 W.W.R. 481, [1970] 3 C.C.C. (2d) 1, the British Columbia Court of Appeal held that s. 2(*f*) of the Canadian Bill of Rights had not been infringed because s. 33 [of the Food and Drugs Act, 1952-53 (Can.), c. 38] (now s. 35 of the Food and Drugs Act, R.S.C. 1970, c. F-27), required only that an accused raise a reasonable doubt that the purpose of his or her possession was trafficking. This decision, however, was not followed in *R. v. Appleby*, [1972] S.C.R. 303, 16 C.R.N.S. 35, [1971] 4 W.W.R. 601, 3 C.C.C. (2d) 354, 21 D.L.R. (3d) 325 [B.C.], or in *R. v. Erdman* (1971), 24 C.R.N.S., 216(B.C.C.A.).

27 Those decisions which have held that only the secondary or evidentiary burden shifts are not persuasive with respect to the Narcotic Control Act. As Ritchie J. found in *R. v. Appleby* (though addressing a different statutory provision), the phrase "to establish" is the equivalent of "to prove". The legislature, by using the word "establish" in s. 8 of the Narcotic Control Act, intended to impose a legal burden on the accused. This is most apparent in the words "if the accused fails to establish that he was not in possession of the narcotic for the purpose of trafficking, he shall be convicted of the offence as charged".

28 In the *Appleby* case, Ritchie J. also held that the accused is required to disprove the presumed fact according to the civil standard of proof, on a balance of probabilities. He rejected the criminal standard of beyond a reasonable doubt, relying, inter alia, upon the following passage from the House of Lords' decision in *Pub. Prosecutor v. Yuvaraj*, [1970] A.C. 913, [1970] 2 W.L.R. 226 at 232(P.C.):

> Generally speaking, no onus lies upon a defendant in criminal proceedings to prove or disprove any fact: it is sufficient for his acquittal if any of the facts which, if they existed, would constitute the offence with which he is charged are "not proved". But exceptionally, as in the present case, an enactment creating an offence expressly provides that if other facts are proved, a particular fact, the existence of which is a necessary factual ingredient of the offence, shall be presumed or deemed to exist "unless the contrary is proved". In such a case the consequence of finding that that particular fact is "disproved" will be an acquittal, whereas the absence of such a finding will have the consequence of a conviction. Where this is the consequence of a fact's being "disproved" there can be no grounds in public policy for requiring that exceptional degree of certainty as excludes all reasonable doubt that that fact does not exist. In their Lordships' opinion the general rule applies in such a case and it is sufficient if the court considers that upon the evidence before it it is more likely than not that the fact does not exist. The test is the same as that applied in civil proceedings: the balance of probabilities.

29 I conclude that s. 8 of the Narcotic Control Act contains a reverse onus provision imposing a legal burden on an accused to prove on a balance of probabilities that he or she was not in possession of a narcotic for the purpose of trafficking. It is therefore necessary to determine whether s. 8 of the Narcotic Control Act offends the right to be "presumed innocent until proven guilty" as guaranteed by s. 11(*d*) of the Charter.

(b) The Presumption of Innocence and S. 11(d) of the Charter

30 Section 11(*d*) of the Charter constitutionally entrenches the presumption of innocence as part of the supreme law of Canada. For ease of reference, I set out this provision again:

> 11. Any person charged with an offence has the right ...
>
> (*d*) to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal ...

31 To interpret the meaning of s. 11(*d*), it is important to adopt a purposive approach. As this court stated in *R. v. Big M Drug Mart Ltd.*[1985] 1 S.C.R. 295 at 344[1985] 3 W.W.R. 48137 Alta. L.R. (2d) 9785 C.L.L.C. 14,02318 C.C.C. (3d) 38518 D.L.R. (4th) 32113 C.R.R. 6460 A.R. 16158 N.R. 81:

> The meaning of a right or freedom guaranteed by the *Charter* was to be ascertained by an analysis of the *purpose* of such a guarantee; it was to be understood, in other words, in the light of the interests it was meant to protect.
>
> In my view this analysis is to be undertaken, and the purpose of the right or freedom in question is to be sought by reference to the character and the larger objects of the *Charter*

> itself, to the language chosen to articulate the specific right or freedom, to the historical origins of the concepts enshrined, and where applicable to the meaning and purpose of the other specific rights and freedoms.

To identify the underlying purpose of the Charter right in question, therefore, it is important to begin by understanding the cardinal values it embodies.

32 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 *Ref. re S. 94(2) of Motor Vehicle Act*, S.C.C. 17th December 1985 (unreported) [now reported [1985] 2 S.C.R. 486, 48 C.R. (3d) 289, *(*sub nom. *Ref. re Constitutional Question Act)* [1986] 1 W.W.R. 481, 69 B.C.L.R. 145, 36 M.V.R. 240, 63 N.R. 266], per Lamer J. The presumption of innocence protects the fundamental liberty and humandignity of any and every 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.

33 The presumption of innocence has enjoyed long-standing recognition at common law. In the leading case, *Woolmington v. D.P.P.*[1935] A.C. 46225, Cr. App. R. 72(H.L.), Viscount Sankey L.C. wrote at pp. 481-82:

> Throughout the web of the English Criminal Law one golden thread is always to be seen, that it is the duty of the prosecution to prove the prisoner's guilt subject to what I have already said as to the defence of insanity and subject also to any statutory exception. If, at the end of and on the whole of the case, there is a reasonable doubt, created by the evidence given by either the prosecution or the prisoner, as to whether the prisoner killed the deceased with a malicious intention, the prosecution has not made out the case and the prisoner is entitled to an acquittal. No matter what the charge or where the trial, the principle that the prosecution must prove the guilt of the prisoner is part of the common law of England and no attempt to whittle it down can be entertained.

Subsequent Canadian cases have cited the *Woolmington* principle with approval: see, for example, *Manchuk v. R.*[1938] S.C.R. 341 at 34970 C.C.C. 161[1938] 3 D.L.R. 693 [Ont.]; *R. v. Sault Ste. Marie*[1978] 2 S.C.R. 1299 at 13163 C.R. (3d) 307 C.E.L.R. 5340 C.C.C. (2d) 35385 D.L.R. (3d) 16121 N.R. 295 [Ont.].

34 Further evidence of the widespread acceptance of the principle of the presumption of innocence is its inclusion in the major international human rights documents. Article 11(1) of the Universal Declaration of Human Rights, adopted 10th December 1948 by the General Assembly of the United Nations, provides:

> 11. (1) Everyone charged with a penal offence has the right to be presumed innocent until proved guilty according to law in a public trial at which he has had all the guarantees necessary for his defence.

In the International Covenant on Civil and Political Rights (1966), art. 14(2) states:

> (2) Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law.

Canada acceded to this covenant, and the optional protocol which sets up machinery for implementing the covenant, on 19th May 1976. Both came into effect on 19th August 1976.

35 In light of the above, the right to be presumed innocent until proven guilty requires that s. 11(*d*) have, at a minimum, the following content. First, an individual must be proven guilty beyond a reasonable doubt. Second, it is the state which must bear the burden of proof. As Lamer J. stated in *Dubois v. R.*, S.C.C., 21st November 1985 (unreported) [now reported [1985] 2 S.C.R. 350, 48 C.R. (3d) 193[1986] 1 W.W.R. 19341 Alta. L.R. (2d) 9722 C.C.C. (3d) 51366 A.R. 20262 N.R. 50], at p. 6 [p. 215 (C.R.)]:

> Section 11(*d*) imposes upon the Crown the burden of proving the accused's guilt beyond a reasonable doubt as well as that of making out the case against the accused before he or she need respond, either by testifying or calling other evidence.

Third, criminal prosecutions must be carried out in accordance with lawful procedures and fairness. The latter part of s. 11(*d*), which requires the proof of guilt "according to law in a fair and public hearing by an independent and impartial tribunal", underlines the importance of this procedural requirement.

(c) Authorities on Reverse Onus Provisions and the Presumption of Innocence

36 Having considered the general meaning of the presumption of innocence, it is now, I think, desirable to review briefly the authorities on reverse onus clauses in Canada and other jurisdictions.

(i) The Canadian Bill of Rights Jurisprudence

37 Section 2(*f*) of the Canadian Bill of Rights, which safeguards the presumption of innocence, provides:

> 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 ...
>
> (*f*) deprive a person charged with a criminal offence of the right to be presumed innocent until proved guilty according to law in a fair and public hearing by an independent and impartial tribunal ...

The wording of this section closely parallels that of s. 11(*d*). For this reason, one of the Crown's primary contentions is that the Canadian Bill of Rights jurisprudence should be determinative of the outcome of the present appeal.

38 The leading case decided under s. 2(*f*) of the Canadian Bill of Rights and relied on by the Crown is *R. v. Appleby*, supra. In that case, the accused had challenged s. 224A(1)(*a*) [of the Criminal Code, 1953-54 (Can.), c. 51] (now s. 237(1)(*a*) of the Criminal Code, R.S.C. 1970, c. C-34), which imposes a burden upon an accused to prove that he or she, though occupying the driver's seat, did not enter the vehicle for the purpose of setting it in motion and did not, therefore, have care and control. This court rejected the arguments of the accused that s. 2(*f*) had been violated; it relied on the *Woolmington* case, supra, which held that the presumption of innocence was subject to "statutory exceptions". As Ritchie J. stated in his judgment for the majority at pp. 315-16:

> It seems to me, therefore, that if *Woolmington's* case is to be accepted, the words "presumed innocent until proved guilty according to law ..." as they appear in s. 2(*f*) of the *Bill of Rights*, must be taken to envisage a law which recognizes the existence of statutory exceptions reversing the onus of proof with respect to one or more ingredients of an offence in cases where certain specific facts have been proved by the Crown in relation to such ingredients.

39 In a concurring opinion, Laskin J. put forward an alternative test. He chose not to follow Ritchie J.'s approach of reading a statutory exception limitation into the phrase "according to law" in s. 2(*f*) of the Canadian Bill of Rights, and said at p. 317:

> I do not construe s. 2(*f*) as self-defeating because of the phrase "according to law" which appears therein. Hence, it would be offensive to s. 2(*f*) for a federal criminal enactment to place upon the accused the ultimate burden of establishing his innocence with respect to any element of the offence charged. The "right to be presumed innocent", of which s. 2(*f*) speaks, is, in popular terms, a way of expressing the fact that the Crown has the ultimate burden of establishing guilt; if there is any reasonable doubt at the conclusion of the case on any element of the offence charged, an accused person must be acquitted. In a more refined sense, the

> presumption of innocence gives an accused the initial benefit of a right of silence and the ultimate benefit (after the Crown's evidence is in and as well any evidence tendered on behalf of the accused) of any reasonable doubt: see *Coffin v. U.S.* (1895), 156 U.S. 432 at 452.

Nevertheless, Laskin J. went on to hold (at p. 318) that the presumption of innocence is not violated by "any statutory or non-statutory burden upon an accused to adduce evidence to neutralize, or counter on a balance of probabilities, the effect of evidence presented by the Crown". The test, according to Laskin J., is whether the legislative provision calls for a finding of guilt even though there is a reasonable doubt as to the culpability of the accused. This would seem to prohibit the imposition of any legal burden on the accused; however, Laskin J. upheld a statutory provision which would appear to have done precisely that.

40 In a subsequent case, *R. v. Shelley*, supra, involving a reverse onus provision regarding unlawful importation, Laskin C.J.C. discussed further the views he had articulated in *Appleby*, supra, at p. 200:

> This Court held in *R. v. Appleby* that a reverse onus provision, which goes no farther than to require an accused to offer proof on a balance of probabilities, does not necessarily violate the presumption of innocence under s. 2(*f*). It would of course, be clearly incompatible with s. 2(*f*) for a statute to put upon an accused a reverse onus of proving a fact in issue beyond a reasonable doubt. In so far as the onus goes no farther than to require an accused to prove a essential fact upon a balance of probabilities, the essential fact must be one which is rationally open to the accused to prove or disprove, as the case may be. If it is one which an accused cannot reasonably be expected to prove, being beyond his knowledge or beyond what he may reasonably be expected to know, it amounts to a requirement that is impossible to meet.

In addition, Laskin C.J.C. sowed the seeds for the development of a "rational connection test" for determining the validity of a reverse onus provision when he stated at p. 202:

> It is evident to me in this case that there is on the record no rational or necessary connection between the fact proved, *i.e.* possession of goods of foreign origin, and the conclusion of unlawful importation which the accused under s. 248(1) must, to avoid conviction, disprove.

41 Although there are important lessons to be learned from the Canadian Bill of Rights jurisprudence, it does not constitute binding authority in relation to the constitutional interpretation of the Charter. As this court held in *R. v. Big M Drug Mart Ltd.*, supra, the Charter, as a constitutional document, is fundamentally different from the statutory Canadian Bill of Rights, which was interpreted as simply recognizing and declaring existing rights: see also *Singh v. Min. of Employment & Immigration; Thandi v. Min. of Employment & Immigration; Mann v. Min. of Employment & Immigration*[1985] 1 S.C.R. 17712 Admin. L.R. 13714 C.R.R. 1317 D.L.R. (4th) 42258 N.R. 1 [Fed.], per Wilson J.; *R. v. Therens*, [1985] 1 S.C.R. 613, 45 C.R. (3d) 97, [1985] 4 W.W.R. 286, 38 Alta. L.R. (2d) 99, 32 M.V.R. 153, 13 C.R.R. 193, 18 C.C.C. (3d) 481, 18 D.L.R.

(4th) 655, 40 Sask. R. 122, 59 N.R. 122 [Sask.], per Le Dain J. In rejecting the Canadian Bill of Rights religion cases as determinative of the meaning of freedom of religion under the Charter in *Big M Drug Mart*, supra, the court had occasion to say at pp. 343-44 [S.C.R.]:

> I agree with the submission of the respondent that the *Charter* is intended to set a standard upon which *present as well as future* legislation is to be tested. Therefore the meaning of the concept of freedom of conscience and religion is not to be determined solely by the degree to which that right was enjoyed by Canadians prior to the proclamation of the *Charter*. For this reason, *Robertson and Rosetanni*, *supra*, cannot be determinative of the meaning of "freedom of conscience and religion" under the *Charter*. We must look rather to the distinctive principles of constitutional interpretation appropriate to expounding the supreme law of Canada.

42 With this in mind, one cannot but question the appropriateness of reading into the phrase "according to law" in s. 11(*d*) of the Charter the statutory exceptions acknowledged in *Woolmington*, supra, and in *Appleby*, supra. The *Woolmington* case was decided in the context of a legal system with no constitutionally-entrenched human rights document. In Canada, we have tempered Parliamentary supremacy by entrenching important rights and freedoms in the Constitution. Viscount Sankey L.C.'s statutory exception proviso is clearly not applicable in this context and would subvert the very purpose of the entrenchment of the presumption of innocence in the Charter. I do not, therefore, feel constrained in this case by the interpretation of s. 2(*f*) of the Canadian Bill of Rights presented in the majority judgment in *Appleby*. Section 8 of the Narcotic Control Act is not rendered constitutionally valid simply by virtue of the fact that it is a statutory provision.

(ii) Canadian Charter Jurisprudence

43 In addition to the present case, there have been a number of other provincial appellate level judgments addressing the meaning of the presumption of innocence contained in s. 11(*d*). This jurisprudence provides a comprehensive and persuasive source of insight into the questions raised in this appeal. In particular, six appellate level courts in addition to the Ontario Court of Appeal have held that s. 8 of the Narcotic Control Act violates the Charter: *R. v. Carroll*, supra; *R. v. Cook*, supra; *R. v. O'Day*, supra; *R. v. Stanger*, supra; *R. v. Landry*, supra; and *R. v. Stock* (1983), 10 C.C.C., (3d) 319(B.C.C.A.).

44 Following the decision of the Ontario Court of Appeal in the present case, the Prince Edward Island Supreme Court (in banco) rendered its decision in *R. v. Carroll*. Writing for the majority, MacDonald J. held at p. 105:

> Unless a provision falls within s. 1 of the Charter, there cannot be a requirement that an accused must prove an essential positive element of the Crown's case other than by raising a reasonable doubt. The presumption of innocence cannot be said to exist if by shifting the

> persuasive burden the court is required to convict even if a reasonable doubt may be said to exist.

In a concurring judgment, Mitchell J. commented at pp. 107-108:

> Section 11(*d*) gives an accused person the right to be presumed innocent until proven guilty. It follows that, if an accused is to be presumed innocent until proven guilty, he must not be convicted unless and until the Crown has proven each and all of the elements necessary to constitute the crime.

Applying these legal conclusions to s. 8 of the Narcotic Control Act, the court held that s. 11(*d*) had been violated. As Mitchell J. stated at p. 108:

> Under s. 8 an accused is not presumed innocent until proven guilty. He is only presumed innocent until found in possession. Once the Crown proves the accused had possession of the narcotic, he is presumed to be guilty of an intention to traffic until he proves otherwise.

45 The Nova Scotia Supreme Court, Appellate Division, also concluded that s. 8 is an unconstitutional violation of the s. 11(*d*) presumption of innocence, in its decision in R. v. Cook, supra. After reviewing *R. v. Oakes* and *R. v. Carroll*, supra, Hart J.A. concluded at pp. 435-36:

> Section 8 of the *Narcotic Control Act* is a piece of legislation that attempts to relieve the Crown of its normal burden of proof by use of what is known as a reverse onus. Different types of reverse onus have been known to the law and proof of a case with the aid of a reverse onus can in my opinion, fall into the wording of s. 11(*d*) of the Charter as being proof "according to law" ... I know of no justification, however, for holding that it would be "according to law" to allow use of a reverse onus clause which permitted the Crown the assistance of a provision which relieved it from calling any probative evidence to establish one of the essential elements of an offence.

Although concurring in the result, Jones J.A. maintained that the reasonableness test should be applied with respect to s. 1 and not with respect to the words "according to law" in s. 11(*d*). At p. 439:

> The test of reasonableness should be available in considering the secondary question under s. 1 of the Charter. It is important that the burden of proof should be on the Crown to show that a statute which violates s. 11(*d*) of the Charter is demonstrably justified in a free and democratic society.

46 In *R. v. O'Day*, supra, the New Brunswick Court of Appeal struck down s. 8 of the Narcotic Control Act and registered its agreement with the three earlier provincial appellate level courts.

47 The Alberta Court of Appeal in *R. v. Stanger*, supra, also found s. 8 unconstitutional; however, the court was not unanimous in this conclusion. On the meaning of s. 11(*d*), Stevenson J.A., writing for the majority, paraphrased Martin J.A.'s comment in *Oakes* and stated at p. 351 [C.C.C.] that the presumption of innocence meant "first, that an accused is innocent until proven guilty in accordance with established procedure, and secondly, that guilt must be proven beyond a reasonable doubt". Stevenson J.A. also cited MacDonald J.'s comment in *Carroll*, supra, at p. 98, that the presumption of innocence is maintained "as long as the prosecution has the final burden of establishing guilt, on any element of the offence charged, beyond a reasonable doubt".

48 I should add that the majority in *Stanger* correctly rejected the applicability of the Privy Council decision in *Ong Ah Chuan v. Pub. Prosecutor; Koh Chai Cheng v. Pub. Prosecutor*[1981] A.C. 648. That case concerned constitutional provisions of Singapore which are significantly different from those of the Charter; in particular, they do not contain an explicit endorsement of the presumption of innocence. Moreover, the Privy Council did not read this principle into the general due process protections of the constitution of Singapore.

49 In *R. v. Landry*, supra, the Quebec Court of Appeal invalidated s. 8 of the Narcotic Control Act and extended its conclusions to s. 2(*f*) of the Canadian Bill of Rights. As Malouf J.A. stated at p. 561:

> Both the *Bill of Rights* and the Charter recognize the right of an accused to be presumed innocent until proven guilty according to law. I cannot accept that such a basic and fundamental principle can be set aside by such a reverse onus provision.

50 Finally, in a very brief judgment, *R. v. Stock*, supra, the British Columbia Court of Appeal concurred with the Court of Appeal decisions reviewed above, endorsing in particular the Ontario Court of Appeal decision in *Oakes*. An earlier British Columbia Court of Appeal opinion, *R. v. Anson* 35 C.R. (3d) 179, [1983] 3 W.W.R. 366, 42 B.C.L.R. 282, 4 C.C.C. (3d) 114, 146 D.L.R. (3d) 661, 4 C.R.R. 337, had dismissed an appeal from a ruling which had upheld the constitutionality of s. 8 of the Narcotic Control Act; however, the basis for the denial of the appeal was procedural. The court did not assess the constitutionality of s. 8 in relation to the presumption of innocence.

51 There have also been a number of cases in which the meaning of s. 11(*d*) has been considered in relation to other legislative provisions: see, for example, *R. v. Holmes*(1983), 41 O.R. (2d) 250, 32 C.R. (3d) 322, 4 C.C.C. (3d) 440, 145 D.L.R. (3d) 689, 4 C.R.R. 222(C.A.); *R. v.Whyte*(1983), 38 C.R. (3d) 24, 25 M.V.R. 22, 10 C.C.C. (3d) 277, 6 D.L.R. (4th) 263, leave to appeal to S.C.C. granted 43 C.R. (3d) xxvii, 10 C.C.C. (3d) 277n, 6 D.L.R. (4th) 263n [B.C.]; *R. v. Lee's Poultry Ltd.*(1985), 43 C.R. (3d) 289, 17 C.C.C. (3d) 539, 12 C.R.R. 125, 7 O.A.C. 100(C.A.); *R. v. S.P.T.*(1985), 43 C.R. (3d) 307, 33 M.V.R. 148, 18 C.C.C. (3d) 125, 16 D.L.R. (4th) 753, 66 N.S.R. (2d) 311, 152 A.P.R. 311(C.A.); *R. v. Kowalczuk*[1983] 3 W.W.R. 694, 5 C.C.C. (3d) 25, 147 D.L.R. (3d) 735, 20 Man. R. (2d) 379(C.A.); *R. v. Schwartz*(1983), 10 C.C.C. (3d) 34, 5 D.L.R.

(4th) 524, 25 Man. R. (2d) 295(C.A.); *Boyle and R.*(1983), 41 O.R. (2d) 713, 35 C.R. (3d) 34, 5 C.C.C. (3d) 193, 148 D.L.R. (3d) 449(C.A.).

52 To summarize, the Canadian Charter jurisprudence on the presumption of innocence in s. 11(*d*) and reverse onus provisions appears to have solidly accorded a high degree of protection to the presumption of innocence. Any infringements of this right are permissible only when, in the words of s. 1 of the Charter, they are reasonable and demonstrably justified in a free and democratic society.

(iii) United States Jurisprudence

53 In the United States, protection of the presumption of innocence is not explicit. Rather, it has been read into the "due process" provisions contained in the Fifth and Fourteenth Amendments of the American Bill of Rights. An extensive review of the United States case law is provided in Martin J.A.'s judgment for the Ontario Court of Appeal. I will therefore merely highlight the major jurisprudential developments.

54 In *Tot v. U.S.; U.S. v. Delia*319 U.S. 46387 L. Ed. 151963 S. Ct. 1241 (1943), Roberts J. outlined the following test at pp. 467-68:

> ... a statutory presumption cannot be sustained if there be no rational connection between the fact proved and the ultimate fact presumed, if the inference of the one from proof of the other is arbitrary because of lack of connection between the two in common experience.

The comparative convenience of producing evidence was also acknowledged as a corollary test. The case involved a presumption to be drawn, from the possession of firearms by a person convicted of a previous crime of violence, that the firearms were illegally obtained through interstate or foreign commerce. Of note was Roberts J.'s comment that, even if a rational connection had been proved, the statutory presumption could not be sustained because of the prejudical reliance on a past conviction as part of the basic fact. The accused would be discredited in the eyes of the jury even before he attempted to disprove the presumed fact.

55 In *Leary v. U.S.*395 U.S. 623 L. Ed. 2d 5789 S. Ct. 1532 (1969), Harlan J. articulated a more stringent test for invalidity at p. 36:

> ... a criminal statutory presumption must be regarded as "irrational" or "arbitrary," and hence unconstitutional, unless it can at least be said with substantial assurance that the presumed fact is more likely than not to flow from the proved fact on which it is made to depend.

Harlan J. also noted [at p. 36, note 64] that, since the statutory presumption was invalid under the above test:

> ... we need not reach the question whether a criminal presumption which passes muster when so judged must also satisfy the criminal "reasonable doubt" standard if proof of the crime charged or an essential element thereof depends upon its use.

56 The United States Supreme Court did answer this question in *Co. Ct. of Ulster v. Allen*, 442 U.S. 140, 60 L. Ed. 2d 777, 99 S. Ct. 2213 (1979). It held that, where a mandatory criminal presumption was imposed by statute, the state may not "rest its case entirely on a presumption unless the fact proved is sufficient to support the inference of guilt beyond a reasonable doubt" (p. 167). A mere rational connection is insufficient. This case illustrates the high degree of constitutional protection accorded the principle that an accused must be found guilty beyond a reasonable doubt. The rationale for this is well stated by Brennan J. in *Re Winship*, 397 U.S. 358 at 363-64, 25 L. Ed. 2d 368, 90 S. Ct. 1068 (1970):

> The requirement of proof beyond a reasonable doubt has this vital role in our criminal procedure for cogent reasons. The accused during a criminal prosecution has at stake interests of immense importance, both because of the possibility that he may lose his liberty upon conviction and because of the certainty that he would be stigmatized by the conviction. Accordingly, a society that values the good name and freedom of every individual should not condemn a man for commission of a crime when there is reasonable doubt about his guilt.

(iv) European Convention on Human Rights Jurisprudence

57 As mentioned above, international developments in human rights law have afforded protection to the principle of the presumption of innocence. The jurisprudence on the European Convention on Human Rights includes a consideration of the legitimacy of reverse onus provisions. Article 6(2) of the European Convention on Human Rights reads:

> (2) Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.

The meaning of art. 6(2) was clarified in the *Pfunders Case (Austria v. Italy)* (1963), 6 Yearbook of E.C.H.R. 740 at 782 and 784:

> This text, according to which everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law, requires firstly that court judges in fulfilling their duties should not start with the conviction or assumption that the accused committed the act with which he is charged. In other words, the onus to prove guilt falls upon the Prosecution, and any doubt is to the benefit of the accused. Moreover, the judges must permit the latter to produce evidence in rebuttal. In their judgment they can find him guilty only on the basis of direct or indirect evidence sufficiently strong in the eyes of the law to establish his guilt.

58 Although the commission has endorsed the general importance of the requirement that the prosecution prove the accused's guilt beyond a reasonable doubt, it has acknowledged the permissibility of certain exceptions to this principle. For example, the commission upheld a statutory reverse onus provision in which a man living with or habitually in the company of a prostitute is presumed to be knowingly living on the earnings of prostitution unless he proves otherwise: *X v. U.K.*, Application 5124/71, Collection of Decisions of E.C.H.R. 135. The commission noted the importance of examining the substance and effect of a statutory reverse onus. It concluded, however, at p. 135:

> The statutory presumption in the present case is restrictively worded ... The presumption is neither irrebuttable nor unreasonable. To oblige the prosecution to obtain direct evidence of "living on immoral earnings" would in most cases make its task impossible.

See discussion in Francis Jacobs, The European Convention on Human Rights (Oxford, 1975), pp. 113-14.

(d) Conclusion regarding S. 11(d) of Charter and S. 8 of Narcotic Control Act

59 This review of the authorities lays the groundwork for formulating some general conclusions regarding reverse onus provisions and the presumption of innocence in s. 11(*d*). We can then proceed to apply these principles to the particulars of s. 8 of the Narcotic Control Act.

60 In general one must, I think, conclude that a provision which requires an accused to disprove on a balance of probabilities the existence of a presumed fact which is an important element of the offence in question violates the presumption of innocence in s. 11(*d*). If an accused bears the burden of disproving on a balance of probabilities an essential element of an offence, it would be possible for a conviction to occur despite the existence of a reasonable doubt. This would arise if the accused adduced sufficient evidence to raise a reasonable doubt as to his or her innocence but did not convince the jury on a balance of probabilities that the presumed fact was untrue.

61 The fact that the standard is only the civil one does not render a reverse onus clause constitutional. As Sir Rupert Cross commented in the Rede lecture "The Golden Thread of the English Criminal Law: The Burden of Proof", delivered in 1976 at the University of Toronto, at p. 11:

> It is sometimes said that exceptions to the Woolmington rule are acceptable because, whenever the burden of proof on any issue in a criminal case is borne by the accused, he only has to satisfy the jury on the balance of probabilities, whereas on issues on which the Crown bears the burden of proof the jury must be satisfied beyond a reasonable doubt.

And at p. 13:

> The fact that the standard is lower when the accused bears the burden of proof than it is when the burden of proof is borne by the prosecution is no answer to my objection to the existence of exceptions to the Woolmington rule as it does not alter the fact that a jury or bench of magistrates may have to convict the accused although they are far from sure of his guilt.

62 As we have seen, the potential for a rational connection between the basic fact and the presumed fact to justify a reverse onus provision has been elaborated in some of the cases discussed above and is now known as the "rational connection test". In the context of s. 11(*d*), however, the following question arises: if we apply the rational connection test to the consideration of whether s. 11(*d*) has been violated, are we adequately protecting the constitutional principle of the presumption of innocence? As Professors MacKay and Cromwell point out in their article "*Oakes*: A Bold Initiative Impeded by Old Ghosts" (1983), 32 C.R. (3d) 221, at p. 233:

> The rational connection test approves a provision that *forces* the trier to infer a fact that may be simply rationally connected to the proved fact. Why does it follow that such a provision does not offend the constitutional right to be proved guilty beyond a reasonable doubt?

A basic fact may rationally tend to prove a presumed fact, but not prove its existence beyond a reasonable doubt. An accused person could thereby be convicted despite the presence of a reasonable doubt. This would violate the presumption of innocence.

63 I should add that this questioning of the constitutionality of the "rational connection test" as a guide to interpreting s. 11(*d*) does not minimize its importance. The appropriate stage for invoking the rational connection test, however, is under s. 1 of the Charter. This consideration did not arise under the Canadian Bill of Rights because of the absence of an equivalent to s. 1. At the Court of Appeal level in the present case, Martin J.A. sought to combine the analysis of s. 11(*d*) and s. 1 to overcome the limitations of the Canadian Bill of Rights jurisprudence. To my mind, it is highly desirable to keep s. 1 and s. 11(*d*) analytically distinct. Separating the analysis into two components is consistent with the approach this court has taken to the Charter to date: see *R. v.Big M Drug Mart Ltd.*, supra; *Hunter v. Southam Inc.*, [1984] 2 S.C.R. 145, *(*sub nom. *Dir. of Investigation & Research, Combines Investigation Branch v. Southam Inc.)* 41 C.R. (3d) 97, [1984] 6 W.W.R. 577, 33 Alta. L.R. (2d) 193, 27 B.L.R. 297, 84 D.T.C. 6467, 14 C.C.C. (3d) 97, 11 D.L.R. (4th) 641, 2 C.P.R. (3d) 1, 9 C.R.R. 355, 55 A.R. 291, 55 N.R. 241; *L.S.U.C. v. Skapinker*, [1984] 1 S.C.R. 357, 11 C.C.C. (3d) 4819 D.L.R. (4th) 161, 8 C.R.R 193, 3 O.A.C. 321, 53 N.R. 169.

64 To return to s. 8 of the Narcotic Control Act, I am in no doubt whatsoever that it violates s. 11(*d*) of the Charter by requiring the accused to prove on a balance of probabilities that he was not in possession of the narcotic for the purpose of trafficking. Mr. Oakes is compelled by s. 8 to prove that he is *not* guilty of the offence of trafficking. He is thus denied his right to be presumed innocent and subjected to the potential penalty of life imprisonment unless he can rebut the presumption. This is radically and fundamentally inconsistent with the societal values of human dignity and

liberty which we espouse, and is directly contrary to the presumption of innocence enshrined in s. 11(*d*). Let us turn now to s. 1 of the Charter.

V. Is S. 8 of the Narcotic Control Act a Reasonable and Demonstrably Justified Limit Pursuant to S. 1 of the Charter?

65 The Crown submits that, even if s. 8 of the Narcotic Control Act violates s. 11(*d*) of the Charter, it can still be upheld as a reasonable limit under s. 1, which, as has been mentioned, provides:

> 1. The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

The question whether the limit is "prescribed by law" is not contentious in the present case, since s. 8 of the Narcotic Control Act is a duly-enacted legislative provision. It is, however, necessary to determine if the limit on Mr. Oakes' right, as guaranteed by s. 11(*d*) of the Charter, is "reasonable" and "demonstrably justified in a free and democratic society" for the purpose of s. 1 of the Charter, and thereby saved from inconsistency with the Constitution.

66 It is important to observe at the outset that s. 1 has two functions: first, it constitutionally guarantees the rights and freedoms set out in the provisions which follow; and second, it states explicitly the exclusive justificatory criteria (outside of s. 33 of the Constitution Act, 1982) against which limitations on those rights and freedoms must be measured. Accordingly, any s. 1 inquiry must be premised on an understanding that the impugned limit violates constitutional rights and freedoms — rights and freedoms which are part of the supreme law of Canada. As Wilson J. stated in *Singh v. Min. of Employment & Immigration*, supra, at p. 218:

> ... it is important to remember that the courts are conducting this inquiry in light of a commitment to uphold the rights and freedoms set out in the other sections of the *Charter*.

67 A second contextual element of interpretation of s. 1 is provided by the words "free and democratic society". Inclusion of these words as the final standard of justification for limits on rights and freedoms refers the court to the very purpose for which the Charter was originally entrenched in the Constitution: Canadian society is to be free and democratic. The court must be guided by the values and principles essential to a free and democratic society, which I believe embody, to name but a few, respect for the inherent dignity of the human person, commitment to social justice and equality, accommodation of a wide variety of beliefs, respect for cultural and group identity, and faith in social and political institutions which enhance the participation of individuals and groups in society. The underlying values and principles of a free and democratic society are the genesis of the rights and freedoms guaranteed by the Charter and the ultimate

standard against which a limit on a right or freedom must be shown, despite its effect, to be reasonable and demonstrably justified.

68 The rights and freedoms guaranteed by the Charter are not, however, absolute. It may become necessary to limit rights and freedoms in circumstances where their exercise would be inimical to the realization of collective goals of fundamental importance. For this reason, s. 1 provides criteria of justification for limits on the rights and freedoms guaranteed by the Charter.

69 These criteria impose a stringent standard of justification, especially when understood in terms of the two contextual considerations discussed above, namely, the violation of a constitutionally-guaranteed right or freedom and the fundamental principles of a free and democratic society.

70 The onus of proving that a limit on a right or freedom guaranteed by the Charter is reasonable and demonstrably justified in a free and democratic society rests upon the party seeking to uphold the limitation. It is clear from the text of s. 1 that limits on the rights and freedoms enumerated in the Charter are exceptions to their general guarantee. The presumption is that the rights and freedoms are guaranteed unless the party invoking s. 1 can bring itself within the exceptional criteria which justify their being limited. This is further substantiated by the use of the word "demonstrably", which clearly indicates that the onus of justification is on the party seeking to limit: *Hunter v. Southam Inc.*, supra.

71 The standard of proof under s. 1 is the civil standard, namely, proof by a preponderance of probability. The alternative criminal standard, proof beyond a reasonable doubt, would, in my view, be unduly onerous on the party seeking to limit. Concepts such as "reasonableness", "justifiability" and "free and democratic society" are simply not amenable to such a standard. Nevertheless, the preponderance of probability test must be applied rigorously. Indeed, the phrase "demonstrably justified" in s. 1 of the Charter supports this conclusion. Within the broad category of the civil standard, there exist different degrees of probability depending on the nature of the case: see Sopinka and Lederman, The Law of Evidence in Civil Cases (Toronto, 1974), at p. 385. As Denning L.J. explained in *Bater v. Bater*[1951] P. 35[1950] 2 All E.R. 458 at 459 (C.A.):

> The case may be proved by a preponderance of probability, but there may be degrees of probability within that standard. The degree depends on the subject-matter. A civil court, when considering a charge of fraud, will naturally require a higher degree of probability than that which it would require if considering whether negligence were established. It does not adopt so high a standard as a criminal court, even when considering a charge of a criminal nature, but still it does require a degree of probability which is commensurate with the occasion.

This passage was cited with approval in *Hanes v. Wawanesa Mut. Ins. Co.*, [1963] S.C.R. 154 at 161, [1963] 1 C.C.C. 321, 36 D.L.R. (2d) 718 [Ont.]. A similar approach was put forward by Cartwright J. in *Smith v. Smith*, [1952] 2 S.C.R. 312 at 331-32, [1952] 3 D.L.R. 449 [B.C.]:

> I wish, however, to emphasize that in every civil action before the tribunal can safely find the affirmative of an issue of fact required to be proved it must be satisfied, and that whether or not it will be so satisfied must depend on the totality of the circumstances on which its judgment is formed including the gravity of the consequences ...

72 Having regard to the fact that s. 1 is being invoked for the purpose of justifying a violation of the constitutional rights and freedoms the Charter was designed to protect, a very high degree of probability will be, in the words of Denning L.J., "commensurate with the occasion". Where evidence is required in order to prove the constituent elements of a s. 1 inquiry, and this will generally be the case, it should be cogent and persuasive and make clear to the court the consequences of imposing or not imposing the limit: see *L.S.U.C. v. Skapinker*, supra, at p. 384; *Singh v. Min. of Employment & Immigration*, supra, at p. 217. A court will also need to know what alternative measures for implementing the objective were available to the legislators when they made their decisions. I should add, however, that there may be cases where certain elements of the s. 1 analysis are obvious or self-evident.

73 To establish that a limit is reasonable and demonstrably justified in a free and democratic society, two central criteria must be satisfied. First, the objective, which the measures responsible for a limit on a Charter right or freedom are designed to serve, must be "of sufficient importance to warrant overriding a constitutionally protected right or freedom": *R. v. Big M Drug Mart Ltd.*, supra, at p. 352. The standard must be high in order to ensure that objectives which are trivial or discordant with the principles integral to a free and democratic society do not gain s. 1 protection. It is necessary, at a minimum, that an objective relate to concerns which are pressing and substantial in a free and democratic society before it can be characterized as sufficiently important.

74 Second, once a sufficiently significant objective is recognized, then the party invoking s. 1 must show that the means chosen are reasonable and demonstrably justified. This involves "a form of proportionality test": *R. v. Big M Drug Mart Ltd.*, supra, at p. 352. Although the nature of the proportionality test will vary depending on the circumstances, in each case courts will be required to balance the interests of society with those of individuals and groups. There are, in my view, three important components of a proportionality test. First, the measures adopted must be carefully designed to achieve the objective in question. They must not be arbitrary, unfair or based on irrational considerations. In short, they must be rationally connected to the objective. Second, the means, even if rationally connected to the objective in this first sense, should impair "as little as possible" the right or freedom in question: *R. v. Big M Drug Mart Ltd.*, supra, at p. 352. Third, there

must be a proportionality between the *effects* of the measures which are responsible for limiting the Charter right or freedom and the objective which has been identified as of "sufficient importance".

75 With respect to the third component, it is clear that the general effect of any measure impugned under s. 1 will be the infringement of a right or freedom guaranteed by the Charter; this is the reason why resort to s. 1 is necessary. The inquiry into effects must, however, go further. A wide range of rights and freedoms are guaranteed by the Charter, and an almost infinite number of factual situations may arise in respect of these. Some limits on rights and freedoms protected by the Charter will be more serious than others in terms of the nature of the right or freedom violated, the extent of the violation, and the degree to which the measures which impose the limit trench upon the integral principles of a free and democratic society. Even if an objective is of sufficient importance, and the first two elements of the proportionality test are satisfied, it is still possible that, because of the severity of the deleterious effects of a measure on individuals or groups, the measure will not be justified by the purposes it is intended to serve. The more severe the deleterious effects of a measure, the more important the objective must be if the measure is to be reasonable and demonstrably justified in a free and democratic society.

76 Having outlined the general principles of a s. 1 inquiry, we must apply them to s. 8 of the Narcotic Control Act. Is the reverse onus provision in s. 8 a reasonable limit on the right to be presumed innocent until proven guilty beyond a reasonable doubt as can be demonstrably justified in a free and democratic society?

77 The starting point for formulating a response to this question is, as stated above, the nature of Parliament's interest or objective which accounts for the passage of s. 8 of the Narcotic Control Act. According to the Crown, s. 8 of the Narcotic Control Act is aimed at curbing drug trafficking by facilitating the conviction of drug traffickers. In my opinion, Parliament's concern that drug trafficking be decreased can be characterized as substantial and pressing. The problem of drug trafficking has been increasing since the 1950s, at which time there was already considerable concern: see Report of the Special Committee on Traffic in Narcotic Drugs, Appendix to Debates of the Senate of Canada, session of 1955, pp. 690-700; see also Final Report, Commission of Inquiry into the Non-Medical Use of Drugs (Ottawa, 1973). Throughout this period, numerous measures were adopted by free and democratic societies, at both the international and national levels.

78 At the international level, on 23rd June 1953, the Protocol for Limiting and Regulating the Cultivation of the Poppy Plant, the Production of, International and Wholesale Trade in, and Use of Opium, to which Canada is a signatory, was adopted by the United Nations Opium Conference held in New York. The Single Convention on Narcotic Drugs (1961), was acceded to in New York on 30th March 1961. This treaty was signed by Canada on 30th March 1961. It entered into force on 13th December 1964. As stated in the preamble, "addiction to narcotic drugs constitutes a serious evil for the individual and is fraught with social and economic danger to mankind".

79 At the national level, statutory provisions have been enacted by numerous countries which, inter alia, attempt to deter drug trafficking by imposing criminal sanctions: see, for example, Misuse of Drugs Act, 1975 (New Zealand), no. 116; Misuse of Drugs Act, 1971 (Eng.), c. 38.

80 The objective of protecting our society from the grave ills associated with drug trafficking is, in my view, one of sufficient importance to warrant overriding a constitutionally-protected right or freedom in certain cases. Moreover, the degree of seriousness of drug trafficking makes its acknowledgement as a sufficiently important objective for the purposes of s. 1 to a large extent self-evident. The first criterion of a s. 1 inquiry, therefore, has been satisfied by the Crown.

81 The next stage of inquiry is a consideration of the means chosen by Parliament to achieve its objective. The means must be reasonable and demonstrably justified in a free and democratic society. As outlined above, this proportionality test should begin with a consideration of the rationality of the provision: Is the reverse onus clause in s. 8 rationally related to the objective of curbing drug trafficking? At a minimum, this requires that s. 8 be internally rational; there must be a rational connection between the basic fact of possession and the presumed fact of possession for the purpose of trafficking. Otherwise the reverse onus clause could give rise to unjustified and erroneous convictions for drug trafficking of persons guilty only of possession of narcotics.

82 In my view, s. 8 does not survive this rational connection test. As Martin J.A. of the Ontario Court of Appeal concluded, possession of a small or negligible quantity of narcotics does not support the inference of trafficking. In other words, it would be irrational to infer that a person had an intent to traffic on the basis of his or her possession of a very small quantity of narcotics. The presumption required under s. 8 of the Narcotic Control Act is overinclusive and could lead to results in certain cases which would defy both rationality and fairness. In light of the seriousness of the offence in question, which carries with it the possibility of imprisonment for life, I am further convinced that the first component of the proportionality test has not been satisfied by the Crown.

83 As I have concluded that s. 8 does not satisfy this first component of proportionality, it is unnecessary to consider the other two components.

VI. Conclusion

84 The Ontario Court of Appeal was correct in holding that s. 8 of the Narcotic Control Act violates the Canadian Charter of Rights and Freedoms and is therefore of no force or effect. Section 8 imposes a limit on the right guaranteed by s. 11(*d*) of the Charter which is not reasonable and is not demonstrably justified in a free and democratic society for the purpose of s. 1. Accordingly, the constitutional question is answered as follows:

Question:

85 Is s. 8 of the Narcotic Control Act inconsistent with s. 11(*d*) of the Canadian Charter of Rights and Freedoms and thus of no force and effect?

Answer:

86 Yes.

87 I would therefore dismiss the appeal.

***Estey J. (McIntyre J.* concurring):**

88 I would dismiss this appeal [from 40 O.R. (2d) 660, 32 C.R. (3d) 193, 2 C.C.C. (3d) 339, 145 D.L.R. (3d) 123, affirming 38 O.R. (2d) 598]. I agree with the conclusions of the Chief Justice with reference to the relationship between s. 11(*d*) and s. 1 of the Charter of Rights. For the disposition of all other issues arising in this appeal, I would adopt the reasons given by Martin J.A. in the court below.

Appeal dismissed.

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1993 CarswellBC 512
Supreme Court of Canada

R. v. Osolin

Please see in particular para. 88

1993 CarswellBC 512, 1993 CarswellBC 1274, [1993] 4 S.C.R. 595, [1993] S.C.J. No. 135, [1994] B.C.W.L.D. 829, 109 D.L.R. (4th) 478, 162 N.R. 1, 19 C.R.R. (2d) 93, 21 W.C.B. (2d) 491, 26 C.R. (4th) 1, 38 B.C.A.C. 81, 62 W.A.C. 81, 86 C.C.C. (3d) 481, J.E. 94-62, EYB 1993-67115

STEPHEN WILLIAM OSOLIN v. R.; ATTORNEY GENERAL OF CANADA, ATTORNEY GENERAL FOR ONTARIO and ATTORNEY GENERAL OF QUEBEC (Intervenors)

Lamer C.J.C., La Forest, L'Heureux-Dubé, Sopinka, Gonthier, Cory, McLachlin, Iacobucci and Major JJ.

Heard: June 17, 1993
Judgment: December 16, 1993
Docket: Doc. 22826

Proceedings: reversed *R. v. Osolin* ((1992)), 1992 CarswellBC 1115, 7 B.C.A.C. 203, 15 W.A.C. 203, 10 C.R. (4th) 159 at 191 ((B.C. C.A.))

Counsel: *John D. McAlpine, Q.C.* and *Paul R. Bennett*, for appellant.
Elizabeth Bennett, for the Crown.
Donna R. Valgardson and *Nancy L. Irving*, for intervenor Attorney General of Canada.
Susan Chapman, for intervenor Attorney General for Ontario.
Jacques Gauvin and *Daniel Grégoire*, for intervenor Attorney General of Quebec.

Subject: Criminal; Constitutional; Criminal; Human Rights

Headnote

Criminal law --- Charter of Rights and Freedoms — Right to trial by jury [s. 11(f)]

Section 265(4) of the Criminal Code does not infringe s. 11(f) of the Charter, as it is nothing more than a re-affirmation of the Judge's role in supervising a jury trial — The issue of whether there is sufficient evidence to raise a defence is a question of law which is properly within the domain of the trial Judge and, consequently, does not violate accused's right to trial by jury Constitution Act, 1982, s 11(f); Criminal Code, R.S.C. 1985, c. C-46, s 265(4).

Criminal law --- Offences against the person and reputation — Sexual assault — General offence — Evidence

Medical records of complainant — Records containing notation of statement by complainant explaining behaviour — Defence of honest but mistaken belief of consent — Trial Judge erring in not permitting accused to cross-examine on medical records — Cross-examination having proper purpose to support defence.

Criminal law --- Offences against the person and reputation — Sexual assault — General offence — Elements

Trial Judge not charging jury on issue of consent where issue not arising from evidence — Trial Judge erring in finding defence unavailable on basis of accused's testimony alone — Court of Appeal erring in rejecting defence based on closely interrelated criminal charge — Criminal Code, R.S.C. 1985, c. C-46, s. 265(4) Criminal Code, R.S.C. 1985, c. C-46, s 265(4).

Criminal law --- Offences against the person and reputation — Sexual assault — General offence — Miscellaneous

Section 265(4) of the Code does not infringe s. 11(d) of the Charter — The burden of proving all elements of the offence rests squarely on the Crown, despite the fact that the air of reality threshold creates an evidentiary burden on an accused to raise sufficient evidence to give the defence an air of reality to justify its presentation to the jury — All criminal defences must meet a threshold requirement before the trial Judge leaves them with a jury, which does not violate the presumption of innocence — Furthermore, s. 265(4) of the Code does not infringe s. 11(f) of the Charter, as it is nothing more than a reaffirmation of the Judge's role in supervising a jury trial — The issue of whether there is sufficient evidence to raise a defence is a question of law which is properly within the domain of the trial Judge and, consequently, does not violate accused's right to trial by jury Constitution Act, 1982, s 11(d); Criminal Code, R.S.C. 1985, c. C-46, s 265(4).

Criminal law --- Offences against the person and reputation — Kidnapping

Consent — Trial Judge not charging jury on issue of consent where issue not arising from evidence — Trial Judge erring in finding defence unavailable on basis of accused's testimony alone — Criminal Code, R.S.C. 1985, c. C-46, s. 265(4) Criminal Code, R.S.C. 1985, c. C-46, s 265(4).

The accused and M were charged with sexual assault and kidnapping. The complainant was 17 years old and had been under psychiatric treatment for depression and anxiety. On the morning of the day in question she went with D and S to B's trailer, where they drank beer. Later in the afternoon the complainant and D had consensual intercourse in a secluded area. When D left, the accused and M arrived at the trailer and left with B to go to a nearby pub. S and the complainant remained at the trailer and had consensual intercourse. At the pub, B told M and the accused that the complainant was "easy" and that they could all have a turn with her. M and the accused returned to the trailer and barged into the bedroom. While the accused drove S some distance away, M attempted to have intercourse with the complainant. She testified that she resisted and struggled, and that he prevented her from getting dressed. She managed to get her underpants on as the accused returned.

The accused threw her over his shoulder and carried her out to M's car. The complainant testified that she resisted leaving the trailer and asked for her clothes but that the accused put her in the back seat of the car and tore off her underpants. M drove them some 40 miles to a cabin, where he left the accused and the complainant alone. According to the complainant, the accused attempted to rape her on the journey to the cabin and when he got to the cabin he raped her, tying her up with some cords. According to the accused, the complainant consented to the sexual conduct and the tying up, and that she only resisted when he tried to shave her pubic area. Early in the morning a police officer found her on a highway, screaming and crying. A hospital examination revealed a number of injuries more consistent with sexual assault than consensual intercourse. The police found torn underpants on the ground some 20 feet from the trailer.

During the trial, the complainant's mental health records were admitted on the issue of her competence to testify. The trial judge refused to allow defence counsel to cross-examine the complainant on these records, specifically as to a note that she was "concerned that her attitude may have influenced the man to some extent". The trial judge also refused to charge the jury on the defence of mistaken belief in consent, holding that there was no "air of reality" to the defence since it was not supported by sources other than the accused.

The jury found the accused guilty on both counts. The accused was sentenced to six years for sexual assault and four years concurrent for the kidnapping. M was found not guilty of sexual assault but guilty of kidnapping.

The accused's appeal was dismissed. The court held that, given the forcible confinement, there was no air of reality to the mistaken belief in consent defence. The court also held that the trial judge had not erred in disallowing the cross-examination on the mental health records. The accused appealed.

Held:

The appeal was allowed; a new trial was ordered.

Trial judge's restriction of cross-examination

Per Cory J. (Major J. concurring)

The right to cross-examine has always been held to be of fundamental importance in a criminal trial. The right is now protected by ss. 7 and 11(*d*) of the *Charter*. As a result it should be interpreted in the broad and generous manner befitting its constitutional status. The right to cross-examine has never been unlimited. It must conform to the basic principle that evidence must be relevant and the probative value must be weighed against its prejudicial effect. Relevance and probative value must be determined in the context of the purpose for which the evidence is tendered.

In the context of sexual assaults, this limitation on cross-examination has been recognized to prevent its use for improper purposes. Sexual assault is more than a simple act of violence. In the vast majority of cases it is gender based. It is an assault on human dignity and constitutes a denial of any concept of equality for women. Sections 15 and 28 of the *Charter* guarantee equality to men and women. These sections should also be taken into account in determining reasonable limitations on cross-examination of complainants. Generally, a complainant may be cross-examined for the purpose of eliciting evidence relating to consent and pertaining to credibility when the probative value of that evidence is not substantially outweighed by the danger of unfair prejudice. Cross-examination which relies upon "rape myths" will always be more prejudicial than probative and should not be admitted. The trial judge must consider all evidence presented at the voir dire and then determine if there is a legitimate purpose for the cross-examination. In each case, the trial judge must carefully balance the fundamentally important right of the accused to a fair trial against the need for reasonable protection of a complainant. If the cross-examination is permitted, the jury must be advised as to the proper use that can be made of the evidence derived from the cross-examination. As a general rule, a sexual assault trial should not become an occasion for putting the complainant's lifestyle and reputation on trial.

Here, once the medical records were properly admitted, in order to ensure a fair trial, cross-examination within these guidelines should have been permitted. The privacy of the complainant is an interest that merits protection, as does the need for a relationship of confidence between a patient and her psychiatrist. However, the right to privacy has to be balanced against the need to provide a fair trial. The trial judge had correctly refused to permit cross-examination for the purpose of determining "what kind of person the complainant is". However, it would have been appropriate to permit cross-examination on the medical record to determine if it would throw any light either on a possible motive of the complainant to allege that she was the victim of sexual assault or with regard to her conduct which might have led the accused to believe she was consenting to sexual intercourse. The denial of the opportunity to cross-examine, and the impossibility of ascertaining what the result of the cross-examination might have been, made it necessary to order a new trial.

Per Sopinka J. (Iacobucci J. concurring)

It was not appropriate to comment on s. 276 of the *Criminal Code* since the issue of its constitutionality was not before the court.

Per Lamer C.J.C.

The trial judge had erred in refusing the cross-examination on the medical records. The cross-examination had a proper purpose of determining whether there was evidence to support a defence of honest but mistaken belief or to support an allegation of fabrication. The denial of the opportunity of cross-examination had deprived the accused of his right to a fair trial.

Per McLachlin J. (dissenting) (La Forest and Gonthier JJ. concurring)

There should not be a new trial ordered on the ground of the denial of cross-examination. Before cross-examination is allowed on a complainant's prior sexual conduct, the defence must demonstrate a degree of relevance which outweighs the damage and disadvantage presented by the admission of such evidence. The evidence must be tendered for a legitimate purpose that logically supports a defence. Fishing expeditions should not be permitted.

Here, the only purpose given by the defence counsel was to show "what kind of person the complainant is". This was an improper purpose and the trial judge correctly refused to permit cross-examination for that purpose. The failure of defence counsel to raise a valid reason for the cross-examination was fatal. The trial judge did not have an independent duty to examine the material to determine whether there were any grounds for legitimate cross-examination. This would mean that there was no longer an onus on the accused to establish a legitimate purpose. Placing such a duty on a trial judge would be inconsistent with the adversarial nature of our trial process and would confuse and unduly complicate the prosecution of criminal offences.

No substantial wrong or miscarriage of justice had occurred. On the defence theory that the complainant may have fabricated her story to avoid a confrontation with her parents, there was ample evidence before the jury of the difficult relationship between the complainant and her parents and their disapproval of some of her conduct. On the defence of honest but mistaken belief in consent, there was a great deal of negative evidence before the jury about the complainant's "attitude and behaviour" on the day in question.

Per L'Heureux-Dubé J. (dissenting) (La Forest J. concurring)

The defence ordinarily has no access to the medical records of the complainant in a sexual assault case because in the vast majority of cases the information is irrelevant. Compulsion to disclose such records may only occur where there is serious reason to believe that, absent such disclosure, a miscarriage of justice is likely. Given the premium placed on the confidentiality of medical records in our society and the high degree of prejudice to the witness caused by delving into psychiatric records, such records should only be disclosed where there is cogent evidence to suggest that the competence of the witness to testify is in serious doubt or the witness' testimony with respect to the particular issue to be decided is unreliable because of the witness' medical condition and that without such disclosure, there would be serious prejudice to the accused's right to make full answer and defence. Mere suggestion, speculation or possibility raised by the defence, as in this case, that such records be relevant is not sufficient.

In the event that medical records are released to the defence, their use must be limited to the specific purpose for which they were released. Even when the records contain information relevant to other issues, cross-examination should, except in extraordinary cases, nevertheless remain impermissible. Particularly in the case of sexual assault trials, medical records should not be used to confront complainants about past sexual history or invoke rape mythology by raising issues which might be perceived by the trier of fact as establishing the "bad character" of the complainant. Here, the complainant's medical records should not have been disclosed to the accused and admitted into evidence. Once the medical records were disclosed, the trial judge was correct in restricting the purpose for which they could be used and in concluding that the privacy of the complainant was an important value.

The accused was not denied the opportunity to make full answer and defence. The material in these records was not relevant to the issue of consent. On the issue of honest but mistaken belief, the complainant's thoughts about the sexual assault after the fact were irrelevant. The material concerning the complainant's relationship with her parents was not relevant and was, in any event, before the jury. The defence intended to use the information to wage a wide-ranging attack on the credibility of the complainant and her "bad character". Inferences about credibility based on past sexual history are based on myths which work to the prejudice of a sexual assault complainant and which Parliament, in its amendments to the law governing sexual assault, has attempted to prevent. It could only have prejudiced the trial by distracting the jury from the narrow issue of consent.

Section 265(4) of the Criminal Code does not violate s. 11(d) or 11(f) of the Charter

Per Cory J. (Major and Iacobucci JJ. concurring)

Section 265(4) of the *Criminal Code*, applicable to all assaults, codifies the common law defence of mistake of fact. It simply sets out the basic requirements applicable to all defences: a defence should be put to the jury if a reasonable jury properly instructed could acquit on the basis of the evidence tendered in support of the defence. The trial judge must decide whether the evidence is sufficient to warrant putting a defence to a jury as this is a question of law. There is a two step procedure which must be followed. The trial judge must review the evidence and decide if it is sufficient to warrant putting the defence to the jury. If the evidence meets that threshold, the trial judge must put the defence to the jury, which in turn will weigh it and decide whether it raises a reasonable doubt. It is trite law that a trial judge must instruct the jury only upon those defences for which there is a real factual basis.

In a sexual assault trial, the defence of mistake of fact must meet the same threshold requirement demanded of all defences. There must be evidence that gives an air of reality to the accused's argument that he believed the complainant was consenting before the defence can be put to the jury. There is no requirement that there be evidence independent of the accused. However, the defence must be supported by evidence beyond the mere assertion of a mistaken belief. It can realistically only arise when the facts described by the complainant and accused generally correspond but their interpretations of those facts lead to different states of mind. Where the evidence is directly opposed as to whether there was consent, the defence of mistake as to consent simply cannot exist. However, even in the absence of the defence, the jury will nonetheless be bound to acquit if it has a reasonable doubt as to whether there was consent in light of the conflicting evidence on the issue. Here, the Court of Appeal correctly held that the trial judge erred in finding that the mistaken belief defence was unavailable on the basis of the accused's evidence alone. However, it erred in finding that there could be no air of reality to the defence on the basis that the complainant had been kidnapped by the accused. There had been no separate conviction on the kidnapping charge and the mens rea for the kidnapping charge and that for the sexual assault were so closely connected as to be inseparable.

The air of reality threshold in s. 265(4) does not infringe the presumption of innocence under s. 11(*d*) of the *Charter*. While the threshold in s. 265(4) of the *Criminal Code* creates an evidentiary burden on the accused in the sense he must raise sufficient evidence to justify its presentation to the jury, the burden of proving all the elements of the defence beyond a reasonable doubt rests squarely on the Crown.

Section 265(4) does not violate the accused's right to trial by jury guaranteed by s. 11(*f*) of the *Charter*. The requirement that there be an air of reality to the defence of honest but mistaken belief in consent is reasonable and entirely valid. It is no more than a reaffirmation of an integral part of the judge's role in supervising a jury trial. Also, it is appropriate that the trial judge determine the question of law as to whether there was sufficient evidence to raise a defence.

Per Sopinka J. (Lamer C.J.C. concurring)

Section 265(4) of the *Criminal Code* respecting the defence of mistaken belief requires no more of the accused than the discharge of an evidentiary burden to adduce or point to some evidence on the basis of which a reasonable jury properly instructed could acquit. The addition of the term "air of reality" cannot help in understanding the duty of the trial judge with respect to the defence of mistaken belief and might create confusion and error. It might encourage trial judges to weigh the evidence rather than apply the legal definition.

To exclude the defence of mistaken belief where the complainant's and accused's versions of what occurred were diametrically opposed would rest on the questionable assumption that either the accused's or the complainant's story is a complete account. The assessment of the evidence of a witness is not an all-or-nothing proposition. A jury may decide to accept only some of what a witness said and reject the rest.

Per McLachlin J. (dissenting) (La Forest and Gonthier JJ. concurring)

Before any defence can be put to the jury, the evidence must provide a basis for that defence. This requirement is sometimes described by saying that there must be an "air of reality" to the defence. In the case of sexual assault, to give an "air of reality" to the defence of honest but mistaken belief there must be evidence of lack of consent and evidence that notwithstanding the actual refusal, the accused honestly but mistakenly believed that the complainant was consenting. The bare assertion of the accused that he believed in consent is not enough to raise the defence of mistaken belief. The assertion must be supported to some degree by other evidence or circumstances. This support may come from the accused or from other sources. The defence of mistaken belief is not precluded where the evidence consists of two diametrically opposed stories, one alleging lack of consent and the other consent. While it may rarely occur, it seems possible for the jury to accept parts of the testimonies of both the complainant and the accused and conclude that, notwithstanding lack of actual consent, the accused honestly believed in consent.

Here, there was no evidence from the accused or from some other source supporting the accused's honest belief. At the very most, the undisputed facts were consistent with wilful blindness.

Per L'Heureux-Dubé J. (dissenting) (La Forest J. concurring)

Section 265(4) of the *Criminal Code* does not violate ss. 11(*d*) and 11(*f*) of the *Charter*. As with any defence, this section simply requires that there be a factual foundation or an "air of reality" to a defence before the trial judge is required to leave it with the jury.

In this case the defence of mistaken belief in consent was completely unwarranted given both the evidence and manner in which the defence was conducted. The defence proceeded entirely on the basis that the complainant willingly and eagerly consented to sexual relations, not that the accused may have been mistaken about whether she consented. While it was open to the jury to disbelieve the complainant and either believe or have reasonable doubt as to the testimony of the accused, the jury was obliged to reach their verdict on the basis of the evidence before them. Had the trial judge left the defence with the jury, he would have erred by inviting them to speculate on a third version of events wholly unsupported by the evidence of either party.

Annotation

The decision of the Supreme Court in *R. v. Pappajohn*, [1980] 2 S.C.R. 120, 14 C.R. (3d) 243, 19 C.R. (3d) 97, [1980] 4 W.W.R. 387, 111 D.L.R. (3d) 1, 52 C.C.C. (2d) 481, 32 N.R. 104 is often only remembered for its controversial ruling that the former crime of rape required proof of subjective awareness of the risk, and thus a mistaken but not necessarily reasonable belief in consent would be a defence. This substantive ruling was partly reversed by Parliament's declaration, as part of Bill C-49, that, in the case of sexual assaults, there can be no mistaken belief defence where:

the accused did not take reasonable steps, in the circumstances known to the accused at the time, to ascertain that the complainant was consenting. (s. 273.2(*b*) of the *Criminal Code*)

Now that the Supreme Court has in *R. v. Creighton*, [1993] 3 S.C.R. 3, 23 C.R. (4th) 189, 83 C.C.C. (3d) 346, 157 N.R. 1, 65 O.A.C. 321, 105 D.L.R. (4th) 632, 17 C.R.R. (2d) 1 declared a variety of objective offences constitutional it seems unlikely that this express resort to the reasonable standard will be declared to violate principles of fundamental justice under s. 7 of the *Canadian Charter of Rights and Freedoms*. See further Isabel Grant and Christine Boyle and also this writer in comments in the "Criminal Reports Forum" (23 C.R. (4th) 240) and earlier, "Sexual Assault: Substantive Issues Before And After Bill C-49" (1993) 35 Crim. L.Q.241. There are questions since *Creighton* as to whether Parliament's scheme adequately distinguishes intentional and negligent conduct for the purpose of punishment and whether courts should read into the reasonable steps approach a requirement of a marked departure from the norm. The majority in *Creighton* decides that on an objective standard no individual factors short of capacity need be considered. This may well not apply to sexual assault given that Parliament has specified that the accused must be judged "in the circumstances known to the accused at the time".

As a practical matter, the most important ruling in *Pappajohn* may well have been the evidentiary ruling. For a differently composed majority, McIntyre J. held that before a mistaken belief defence could be put to the jury it had to be supported by sources other than the accused:

To require the putting of the alternative defence of mistaken belief in consent, there must be, in my opinion, some evidence beyond the mere assertion of belief in consent by counsel ... This evidence must appear from or be supported by sources other than the [accused] in order to give it any air of reality. (at p. 283 [C.R.])

This special "air of reality" ruling seemed pragmatically designed to restrict the mistaken belief defence. It placed a corroboration requirement on the accused not required for any other type of defence. Despite criticism the Supreme Court prior to *Osolin* refused to change course. In *R. v. B. (E.H.)*, [1987] 1 S.C.R. 782, 58 C.R. (3d) 48, *(*sub nom. *R. v. B.)* [1987] 4 W.W.R. 577, 14 B.C.L.R. (2d) 196, *(*sub nom. *R. v. L.)* 75 N.R. 271, 33 C.C.C. (3d) 385, 39 D.L.R. (4th) 641, McIntyre J., for the court, held that the same test applied to the express mistake of belief defence enacted by Parliament in 1983 for all types of assault and sexual assault (s. 265(4)). Only Lamer J. expressed concern about the requirement of sources other than the accused, being of the view that this amounted to an unfair corroboration requirement and that the defence should be put in any case where the accused testifies as to a mistaken belief. In *R. v. Reddick*, [1991] 1 S.C.R. 1086, 5

C.R. (4th) 389, 64 C.C.C. (3d) 257, 122 N.R. 348, 47 O.A.C. 289, McLachlin J., for the majority, adopts and applies the above-quoted *Pappajohn* requirement of sources other than the accused.

It seems clear that the special "air of reality" ruling in *Pappajohn* has accounted for the reality that the mistaken belief defence has rarely been put to juries. Since *Pappajohn* there have been few decisions with written reasons reaching the *Criminal Reports* where an acquittal has been based on a mistaken belief defence and only one such acquittal confirmed by a Court of Appeal (*R. v. Weaver* (1990), 80 C.R. (3d) 396, 110 A.R. 396 (C.A.)).

This pattern is likely to change with the decision in *R. v. Osolin*. The court unanimously decides that the air of reality test declared in s. 265(4) does not violate the presumption of innocence of s. 11(*d*) of the *Charter* nor the right to trial by jury under s. 11(*f*). Mr.Justice Cory expressly rejects the McIntyre view that there must be a source of evidence other than the accused:

In my view, this proposition cannot be correct. There is no requirement that there be evidence independent of the accused in order to have the defence put to the jury. However, the mere assertion by the accused that "I believed she was consenting" will not be sufficient. What is required is that the defence of mistaken belief be supported by evidence beyond the mere assertion of a mistaken belief. (at p. 36)

The court is unanimous on this point. McLachlin J. expressly adopts Cory J.'s "resolution of the confusion which existed in the earlier cases". This is as close as Her Ladyship gets to acknowledging that her previous position for the court in *Reddick* has changed.

The court in *Osolin* does not accept all of the Lamer position in *B. (E.H.)*. The mistaken belief defence need not always be put where the accused testifies as to mistaken belief. Like any other defence the trial judge will have to assess whether this provides the evidentiary basis to put the defence to the jury.

Submerged in the complex series of judgments in *Osolin* is a clear majority for the proposition that the defence of mistaken belief may be available even where the complainant and the accused relate diametrically opposed versions of what occurred. On this point Cory and Major JJ. are the sole dissenters. The majority view will require elaboration in further cases but would appear to further point to trial judges having to be more receptive to mistake defences.

The prospect of *Osolin* leading to more mistaken belief defences being left with juries should not be a matter for concern. If Bill C-49 is to have its intended effect there should be more trials involving allegations that sexual behaviour was unreasonable in the circumstances. Given the way s. 273.2 is drafted and *Osolin*, one can anticipate more defences of "She consented or, in the circumstances known to me, I took reasonable steps to ascertain whether she was consenting". The Supreme Court has rightly decided that whether the mistake defence goes to the jury should be left to the discretion of the trial judge and not limited by an arbitrary evidentiary rule which might prevent a fair trial.

The *Osolin* rulings on interpreting the new rape shield laws also point to greater willingness to consider bases for mistaken belief defences. For the majority, Mr. Justice Cory held that the trial judge should have allowed the defence counsel to cross-examine the complainant on her medical record. However, this was not for the reason advanced by defence counsel, to show "what kind of person the complainant is", but to determine a possible motive in the complainant to falsely complain or to support a defence of honest belief in consent. Cory J. wrote that, quite apart from submissions of defence counsel, it was the duty of the trial judge to ensure that the accused's rights with regard to cross-examination were protected. From *R. v. Seaboyer*, [1991] 2 S.C.R. 577, 7 C.R. (4th) 117, 128 N.R. 81, 6 C.R.R. (2d) 35, 66 C.C.C. (3d) 321, 83 D.L.R. (4th) 193, 48 O.A.C. 81, he determined that the trial judge always has the discretion to receive evidence when the probative value outweighs the prejudicial impact. What was forbidden by *Seaboyer* was only evidence which relied solely on "groundless myths and fantasized stereotypes". He summarized *Seaboyer* as follows:

Generally, a complainant may be cross-examined for the purpose of eliciting evidence relating to consent and pertaining to credibility when the probative value of that evidence is not substantially outweighed by the danger of unfair prejudice which might flow from it. (at p. 24)

This interpretation of *Seaboyer*, and consequently the legislation patterned on that case, s. 276 of the Code, indicates a willingness on the part of at least some members of the court to soften the rigidity of the apparent blanket exclusion in the legislation. This suggests that the court will read down the legislation in the future to make it constitutional. Although not cited, reading down is the suggested approach of David Paciocco, "The New Rape Shield Provisions in Section 276 Should Survive *Charter* Challenge" (1993), 21 C.R. (4th) 223, in contrast to the view of R.J. Delisle, "Potential Charter Challenges to the New Rape Shield Law" (1992), 13 C.R. (4th) 390 that the scheme is unconstitutional. Recognizing the existence of an overriding discretion even with respect to statutory provisions which do not appear to allow discretion is certainly consistent with earlier pronouncements of the court: see, e.g., *R. c. Potvin*, [1989] 1 S.C.R. 525, 68 C.R. (3d) 193, (sub nom. *R. v. Potvin)* 93 N.R. 42, 47 C.C.C. (3d) 289, 21 Q.A.C. 258, 42 C.R.R. 44, *R. v. L. (D.O.)* (1993), 25 C.R. (4th) 285, 161 N.R. 1, and *R. v. Corbett*, [1988] 1 S.C.R. 670, 64 C.R. (3d) 1, [1988] 4 W.W.R. 481, 85 N.R. 81, 41 C.C.C. (3d) 385, 28 B.C.L.R. (2d) 145, 34 C.R.R. 54. In the latter two decisions the court specifically recognized the need for discretion to make the particular statutory provisions constitutional. It would seem to be only a matter of time before the court recognizes that discretion is necessary to make s. 276 constitutional.

Don Stuart.

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Per Cory J. (Major J. concurring)

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Per Sopinka J.

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Per McLachlin J. (dissenting) (La Forest and Gonthier JJ. concurring)

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Statutes considered:

Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B of the Canada Act 1982 (U.K.), 1982, c. 11 —

s. 1

s. 7

s. 8

s. 11(*d*)

s. 11(*f*)

s. 15

s. 28

Criminal Code, R.S.C. 1985, c. C-46 —

s. 265(4)

s. 276 [re-en. S.C. 1992, c. 38, s. 2]

ss. 276.1-276.3 [en. S.C. 1992, c. 38, s. 2]

s. 276.4 [en. S.C. 1992, c. 38, s. 2]

s. 277

Criminal Code (sexual assault), An Act to amend the, S.C. 1992, c. 38 —

s. 2

Privacy Act, R.S.C. 1985, c. P-21.

Appeal from judgment reported at (1991), 10 C.R. (4th) 159, 7 B.C.A.C. 181, 15 W.A.C. 181 dismissing appeal from conviction on charges of sexual assault and kidnapping.

***Cory J. (Major J.* concurring):**

1 There are two basis issues raised on this appeal. One is whether the "air of reality" test which is set out in s. 265(4) of the *Criminal Code*, R.S.C. 1985, c. C-46, violated the appellant's constitutional rights under ss. 11(*d*) and 11(*f*) of the *Canadian Charter of Rights and Freedoms*. The other is whether the Court of Appeal erred in failing to grant a new trial on the basis of the restrictions imposed by the trial judge on the cross-examination of the complainant.

I. Factual Background

2 The complainant in this case is a 17-year-old girl. She had been in a psychiatric hospital in January and February of 1987, but by March 26, of that same year she was living with her parents near Ladysmith in British Columbia. Although she was 17 years of age, she had a limited education. She had completed Grade 8 and left school at 14 years of age. She is not physically a big girl, 5 feet 7 inches in height and weighing only 115 pounds.

3 On the morning of March 26, a friend by the name of Brad Dick, whom she had dated on a few occasions, called her and they arranged to meet at 11:00 o'clock that morning. Dick, who was in his mid twenties, arrived at the meeting place with a friend of his by the name of Ken Smith, who was in his thirties.

4 The three went to Jim Bragg's trailer, north of Ladysmith. There they drank some beer. From there, they went to Dual Mountain and then went to Boat Harbour. There Brad Dick and the complainant went to a secluded area and had consensual sexual relations.

5 The three friends eventually returned to the trailer. There Smith gave Dick a ride into town around 5:00 p.m. Smith returned and he, the complainant and Bragg spent time together drinking and playing cards. The complainant stayed with Bragg and Smith because in her words they seemed like "pretty nice guys" and she enjoyed their company. The three went for a drive in Smith's car but it was experiencing mechanical difficulties. It stalled some 100 feet from the trailer and they had to push it. While they were doing so, the appellant, Stephen Osolin, and Russell McCallum came by in another car. All five spent a few minutes in the trailer. Smith and the complainant went out to his car where they were kissing and petting. Bragg, McCallum and Osolin left the trailer to go to a pub. When they did so, Bragg told Smith and the complainant that they could use the trailer. Smith and the complainant then went into the bedroom of the trailer where they engaged in sexual intercourse.

6 Meanwhile at the pub, Bragg told McCallum and Osolin that the complainant was promiscuous, or in his words "easy", and they all could have a turn with her. McCallum and Osolin left Bragg at the pub and drove back to his trailer. There they barged into the bedroom, rousted Smith out of bed, took him outside and drove him some distance away from the trailer. In passing it should be noted that Smith, who was 5 feet 7 inches and weighing 150 pounds, was considerably smaller than the other men.

7 Back in the bedroom, McCallum grabbed the complainant and threw her onto the bed. She was shocked and scared. McCallum touched and fondled her and would not let her get dressed. He attempted to have sexual intercourse with her but she struggled. He became angry and his threatening words made her fearful. She heard the car returning and tried to put on her blouse, but once again McCallum prevented her.

8 In doing so, he tore her Viking pendant from her neck. She saw it fall onto the bed and clutched it. Later she let the pendant fall in the cabin in Parksville, where it was located by the police. She managed to get her underpants on as Osolin entered the room.

9 She stated that someone hit her on the side of the head. Osolin threw her over his shoulder and carried her out to the car. When she was being carried out she said that she wanted her clothes. The complainant said that she resisted leaving the trailer, said that she wanted her clothes but that her head was hit on the door jamb and Osolin struck her on the face. Neither Osolin nor McCallum got her clothes for her. The appellant admitted that he "overrode" her complaints about being forced while naked to leave the trailer. The complainant testified that Osolin then put the complainant in the back seat of the car and tore off her underpants. Osolin and McCallum both testified that the complainant was nude at this time and Osolin had not ripped off her underpants. The police

later found a pair of torn women's underwear pants lying on the ground some 20 feet from the front of the trailer.

10 Osolin got into the back seat with the complainant and McCallum then drove away. She was on her left side and Osolin would not let her sit up. She said that she was crying at the time and unable to move. Osolin fondled her breasts and tried to pry her legs apart with his hands. She did not consent to any of the touching and said she was struggling when he forcefully hit her on the side of the face. She specifically denied kissing, petting and drinking beer or having a friendly conversation with him. Osolin testified that the complainant did nothing which indicated she was not consenting.

11 Eventually the car stopped and Osolin pulled her out. He held her by the right bicep and pulled her through a fence. McCallum drove away. At this time she was wearing only a pair of white socks. She was very cold, upset and crying. In the cabin he pulled her into a bedroom. The complainant testified that he threw her on the bed and tied her hands behind her back with a cord, which he pulled from a lamp. When Osolin left the bedroom for a moment, she ran to a window and tried to escape but he returned with more electrical cords which he had torn from an appliance. He tied her spread-eagle to the bed frame. She testified that she was screaming and he said "I could kill you so easily" and would do unless she was "good". He returned to the bedroom with soap and a razor and started shaving her pubic hair. She told him to stop but he persisted. She managed to hit him with one knee and he tied that leg tighter. He then raped her. The appellant testified that the complainant was an eager although not active participant in all the acts leading up to and including sexual intercourse.

12 After the act of intercourse he untied her and she asked if she could take a bath. Although she locked the bathroom door, the appellant pried it open and came in. She testified that while in the bathroom the appellant apologized for all that had happened. The appellant said he apologized only for using the razor, because there was nothing else to apologize for. He gave her an old nightgown and a sweater to wear. When she got out of the bath, the two laid down on the bed and either passed out or fell asleep. The complainant testified that when she awoke the appellant was touching her again. The complainant became hysterical and said she wanted to go home. The appellant testified that he was awoken by the complainant saying she had to go to Ladysmith. The appellant said McCallum would pick them up in the morning, but when she insisted on leaving he put her out of the cabin and pointed her to the highway.

13 Shortly before 3:30 a.m. an R.C.M.P. constable found the complainant on the highway, screaming and crying hysterically. He asked her if she had been raped and she replied that she had. He drove her back to the police detachment where she asked to use the washroom and vomited. She continued to cry hysterically and was taken to the emergency room at the hospital in Nanaimo.

14 The medical examination revealed the complainant had a number of bruises, abrasions and scratches, including bruising, swelling and discolouration in the genital area. Generally, the injuries noted were more consistent with sexual assault than consensual intercourse.

15 The jury found the appellant guilty of both sexual assault and kidnapping. He was sentenced to 6 years on the count for sexual assault and 4 years for kidnapping, the sentences to be served concurrently.

II. Courts Below

Trial Court

16 The trial judge directed the jury that with respect to the charge of kidnapping the Crown had to demonstrate that the appellant had intended to confine the complainant against her will. With regard to sexual assault, he told the jury that lack of consent on the part of the complainant had to be proven beyond a reasonable doubt. He did not specifically tell the jury that the accused had to appreciate that the complainant was not consenting in order to commit the offence, and he declined to charge the jury with respect to the defence of honest but mistaken belief in consent. He ruled that there was no "air of reality" to the defence of mistake of fact as was required by the decisions in *R. v. Pappajohn*[1980] 2 S.C.R. 120, and *R. v. Sansregret*[1985] 1 S.C.R. 570. He stated "there must be evidence beyond the mere assertion of belief in consent by the accused. That evidence must appear from or be supported by sources other than the accused in order to give it an air of reality".

17 During the course of the trial the complainant's mental health records were admitted. They had been obtained in order to permit an expert to consider them on the issue of the complainant's competence to testify under oath. Counsel sought leave to cross-examine the complainant on those records, specifically on the following note in the records which is dated July 9, 1987:

> The hearing into the sexual assault has been postponed until September. [L.] now wishes that it had not been postponed. She is concerned that her attitude and behaviour may have influenced the man to some extent and is having second thoughts about the entire case.

18 The trial judge refused to permit counsel to cross-examine on this note ruling that the records had been made available for the limited purpose of determining competence of the complainant to testify under oath. Further exploration by means of cross-examination would in his opinion be a violation of the complainant's right to privacy.

The Court of Appeal (1991), 7 B.C.A.C. 181, 15 W.A.C. 181, 10 C.R. (4th) 159

19 Southin J.A. writing for the court considered first whether the trial judge had erred in failing to charge the jury with respect to the mens rea required for the offences of sexual assault and kidnapping. On the basis of *R. v. R. (J.D.)*, [1987] 1 S.C.R. 918, and *R. v. B. (E.H.)*, [1987] 1 S.C.R.

782, she held with regard to sexual assault that the trial judge had erred in his appreciation of the air of reality requirement. She expressed the opinion that the testimony of the accused alone might give an air of reality to the defence of mistaken belief that the complainant was consenting.

20 However, she found that while the trial judge had erred on this issue, the error did not result in any misdirection to the jury, as there was nothing in the appellant's evidence which required the trial judge to charge the jury on the mens rea required to commit the offence of kidnapping. The appellant had never testified that he believed that the complainant was consenting to being taken to Parksville without any clothes, nor that it was not his intention to confine her against her will. In any event, she expressed the opinion that he would not have been believed, if he had testified in such a manner. In the absence of the commission of the offence of kidnapping by the appellant, she noted that it might have been preferable that the issue of mens rea had been left with the jury on the question of sexual assault. However she wrote (at p. 184 C.R.):

> ... an argument that a man who, knowingly or recklessly, forcibly confined a woman against her will can have an honest belief that, during her confinement, she was freely consenting to his sexual advances has no air of reality about it at all.

21 Thus it was held that the omission from the charge of any direction as to mens rea for sexual assault did not amount to a misdirection.

22 Southin J.A. then dealt with the appellant's alternative submis sion that the trial judge's decision not to refer to the defence of honest but mistaken belief in his charge to the jury constituted a violation of the appellant's rights to be presumed innocent until proven guilty and to a trial by jury as guaranteed by ss. 11(*d*) and 11(*f*) of the *Charter*. She rejected this contention holding that the *Charter* does not require the judge in his charge to draw to the attention of the jury all legally possible issues regardless of whether they arise on the evidence.

23 Lastly on the cross-examination question, it was held that the trial judge erred in basing his refusal to allow cross-examination on the complainant's mental health records on the grounds that it would violate her right to privacy. It was held that if the cross-examination on the records went to the credibility of the complainant then counsel for the appellant should have been permitted to cross-examine. However, since the trial record did not disclose what questions counsel proposed to ask, it was determined that this ground of appeal must also fail.

III. Analysis

24

A. The Trial Judge's Restriction of Cross-examination

(1) Cross-examination as a Fundamental Aspect of a Fair Trial

25 There can be no question of the importance of cross-examination. It is of essential importance in determining whether a witness is credible. Even with the most honest witness cross-examination can provide the means to explore the frailties of the testimony. For example, it can demonstrate a witness' weakness of sight or hearing. It can establish that the existing weather conditions may have limited the ability of a witness to observe, or that medication taken by the witness would have distorted vision or hearing. Its importance cannot be denied. It is the ultimate means of demonstrating truth and of testing veracity. Cross-examination must be permitted so that an accused can make full answer and defence. The opportunity to cross-examine witnesses is fundamental to providing a fair trial to an accused. This is an old and well established principle that is closely linked to the presumption of innocence. See *R. v. Anderson* (1938), 70 C.C.C. 275(Man. C.A.); *R. v. Rewniak*194993 C.C.C. 142 [7 C.R. 127] (Man. C.A.); *Abel v. R.* (1955), 115 C.C.C. 119 [23 C.R. 163] (Que. C.A.); *R. v. Lindlau* (1978), 40 C.C.C. (2d) 47(Ont. C.A.). The importance of the right to cross-examine was well expressed by the court in the reasons of Ritchie J. in *R. v. Titus*[1983] 1 S.C.R. 259, at pp. 263-64. There he wrote:

> I think it essential to stress the purpose for which the cross- examination is permitted, namely, in order that the defence may explore to the full all factors which might expose the frailty of the evidence called by the prosecution. That the accused as he stands in the prisoner's box on trial for murder is deemed to be innocent until proven guilty beyond a reasonable doubt is one of the fundamental presumptions inherent in the common law and as such the accused is entitled to employ every legitimate means of testing the evidence called by the Crown to negative that presumption and in my opinion this includes the right to explore all circumstances capable of indicating that any of the prosecution witnesses had a motive for favouring the Crown.

26 In *R. v. Seaboyer*[1991] 2 S.C.R. 577, it was once again emphasized that the right to cross-examine constitutes a principle of fundamental justice that is critical to the fairness of the accused's trial. In that case, the right to cross-examine was placed in the context of the right to make full answer and defence (at p. 608, per McLachlin J.):

> The right of the innocent not to be convicted is dependent on the right to present full answer and defence. This, in turn, depends on being able to call the evidence necessary to establish a defence and to challenge the evidence called by the prosecution.
>
> . . . . .
>
> In short, the denial of the right to call and challenge evidence is tantamount to the denial of the right to rely on a defence to which the law says one is entitled. The defence which the law

> gives with one hand, may be taken away with the other. Procedural limitations make possible the conviction of persons who the criminal law says are innocent.

27 Cross-examination is all the more crucial to the accused's ability to make full answer and defence when credibility is the central issue in the trial. Such was the finding made by the Ontario Court of Appeal in *R. v. Anandmalik*19846 O.A.C. 143, at p. 144:

> In a case where the guilt or innocence of the [accused] largely turned on credibility, it was a serious error to limit the [accused] of his substantial right to fully cross-examine the principal Crown witness. It would not be appropriate in the circumstances to invoke or apply the curative provisions of s. 613(1)(b)(iii).

The same point was made by the Alberta Court of Appeal in *R. v. Giffin* (1986), 69 A.R. 158, at p. 159:

> We agree ... that the events about which counsel sought to cross-examine were relevant on the question of the credibility of the witness ... The accused in this case cannot be said to have had an opportunity for a fair answer and defence when he was not permitted to ask them.

To the same effect is *R. v. Wallick* (1990), 69 Man. R. (2d) 310(C.A.), where at p. 311 it was said:

> Cross-examination is a most powerful weapon of the defence, particularly when the entire case turns on credibility of the witnesses. An accused in a criminal case has the right of cross-examination in the fullest and widest sense of the word as long as he does not abuse that right. Any improper interference with the right is an error which will result in the conviction being quashed.

28 Thus it can be seen that the right to cross-examine has always been held to be of fundamental importance in a criminal trial. That right is now protected by ss. 7 and 11(*d*) of the *Charter*. As a result it should be interpreted in the "broad and generous manner befitting its constitutional status" (see *R. c. Potvin*[1989] 1 S.C.R. 525, at p. 544).

(2) Limitations on the Right to Cross-examine

29 Despite its importance the right to cross-examine has never been unlimited. It must conform to the basic principle that all evidence must be relevant in order to be admissible. In addition the probative value of evidence must be weighed against its prejudicial effect. See *Wigmore on Evidence*, vol. 1A (Tillers rev. 1983), at pp. 969 and 975. Lamer J. (as he then was) commented on the need for cross-examination to comply with these two principles in *R. v. Morris*[1983] 2 S.C.R. 190, at p. 201:

> Thayer's statement of the law which is still the law in Canada, was as follows:

> (1) that nothing is to be received which is not logically probative of some matter requiring to be proved; and (2) that everything which is thus probative should come in, *unless a clear ground of policy or law excludes it*.

To this general statement should be added the discretionary power judges exercise to exclude logically relevant evidence

> ... as being of too slight a significance, or as having *too conjectural and remote a connection; others, as being dangerous, in their effect on the jury, and likely to be misused or overestimated by that body; others, as being impolitic, or unsafe on public grounds*; others, on the bare ground of precedent. It is this sort of thing ... — the rejection on one or another practical ground, of what is really probative, — which is the characteristic thing in the law of evidence; stamping it as the child of the jury system.

[Emphasis added.]

30 Relevance and probative value must be determined in the context of the purpose for which evidence is tendered. Evidence relevant and probative to one issue may not be relevant and probative to another. In the context of sexual assaults, this limitation on cross-examination has been recognized to prevent its use for improper purposes. For example, it cannot be used to elicit the prior sexual history of a complainant for the purpose of impugning her credibility. It has been recognized that the myth that for some reason the complainant's credibility would be affected by prior sexual experience is completely groundless. In *Seaboyer*, supra, s. 277 of the *Criminal Code*'s prohibition of cross-examination on prior sexual history for the purpose of impugning credibility of the complainant was upheld in the following terms (at pp. 612-13, per McLachlin J.):

> Section 277 excludes evidence of sexual reputation for the purpose of challenging or supporting the credibility of the plaintiff. The idea that a complainant's credibility might be affected by whether she has had other sexual experience is today universally discredited. There is no logical or practical link between a woman's sexual reputation and whether she is a truthful witness. It follows that the evidence excluded by s. 277 can serve no legitimate purpose in the trial. Section 277, by limiting the exclusion to a purpose which is clearly illegitimate, does not touch evidence which may be tendered for valid purposes, and hence does not infringe the right to a fair trial.

31 In contrast, s. 276 of the *Criminal Code* was struck down since it provided a blanket prohibition on cross-examination on previous sexual history of the complainant in a sexual assault case regardless of the purpose for which that evidence was being adduced. The court held that such evidence could not be said to be of such trifling weight that its prejudicial effect would always outweigh its probative value (*Seaboyer*, supra, at p. 613).

32 The issue of admissibility of evidence in a sexual assault case requires a careful balancing. On one hand there must be care and sensitivity exhibited to ensure that the complainant's cross-examination is relevant and pertinent and not needlessly extended for improper purposes. On the other hand the accused's right to a fair trial must always be protected. This principle was accepted in *Seaboyer*, supra, and is reflected in Parliament's enactment of new provisions to replace the former s. 276 (*An Act to amend the Criminal Code (sexual assault)*, S.C. 1992, c. 38, s. 2, which came into force August 15, 1992). These provisions aim directly at preventing the use of cross-examination and introduction of evidence for improper purposes. The new section provides:

> 276. (1) In proceedings in respect of an offence under section 151, 152, 153, 155 or 159, subsection 160(2) or (3) or section 170, 171, 172, 173, 271, 272 or 273, evidence that the complainant has engaged in sexual activity, whether with the accused or with any other person, is not admissible to support an inference that, by reason of the sexual nature of that activity, the complainant
>
> (*a*) is more likely to have consented to the sexual activity that forms the subject-matter of the charge; or
>
> (*b*) is less worthy of belief.
>
> (2) In proceedings in respect of an offence referred to in subsection (1), no evidence shall be adduced by or on behalf of the accused that the complainant has engaged in sexual activity other than the sexual activity that forms the subject-matter of the charge, whether with the accused or with any other person, unless the judge, provincial court judge or justice determines, in accordance with the procedures set out in sections 276.1 and 276.2, that the evidence
>
> (*a*) is of specific instances of sexual activity;
>
> (*b*) is relevant to an issue at trial; and
>
> (*c*) has significant probative value that is not substantially outweighed by the danger of prejudice to the proper administration of justice.
>
> (3) In determining whether evidence is admissible under subsection (2), the judge, provincial court judge or justice *shall take into account*
>
> (*a*) the interests of justice, including the right of the accused to make a full answer and defence;
>
> (*b*) society's interest in encouraging the reporting of sexual assault offences;
>
> (*c*) whether there is a reasonable prospect that the evidence will assist in arriving at a just determination in the case;

> (*d*) *the need to remove from the fact-finding process any discriminatory belief or bias*;
>
> (*e*) *the risk that the evidence may unduly arouse sentiments of prejudice, sympathy or hostility in the jury*;
>
> (*f*) the potential prejudice to the *complainant's personal dignity* and right of privacy;
>
> (*g*) the right of the complainant and of every individual to personal security and to the full protection and benefit of the law; and
>
> (*h*) any other factor that the judge, provincial court judge or justice considers relevant. [Emphasis added.]

Sections 276.1 to 276.3 deal with application for a hearing, exclusion of the jury and public and publication bans. Finally s. 276.4 provides:

> 276.4 Where evidence is admitted at trial pursuant to a determination made under section 276.2, the judge shall instruct the jury as to the uses that the jury may and may not make of that evidence.

33 These statutory provisions mirror the concern for the appropriate protection of the interest of the complainants in sexual assault cases that were set forth in *Seaboyer*. Both the reasons of McLachlin J. and the new provisions of the Code suggest the factors which should be considered in limiting the scope of cross-examination of a complainant in a sexual assault trial. It cannot be forgotten that a sexual assault is very different from other assaults. It is true that it, like all the other forms of assault, is an act of violence. Yet it is something more than a simple act of violence. Sexual assault is in the vast majority of cases gender based. It is an assault upon human dignity and constitutes a denial of any concept of equality for women.

34 The reality of the situation can be seen from the statistics which demonstrate that 99 per cent of the offenders in sexual assault cases are men and 90 per cent of the victims are women. See *Gender Equality in the Canadian Justice System: Summary Document and Proposals for Action* (April 1992), at p. 13. We have seen that the accused's rights to a fair trial and to cross-examine are protected by the common law and given constitutional sanctity by ss. 7 and 11(*d*). However in the context of sexual assault the rights of the complainant cannot be completely overlooked. The provisions of s. 15 and s. 28 of the *Charter* guaranteeing equality to men and women, although not determinative should be taken into account in determining the reasonable limitations that should be placed upon the cross-examination of a complainant. It is only right that reasonable limitations be placed upon such cross-examination. A complainant should not be unduly harassed and pilloried to the extent of becoming a victim of an insensitive judicial system. Yet a fair balance must be achieved so that the limitations on the cross-examination of complainants in sexual assault cases do not interfere with the right of the accused to a fair trial.

35 In *Seaboyer* it was stressed that the trial judge must be responsible for ensuring that only probative evidence is admitted and that the purpose for which that evidence is admitted is legitimate. At p. 634 the following appears:

> First, the judge must assess with a high degree of sensitivity whether the evidence proffered by the defence meets the test of demonstrating a degree of relevance which outweighs the damages and disadvantages presented by the admission of such evidence ... The trial judge must ensure that evidence is tendered for a legitimate purpose, and that it logically supports a defence. The fishing expeditions which unfortunately did occur in the past should not be permitted. The trial judge's discretion must be exercised to ensure that neither the *in camera* procedure nor the trial become forums for demeaning and abusive conduct by defence counsel.
>
> It is hoped that a sensitive and responsive exercise of discretion by the judiciary will reduce and even eliminate the concerns which provoked legislation such as s. 276, while at the same time preserving the right of an accused to a fair trial.

36 The reasons in *Seaboyer* make it clear that eliciting evidence from a complainant for the purpose of encouraging inferences pertaining to consent or the credibility of rape victims which are based on groundless myths and fantasized stereotypes is improper. A number of rape myths have in the past improperly formed the background for considering evidentiary issues in sexual assault trials. These include the false concepts that: women cannot be raped against their will; only "bad girls" are raped; anyone not clearly of "good character" is more likely to have consented. (See C. MacKinnon, *Toward a Feminist Theory of the State* (1989), at p. 175; L.L. Holmstrom and A.W. Burgess, *The Victim of Rape: Institutional Reaction* (1983); and *Gender Equality in the Canadian Justice System*, supra, at p. 18.) In *Seaboyer*, supra, McLachlin J. observed that these myths were now discredited at p. 604:

> Evidence that the complainant had relations with the accused and others was routinely presented (and accepted by judges and juries) as tending to make it more likely that the complainant had consented to the alleged assault and as undermining her credibility generally. These inferences were based not on facts, but on the myths that unchaste women were more likely to consent to intercourse and in any event, were less worthy of belief. These twin myths are now discredited.

37 It might be helpful to summarize the principles that can be taken from *Seaboyer* with regard to the cross-examination of complainants. Generally, a complainant may be cross-examined for the purpose of eliciting evidence relating to consent and pertaining to credibility when the probative value of that evidence is not substantially outweighed by the danger of unfair prejudice which might flow from it. Cross-examination for the purposes of showing consent or impugning credibility which relies upon "rape myths" will always be more prejudicial than probative. Such

evidence can fulfil no legitimate purpose and would therefore be inadmissible to go to consent or credibility. Cross-examination which has as its aim to elicit such evidence should not be permitted. It will be up to the trial judge to take into consideration all of the evidence presented at the voir dire and to then determine if there is a legitimate purpose for the proposed cross-examination.

38 In each case the trial judge must carefully balance the fundamentally important right of the accused to a fair trial against the need for reasonable protection of a complainant, particularly where the purpose of the cross-examination may be directed to "rape myths". In order to assure the fairness of the trial, where contentious issues arise as to the cross-examination of the complainant a voir dire should be held. In the voir dire it will be necessary to show either by way of submissions of counsel, affidavit or viva voce evidence that the proposed cross-examination is appropriate. If at the conclusion of the voir dire the cross-examination is permitted then the jury must be advised as to the proper use that can be made of the evidence derived from the cross-examination. As a general rule the trial of an accused on a charge of sexual assault need not and should not become an occasion for putting the complainant's lifestyle and reputation on trial. The exception to this rule will arise in those relatively rare cases where the complainant may be fraudulent, cruelly mischievous or maliciously mendacious.

(3) Application to the Facts of this Case

39 Some 100 pages of medical records were placed before the court in order to determine the complainant's reliability to testify under oath. Counsel for the appellant sought to cross-examine the complainant on them, particularly on the notation made on July 9, 1987, referred to above in the summary of the reasons of the trial court.

40 Before this court it was argued that cross-examination on this entry might have elicited evidence which would be relevant to the appellant's belief in the complainant's consent.

41 It will be remembered that the trial judge refused cross-examination on the ground that it would be a violation of the complainant's privacy to use the medical records for any purpose other than determining her ability to testify under oath. The Court of Appeal held that the trial judge had erred, but concluded that there was nothing in the medical records which would allow it to deduce what questions counsel at trial proposed to ask had he been permitted to make use of those records. Therefore the Court of Appeal found that it could not properly deal with the ruling on the cross-examination.

42 There has been no submission made that the medical records were improperly before the court. It was accepted by all parties that they were necessary to determine the issue as to the complainant's ability to testify under oath. Once the medical records were properly admitted, then it was open to the defence to cross-examine upon them in appropriate circumstances. This should not be taken to mean that medical or psychiatric records of complainants in sexual cases will automatically be admissible. There must be a sound basis in relevance for their admission. In most

cases there should be a reasonably close temporal connection between the medical reports and the assault.

43 It is true that the privacy of the complainant is an interest that merits protection as does the need for a relationship of confidence between a patient and her psychiatrist. However, that right to privacy must be balanced against the need to provide a fair trial for the accused and to avoid a miscarriage of justice. Once the medical reports were properly admitted, then in order to ensure a fair trial, cross-examination upon them within the guidelines set out earlier, should have been permitted.

44 The purpose of the cross-examination must be a significant factor in determining if it is appropriate. Here the defence counsel in submissions to the trial judge indicated that the cross-examination would be directed towards "what kind of person the complainant is". This on its face appears to be the very sort of improper purpose for which evidence cannot be adduced and a jury would have to have been cautioned to that effect. Without anything further as to the object it would seem that the trial judge was correct in refusing to permit cross-examination for that purpose.

45 However, quite apart from the submissions of the defence counsel, it is the duty of the trial judge to ensure that the accused's rights with regard to cross-examination, which are so essential to the defence, are protected. The trial judge had before him all the medical records. It would have been appropriate to permit cross-examination with regard to the July 9 record, particularly to determine if it would throw any light either upon a possible motive of the complainant to allege that she was the victim of sexual assault or with regard to her conduct which might have led the appellant to believe that she was consenting to sexual advances.

46 There was then a sound basis for permitting cross-examination upon the medical reports, particularly the notation of July 9. In the absence of that cross-examination, it is impossible to know what evidence might have been adduced. When the opportunity to cross-examine was denied, the accused was deprived of his right to a fair trial. As Wilson J. stated in *Potvin*, supra, at p. 543:

> ... it is the opportunity to cross-examine and not the fact of cross-examination which is crucial if the accused is to be treated fairly.

47 I would repeat for the purposes of emphasis that the cross-examination of a complainant can only be undertaken for proper purposes and its ambit may well be restricted. Although cross-examination on the medical records ought to have been permitted in this case, that does not mean that it will necessarily bring forth evidence helpful to the position of the appellant. For example what the complainant said to her counsellor on July 9, could well reflect a victim's unfortunate and unwarranted feelings of guilt and shame for actions and events that were in no way her fault. Feelings of guilt, shame and lowered self-esteem are often the result of the trauma of a sexual assault. If this is indeed the basis for her statement to the counsellor, then they could not in any way lend an air of reality to the accused's proposed defence of mistaken belief in the complainant's

consent. However, in the absence of cross-examination it is impossible to know what the result might have been.

48 In summary then, the opportunity to cross-examine on the medical record was essential to ensure that the accused had the benefit of a fair trial. The denial of that opportunity, and the impossibility of ascertaining what might have been the result of the cross-examination, make it necessary to order a new trial on those grounds.

49 However, the appellant also challenges the validity of s. 265(4) of the *Criminal Code* and that issue must be resolved.

B. Section 265(4) of the Criminal Code: the Mistake of Fact and Defence

50 Section 265(4) provides as follows:

> 265. ...
>
> (4) Where an accused alleges that he believed that the complainant consented to the conduct that is the subject-matter of the charge, a judge, if satisfied that there is sufficient evidence and that, if believed by the jury, the evidence would constitute a defence, shall instruct the jury, when reviewing all the evidence relating to the determination of the honesty of the accused's belief, to consider the presence or absence of reasonable grounds for that belief.

51 The appellant's first submission is that the courts below erred in their finding that the evidence was insufficient to justify putting the defence of mistaken belief in the complainant's consent to the jury. In the absence of any evidence which might be held to be admissible arising from a cross-examination on the medical records at a new trial, and considering only the evidence presented at the trial it would be difficult to find any error in that decision. Here the evidence of the complainant was emphatically to the effect there was no consent and that nothing she said or did would give rise to a belief that she was consenting to the actions of the appellant. On the other hand the appellant testified that the complainant was throughout an enthusiastic and willing if not a particularly active participant in all his actions. On that basis there would appear to be no basis for considering the defence of a mistaken belief in the consent of the complainant. However, as there must be a new trial to allow for a cross-examination upon the medical records within the guidelines outlined, it would be inappropriate to discuss this issue in light of the fresh evidence that may be forthcoming.

52 The second position put forward by the appellant is that s. 265(4) violates the rights of an accused under ss. 11(*d*) (the presumption of innocence) and 11(*f*) (the right to trial by jury).

(1) Interpretation of Section 265(4)

53 Section 265(4) of the *Criminal Code* is applicable to all assaults, not just sexual assaults. It appears to be no more than the codification of the common law defence of mistake of fact. See *R.*

(J.D.), supra, and *R. v. Jobidon*[1991] 2 S.C.R. 714, at p. 730. In my view the section simply sets out the basic requirements which are applicable to all defences. Namely, that a defence should not be put to the jury if a reasonable jury properly instructed would have been unable to acquit on the basis of the evidence tendered in support of that defence. On the other hand, if a reasonable jury properly instructed could acquit on the basis of the evidence tendered with regard to that defence, then it must be put to the jury. It is for the trial judge to decide whether the evidence is sufficient to warrant putting a defence to a jury as this is a question of law alone. (See *Parnerkar v. R.*[1974] S.C.R. 449, and *Pappajohn*, supra.) There is thus a two step procedure which must be followed. First, the trial judge must review all the evidence and decide if it is sufficient to warrant putting the defence to the jury. Second, if the evidence meets that threshold, the trial judge must put the defence to the jury, which in turn will weigh it and decide whether it raises a reasonable doubt. See *Wigmore on Evidence*, supra, at pp. 968-69; and *Faid v. R.*[1983] 1 S.C.R. 265, at p. 276. I take this to be the meaning of the words "sufficient evidence" as they appear in s. 265(4).

54 It is trite law that a trial judge must instruct the jury only upon those defences for which there is a real factual basis. A defence for which there is no evidentiary foundation should not be put to the jury. This rule extends well beyond the defence of mistaken belief in consent and is of long standing. In *Kelsey v. R.*[1953] 1 S.C.R. 220, at p. 226, Fauteux J., writing for the majority, held:

> The allotment of any substance to an argument or of any value to a grievance resting on the omission of the trial Judge from mentioning such argument must be conditioned on the existence in the record of some evidence or matter apt to convey *a sense of reality* in the argument and in the grievance. [Emphasis added.]

55 In *Parnerkar*, supra, it was argued that the defence of provocation must be put to the jury if there was "any evidence" to support it. Fauteux C.J.C., writing for the majority, rejected this argument. At p. 454 he wrote:

> The function assigned to the jury with respect to the particular facts mentioned in s. 203(3) does not in any way differ from the function they have to decide all other questions of fact, whether these facts constitute elements of a crime or elements of an excuse or a justification for a crime charged. Indeed and in all of the cases, the valid exercise of the function of the jury is, according to the very words of the oath of office taken by them, to give a verdict according to evidence. They cannot go beyond the evidence and resort to speculation nor, of course, would it be proper for the trial judge to invite them to do so. If, then, the record is denuded of any evidence potentially enabling a reasonable jury acting judicially to find a wrongful act or insult of the nature and effect set forth in s. 203(3)(*a*) and (*b*), it is then, as a matter of law, within the area exclusively reserved to the trial judge to so decide and his duty to refrain from putting the defence of provocation to the jury.
>
> There is nothing, either expressed or necessarily implied, in the language of s. 203(3) to indicate an intention of Parliament to modify the principle according to which the sufficiency

> of evidence, which is an issue only where there is some evidence, is a question of fact for the jury and the absence of evidence is a question of law for the trial judge.

56 In *R. v. Squire*[1977] 2 S.C.R. 13, the court again dealt with the defence of provocation and the circumstances in which it should be put to a jury. Spence J. cited *Parnerkar*, supra, and concluded, at p. 21:

> As I have said, it is the duty of this Court to come to a decision whether those circumstances amount to any evidence that a reasonable jury acting judicially could find a wrongful act or insult sufficient to deprive an ordinary person of the power of self-control (s. 215(2)), and I am strongly of the view, with great respect to the opinion expressed by Martin J.A., that no jury acting judicially could come to such a conclusion.

57 Dickson J., as he then was, set out the two-pronged approach to defences in *Faid*, supra, at pp. 276-77:

> Whether the accused was provoked to lose his self-control is a question of fact for the jury. Where an accused testifies that he killed impulsively in hot blood it must be left to the jury to decide whether he is to be believed or not. There is, however, the preliminary question to be decided by the judge as a question of law, namely, whether there was any evidence produced on which a jury could decide that the accused acted in the heat of passion. The question as to whether or not there is any evidence is for the court, but subject to that the following matters are both questions of fact for the jury, namely, (i) the sufficiency of the particular wrongful act or insult to cause an ordinary person to be deprived of self-control, and (ii) whether the accused was actually deprived of his self-control ...

Dickson J. went on to state, at p. 278:

> In the present case the question is whether there was any evidence potentially enabling a reasonable jury acting judicially to find that Faid was deprived of the power of self-control by the provocation that he alleged he received.

The question is not whether there is some evidence, but rather, whether there is some evidence capable of supporting the particular defence alleged by the accused. This is made clear by the manner in which the court examined the evidence in *Faid*, supra, at p. 278:

> There can be no doubt that a reasonable jury acting judicially could find a blow to the head or a knife attack to be a wrongful act or insult of the nature and effect set forth in s. 215(3). Provocation no doubt existed here but that is not the end of the inquiry. The critical question to be answered in this case was whether there was any evidence that Faid was provoked. Was there any evidence of passion or that he "acted upon" the provocation on the sudden and before there was time for his passion to cool? We have only his evidence on the point and

> nowhere in that evidence does one find any suggestion that as a result of the blows or other conduct of Wilson he was enraged, or that his passions were inflamed, or that he killed in heat of blood.

58 There was evidence before the jury of acts that could amount to provocation. Yet it was not sufficient to support the defence argued since there was no evidence that Faid was provoked by those acts. Thus, the trial judge should not have put that specific defence to the jury.

59 The same reasoning was applied to the defence of necessity in *R. v. Morgentaler*1975[1976] 1 S.C.R. 616. Laskin C.J.C. (dissenting on another point) stated (at p. 654):

> The trial Judge in charging the jury on necessity could only have done so on the basis that there was evidence to go to the jury on which they could make a finding that the defence was made out.

Writing for the majority, supra, at p. 659, Pigeon J. stated:

> In *Parnerkar v. The Queen*, (at p. 454) Fauteux C.J., speaking for a majority, said:
>
> > If, then, the record is denuded of any evidence potentially enabling a reasonable jury acting judicially to find a wrongful act or insult of the nature and effect set forth in s. 203(3)(*a*) and (*b*), it is then, as a matter of law, within the area exclusively reserved to the trial judge to so decide and his duty to refrain from putting the defence of provocation to the jury.
>
> This reasoning is clearly applicable to every defence, seeing that it rests on the fundamental definition of the respective roles of judge and jury.

60 The same rule has been applied in the context of self-defence. In *R. v. Brisson*[1982] 2 S.C.R. 227, the court held that there must be an air of reality to the defence before it can be put to the jury. McIntyre J. for the majority on this issue stated (at p. 235):

> A trial judge must put to the jury all defences which arise from the evidence. There must, however, be some evidence sufficient to give an air of reality to a defence before the obligation to put a defence can arise.

61 This court again stated the requirement that there must be evidence sufficient to give an air of reality before a defence may be put to a jury in *Aalders c. R.R. v. Aalders*[1993] 2 S.C.R. 482. Writing for the majority, I held that the alternative verdict of manslaughter should not have been put to the jury because in light of the evidence presented in that case "[t]here was no air of reality to the defence" (pp. 505-6).

62 All these cases recognize the wise concept that the jury should only be instructed on defences that arise from the evidence which has been tendered. A juror should not be required to listen to instructions on defences which simply cannot be applicable to the case that they have heard. The comments to this effect made by Doherty J.A. in *R. v. Haughton* (1992), 11 O.R. (3d) 621(C.A.), at p. 625, are particularly appropriate.

63 In the realm of sexual assault cases the requirement of sufficient evidence has caused some confusion. Yet in my view these words require no more than the application of the principles that have been set out above. In *Pappajohn*, supra, it was held that the defence of mistaken belief in consent should only be put to the jury if there was an adequate and evidentiary foundation found for it. There McIntyreJ. writing for the majority stated that in order for the defence to be put to the jury it must have "an air of reality". He explained that term in these words (at pp. 126-27):

> Before any obligation arises to put defences, there must be in the evidence some basis upon which the defence can rest and it is only where such an evidentiary basis is present that a trial judge must put a defence.

He then went on to state (at p. 133):

> It would seem to me that if it is considered necessary in this case to charge the jury on the defence of mistake of fact, it would be necessary to do so in all cases where the complainant denies consent and an accused asserts it.

64 In *B. (E.H.)*, supra, McIntyre J. had a further opportunity to explore the defence of mistake and the air of reality requirement. He restated his earlier position (at pp. 789-90):

> It is well settled law that in his charge the trial judge must put to the jury all defences that may arise upon the evidence, whether they have been raised by counsel for the defence or not. In doing so, he is obliged to explain the law respecting the defence and to refer the jury to the evidence which may be relevant on that issue. Before putting the defence, however, the trial judge must decide whether in the facts before him the defence arises on the evidence. It is only when he decides this question in favour of the defence that he must leave it to the jury, for a trial judge is not bound to put every defence suggested by counsel in the absence of some evidentiary base. Indeed, he should not do so, for to put a wholly unsupported defence would only cause confusion.

He then continued, at p. 791:

> When the defence of mistake of fact — or for that matter any other defence — is raised, two distinct steps are involved. The first step for the trial judge is to decide if the defence should be put to the jury. It is on this question, as I have said, that the "air of reality" test is applied.

65 In a judgment released concurrently (*R.(J.D.)*, supra), Wilson J., writing for the court, also discussed the air of reality threshold (at p. 933):

> Although there has been some difference of view on the Court as to whether the accused's knowledge of lack of consent is to be described as an element of the offence or as a defence of mistake of fact, the Court has been unanimous in its agreement on one proposition — there must be evidence that gives an air of reality to the accused's argument that he believed the complainant was consenting before the issue goes to the jury.

And further at p. 938:

> In my view, the inclusion of s. 244(4) [now s. 265(4)] in the *Code* makes it clear that the trial judge should not in every case instruct the jury to consider whether the accused had an honest, though mistaken, belief in consent. The trial judge should only give such an instruction when certain threshold requirements have been met. These requirements are totally consistent with the previous case law.

66 It can be seen that this court has consistently held that the defence of mistake of fact in a sexual assault trial will be put to the jury so long as it meets the same threshold requirement as that demanded of all defences. The term "air of reality" simply means that the trial judge must determine if the evidence put forward is such that, if believed, a reasonable jury properly charged could have acquitted. If the evidence meets that test then the defence must be put to the jury. This is no more than an example of the basic division of tasks between judge and jury. It is the judge who must determine if evidence sought to be adduced is relevant and admissible. In the same way, it is the judge who determines if there is sufficient evidence adduced to give rise to the defence. If there has been sufficient evidence put forward, then the jury must be given the opportunity to consider that defence along with all the other evidence and other defences left with them in coming to their verdict. See *Morgentaler*, supra, at p. 659, per Pigeon J., and *Wigmore on Evidence*, supra, at p. 976.

67 The jury system has in general functioned exceptionally well. Its importance has been recognized in s. 11(*f*) of the *Charter*. One of the reasons it has functioned so very well is that trial judges have been able to direct the minds of jurors to the essential elements of the offence and to those defences which are applicable. That process should be maintained. The charge to the jury must be directed to the essential elements of the crime with which the accused is charged and defences to it. Speculative defences that are unfounded should not be presented to the jury. To do so would be wrong, confusing, and unnecessarily lengthen jury trials.

68 In coming to a conclusion as to the sufficiency of the evidence pertaining to a defence, the trial judge must consider all the evidence and all the circumstances. It is only when the totality of the evidence tendered at the trial has been taken into account and considered in the light of all

the relevant circumstances that the trial judge will be in a position to make a ruling. See *B. (E.H.)*, supra, at pp. 790-91, and *Squire*, supra, at p. 21.

69 In what circumstances will it be appropriate to consider a defence of mistaken belief in consent? It is the position of the intervener, the Attorney General for Ontario, that the defence cannot arise in situations where the evidence of the complainant and the accused are diametrically opposed. For example, if the accused states that there was willing consent and the complainant denies any consent then the defence simply cannot arise. In such circumstances for a jury to accept the defence of mistaken belief in consent it would have to reject all the evidence given at the trial including that tendered by both the complainant (no consent) and that of the accused (willing consent). Indeed in order to give effect to the defence a jury would have to speculate upon and give effect to a third version of events which was not in evidence. See, for example, *R. v. Guthrie* (1985), 20 C.C.C. (3d) 73(Ont. C.A.), at pp. 83-84.

70 McIntyre J. adverted to this issue when he stated in *Pappajohn*, supra, at pp. 133-34:

> Where the complainant says rape and the accused says consent, and where on the whole of the evidence, including that of the complainant, the accused, and the surrounding circumstances, there is a clear issue on this point, and where as here the accused makes no assertion of a belief in consent as opposed to an actual consent, it is unrealistic in the absence of some other circumstance or circumstances ... to consider the judge bound to put the mistake of fact defence.

71 This point was also made in the House of Lords decision in *Director of Public Prosecutions v. Morgan*[1976] A.C. 182(H.L.). Lord Cross explained at p. 204:

> So, as the judge made clear at the outset of his summing up, the only real issue in the case was whether what took place in the Morgan's house that night was a multiple rape or a sexual orgy. The jury obviously considered that the appellants' evidence as to the part played by Mrs. Morgan was a pack of lies and one must assume that any other jury would take the same view as to the relative credibility of the parties. That any jury which thought that the grounds for a belief in consent put forward by the defendants, which if truly held would have been eminently reasonable, were in fact never entertained by them at all, should in the same breath hold that they may have had an honest belief in consent based on different and unreasonable grounds is inconceivable.

Lord Hailsham stated the issue as follows, at p. 207:

> The choice before the jury was thus between two stories each wholly incompatible with the other, and in my opinion it would have been quite sufficient for the judge, after suitable warnings about the burden of proof, corroboration, separate verdicts and the admissibility of the statements only against the makers, to tell the jury that they must really choose between

> the two versions, the one of a violent and unmistakable rape of a singularly unpleasant kind, and the other of active co-operation in a sexual orgy, always remembering that if in reasonable doubt as to which was true they must give the defendants the benefit of it. In spite of the valiant attempts of counsel to suggest some way in which the stories could be taken apart in sections and give rise in some way to a situation which might conceivably have been acceptable to a reasonable jury in which, while the victim was found not to have consented, the appellants, or any of them could conceivably either reasonably or unreasonably have thought she did consent, I am utterly unable to see any conceivable half-way house. The very material which could have introduced doubt into matter of consent goes equally to belief and vice versa.

See also: *Bratty v. Attorney-General for Northern Ireland*[1963] A.C. 386(H.L.).

72 I agree with this position. The defence of mistake may arise when the accused and the complainant tell essentially the same story and then argue that they interpreted it differently. Realistically it can only arise when the facts described by the complainant and the accused generally correspond but the interpretation of those facts leads to a different state of mind for each of the parties. In a situation where the evidence given is directly opposed as to whether there was consent, the defence of mistake as to consent simply cannot exist. However, even in the absence of that defence, the jury will nonetheless be found to acquit if it has a reasonable doubt as to whether there was consent in light of the conflicting evidence on the issue. Lack of consent is an integral element of the offence. In cases where there is conflicting evidence on the issue the trial judge will always direct the jury that they must be satisfied beyond a reasonable doubt that consent was lacking.

73 It should be emphasized once again that the defence of mistaken belief in consent will be invoked rarely. In the vast majority of cases a sexual assault does not occur as a result of accident or mistake. It is simply not a crime that lends itself to commission by mistake or by accident. As Dickson J. dissenting in *Pappajohn*, supra, stated, at p. 155, it is not a crime that is committed per incuriam. Indeed it may well be appropriate for a trial judge to charge a jury that in the usual course of events this is not a crime that can be committed accidentally.

(2) Evidentiary Burden of Section 265(4)

74 The next question that must be addressed is what evidence must be adduced before the trial judge should put the defence of mistake to the jury. This issue has caused some confusion. In *Pappajohn*, supra, at p. 133, McIntyre J. stated:

> To require the putting of the alternative defence of mistaken belief in consent, there must be, in my opinion, *some evidence beyond the mere assertion of belief in consent by counsel for the appellant. This evidence must appear from or be supported by sources other than the appellant in order to give it any air of reality*. [Emphasis added.]

75 McIntyre J. clarified his position in *B. (E.H.)*, supra, at p. 790:

> There will not be an air of reality about a mere statement that "I thought she was consenting" not supported to some degree *by other evidence or circumstances* arising in the case. If that mere assertion were sufficient to require a trial judge to put the "mistake of fact" defence, it would be a simple matter in any rape case to make such an assertion and, regardless of all other circumstances, require the defence to be put. [Emphasis added.]

76 The question that arises is whether this means that in order for the defence to be put to the jury there must be some evidence of mis taken belief in consent emanating from a source other than the accused. In my view, this proposition cannot be correct. There is no requirement that there be evidence independent of the accused in order to have the defence put to the jury. However, the mere assertion by the accused that "I believed she was consenting" will not be sufficient. What is required is that the defence of mistaken belief be supported by evidence beyond the mere assertion of a mistaken belief. In the words of the Lord Morris of Borth-y-Gest, there must be more than a "facile mouthing of some easy phrase of excuse" (*Bratty* supra, at p. 417).

77 In order to have the defence put to the jury the same requirement must be satisfied as for all other defences. Just as a defence of provocation will not be put to the jury on the basis of the bare assertion of the accused that "I was provoked", see *Faid*, supra, at p. 278, so too the bare assertion of the accused that "I thought she was consenting" will not warrant putting the defence of mistaken belief in consent to the jury. The requisite evidence may come from the detailed testimony of the accused alone, on this issue or from the testimony of the accused coupled with evidence from other sources. For example, the complainant's testimony may supply the requisite evidence.

78 In the case at bar, the Court of Appeal correctly held that the trial judge erred in finding that the defence of mistake was unavailable on the basis of the accused's evidence alone. However, it erred in finding that there could be no air of reality to the defence on the basis that the complainant had been kidnapped by the appellant.

79 The basic premise that Southin J.A. elaborated is correct. That is to say the belief by a convicted kidnapper that his victim consented to a sexual assault on the occasion of the kidnapping has no air of reality. However, in this case there had not been a previous or separate conviction on the kidnapping charge. Indeed, the mens rea for the kidnapping charge and that for the sexual assault were so closely connected as to be inseparable. The kidnapping could not therefore be used as the grounds for rejecting the defence of mistake.

(3) Constitutionality of Section 265(4)

(i) The presumption of innocence: section 11(d)

80 The fundamental principle protected by s. 11(*d*) is the guarantee of a right to be presumed innocent, that is, that an accused is not to be convicted when there exists a reasonable doubt as to his guilt. Any law which places a persuasive burden on the accused to prove either the existence or non-existence of a fact essential to guilt will infringe upon the right guaranteed by s. 11(*d*). As I have indicated, all criminal defences must meet a threshold requirement of sufficient evidence, or in other words, an air of reality, before the trial judge should leave them with a jury. In my view this does not violate the presumption of innocence.

81 This court has earlier had occasion to consider whether such a requirement places an unacceptable reverse onus of proof on the accused. For example, in *Perka v. R.*[1984] 2 S.C.R. 232, DicksonJ. discussed this issue in relation to the defence of necessity (at pp. 257-58):

> Although necessity is spoken of as a defence, in the sense that it is raised by the accused, the Crown always bears the burden of proving a voluntary act. The prosecution must prove every element of the crime charged. One such element is the voluntariness of the act. Normally, voluntariness can be presumed, but if the accused places before the Court, through his own witnesses or through cross-examination of Crown witnesses, evidence sufficient to raise an issue that the situation created by external forces was so emergent the failure to act could endanger life or health and upon any reasonable view of the facts, compliance with the law was impossible, then the Crown must be prepared to meet that issue. There is no onus of proof on the accused.

In conclusion he stated at p. 259:

> [W]here the accused places before the Court sufficient evidence to raise the issue, the onus is on the Crown to meet it beyond a reasonable doubt.

82 The distinction between a burden of proof with regard to an offence or an element of the offence, and an evidentiary burden is critical. It must be remembered that the accused only bears the evidentiary burden of raising the issue of mistake, and in fact, only bears that burden if sufficient evidence has not already been raised by the prosecution's case. The reasons of Wilson J. in *R. (J.D.)*, supra, at p. 933, deal with this issue:

> In addition, I believe that previous case law establishes the proposition that, where there is sufficient evidence for the issue to go to the jury, the Crown bears the burden of persuading the jury beyond a reasonable doubt that the accused knew the complainant was not consenting or was reckless as to whether she was consenting or not. Using the language of Glanville

> Williams in *Criminal Law: The General Part* (2nd ed. 1961), at pp. 871-910, there are two separate burdens in relation to the issue of honest but mistaken belief — the evidentiary burden and the burden of persuasion. Evidence must be introduced that satisfies the judge that the issue should be put to the jury. This evidence may be introduced by the Crown or by the defence. The accused bears the evidentiary burden only in the limited sense that, if there is nothing in the Crown's case to indicate that the accused honestly believed in the complainant's consent, then the accused will have to introduce evidence if he wishes the issue to reach the jury. Once the issue is put to the jury the Crown bears the risk of not being able to persuade the jury of the accused's guilt.

McIntyre J. also made this fundamental distinction in *Pappajohn*, supra, at p. 127:

> What is the standard which the judge must apply in considering this question? Ordinarily, when there is any evidence of a matter of fact, the proof of which may be relevant to the guilt or innocence of an accused, the trial judge must leave that evidence to the jury so that they may reach their own conclusion upon it. Where, however, the trial judge is asked to put a specific defence to the jury, he is not concerned only with the existence or non-existence of evidence of fact. He must consider, assuming that the evidence relied upon by the accused to support a defence is true, whether that evidence is sufficient to justify the putting of the defence.

83 Section 265(4) does not create a statutory presumption. The accused seeking to raise the defence of mistaken belief only bears a tactical evidentiary burden. This point was made by Wilson J. in *R. (J.D.)*, supra, at p. 936:

> There is an evidentiary burden on the accused but (and this, in my opinion, is the important point) if there is sufficient evidence to put the issue before the jury, then the Crown has the burden of proving beyond a reasonable doubt that the accused did not have an honest belief as to consent. The defence of mistake, as DicksonJ. pointed out in *Pappajohn*, is simply a denial of *mens rea* which does not involve the accused in a burden of proof.

84 This position is supported by Professor Hogg:

> ... the presumption of innocence would not be infringed by a provision that imposed on the accused the burden of adducing sufficient evidence to raise a reasonable doubt as to the presence or absence of some fact that is an element of the offence, a collateral factor, an excuse or a defence. An evidentiary burden of this kind does not infringe s. 11(d), because a conviction could be avoided simply by the accused *raising a reasonable doubt* in the mind of the trier of fact. [Emphasis in original.]
>
> (*Constitutional Law of Canada*, 3rd ed., vol. 2 (Toronto: Carswell, 1992), at p. 48-15.)

85 Section 265(4) leaves the burden on the Crown in regard to all the essential elements of the offence. The prosecution must prove both the mens rea and the actus reus beyond a reasonable doubt: that the accused engaged in sexual intercourse with a woman who was not consenting, and that he intended to engage in sexual intercourse without the consent of the woman. It is always open to the jury even with out the defence of mistake of fact as to consent to find that there was a reasonable doubt as to the accused's mens rea and acquit. The mere fact of the air of reality requirement does not displace the presumption of innocence.

86 In conclusion, then, the air of reality threshold set forth in s. 265(4) does not violate s. 11(*d*). While it creates an evidentiary burden on the accused in the sense that he must raise sufficient evidence to give the defence an air of reality to justify its presentation to the jury, the burden of proving all of the elements of the offence beyond a reasonable doubt rests squarely with the Crown.

(ii) Right to a trial by jury: section 11(f)

87 Section 11(*f*) confers on a person charged with an offence the right to be tried by a jury where the maximum punishment for the offence is imprisonment for five years or more.

88 It is a basic tenet of the jury system that the jury decides issues of fact while the judge determines questions of law. Whether there is sufficient evidence to determine if an issue has been properly raised is a question of law, and therefore is properly in the domain of the judge (*B. (E.H.)*, supra, at pp. 790-91 and 796).

89 The requirement that there be an air of reality to the defence of mistaken belief in consent set out in s. 265(4) is reasonable and entirely valid. It is no more than a reaffirmation of an integral part of the judge's role in supervising a jury trial. The trial judge must determine questions of law such as the relevance and admissibility of evidence and the competence and compellability of witnesses. In doing so the trial judge cannot be accused of usurping the role of the jury or violating the accused's rights. Similarly it is appropriate that the jury determine if there is sufficient evidence to raise the defence of mistaken belief in consent. In considering the evidence giving rise to the air of reality, it must be remembered that the trial judge is not weighing the evidence, but is simply examining it to determine what defences are available. See *Guthrie*, supra, at p. 84.

90 The appellant was provided with a trial by jury. The only elements of the trial that were decided by the trial judge were those things properly within his realm, namely those issues pertaining to trial process and questions of law. There is consequently no violation of the appellant's right to a trial by jury.

(iii) Section 1

91 As I have concluded that the air of reality threshold contained in s. 265(4) violates neither ss. 11(*d*) nor 11(*f*) there is no need to consider s. 1 of the *Charter*.

IV. Disposition

92 The appeal should be allowed and a new trial ordered on the ground that the trial judge erred in failing to allow the cross-examination of the complainant on her medical records. That cross-examination should be allowed to the extent that it would comply with these reasons.

93 The constitutional questions should be answered as follows:

> 1. If s. 265(4) of the *Criminal Code* imposes an "air of reality test" as a threshold to be met before the issue of mistaken belief is left to the jury, does the subsection limit the right to be presumed innocent as guaranteed by s. 11(*d*) of the *Canadian Charter of Rights and Freedoms* or the right to a trial by jury as guaranteed by s. 11(*f*) of the *Charter*?
>
> No.
>
> 2. If s. 265(4) limits the rights guaranteed by ss. 11(*d*) and/or 11(*f*) of the *Charter*, are such limits prescribed by law and demonstrably justified in a free and democratic society?

94 It is not necessary to answer the second question.

***Iacobucci J.*:**

95 I agree with Cory J. subject to the reservation expressed by Sopinka J. that, in agreeing with the reasons of Cory J., I do not wish to comment on s. 276 of the *Criminal Code*, R.S.C. 1985, c. C-46 (as amended by *An Act to amend the Criminal Code (sexual assault)*, S.C. 1992, c. 38, s. 2).

***Sopinka J.*:**

96 I have read the reasons of Justice Cory and agree with the result he has reached and with his reasons, subject to the following observation.

97 While I agree with his reasons relating to cross-examination on the medical records, I would prefer not to comment on s. 276 of the *Criminal Code*, R.S.C. 1985, c. C-46 (as amended by *An Act to amend the Criminal Code (sexual assault)*, S.C. 1992, c. 38, s. 2). My colleague's reference to it might be construed as a comment on its constitutionality which is not an issue that is before us.

98 With respect to the defence of mistaken belief, I agree with Cory J. that s. 265(4) "simply sets out the basic requirements which are applicable to all defences" and that it requires no more

of the accused than the discharge of an evidentiary burden to adduce or point to some evidence on the basis of which a reasonable jury properly instructed could acquit. I believe we are all in agreement in this respect. Indeed, this is the basis for our determination that it is constitutional. The term "evidentiary burden" and the definition I have set out are well known to trial judges and well accepted. I cannot understand how the addition of the term "air of reality" helps in understanding the duty of a trial judge with respect to this defence. I am concerned that when an attempt is made to add to the definition of a basic concept in the criminal law, it only creates confusion. Just as attempts to refine the meaning of "reasonable doubt" have frequently resulted in reversible error, so too the use of the "air of reality" test encourages trial judges to weigh the evidence rather than apply the legal definition to which I have referred.

99 I agree with the reservations expressed by McLachlin J. with respect to Cory J.'s approval of the principle that the defence of mistaken belief is not available if the complainant and the accused relate diametrically opposed versions of what occurred.

100 Excluding the defence of mistaken belief where the accused and complainant tell opposing versions rests on the assumption that either the accused's or the complainant's story is a complete account of what occurred. As J.M. Williams ("Mistake of Fact: The Legacy of *Pappajohn v. The Queen*" (1985) 63 Can. Bar Rev. 597) points out, this is a questionable assumption. Referring to *R. v. Pappajohn* ([1980] 2 S.C.R. 120), Williams, at pp. 611-12, states:

> It is implicit in the majority decision that the jury would either totally accept one story or totally reject it. If this was a correct reading of what the jury would do then one can readily understand why the majority could not see any purpose in putting the alternative defence of mistake to the jury. Assuming, as was suggested, that the two stories were totally incompatible then, if the jury believed the accused's story *in toto*, he would be acquitted on the basis that there was no *actus reus* (i.e., consent was present). If the jury totally believed the complainant, then not only would the *actus reus* have been proven but moreover the jury would have already branded the accused as a liar. Therefore, it becomes unrealistic to suggest that they would nonetheless hold that he had an *honest belief* in consent.
>
> The above reasoning appears logical, given the premise. The question remains, however, whether it is correct to assume that a jury will accept one story in its totality and reject the other completely? It would seem not. Where there are conflicting versions of facts, the trier of fact must "find" what happened. It is well accepted that in doing so, the trier of fact is not bound to deal with one party's evidence as a whole but may accept some of it and reject that which is unacceptable. [Emphasis in original.]

101 In *Lee Chun-Chuen v. R.*[1963] 1 All E.R. 73(P.C.), Lord Devlin, in discussing the manner in which an evidentiary burden in respect of provocation may be discharged, stated, at p. 80:

> What is essential is that there should be produced, either from as much of the accused's evidence as is acceptable or from the evidence of other witnesses or from a reasonable combination of both, a credible narrative of events disclosing material that suggests provocation in law. If no such narrative is obtainable from the evidence, the jury cannot be invited to construct one.

102 As a matter of standard practice, a jury in criminal cases is instructed that in assessing the evidence of a witness, it is not an all-or-nothing proposition. A typical jury instruction is as follows:

> When you consider the evidence of a witness, please understand that you do not have to accept or reject everything a particular witness said. You may, of course, decide to accept or reject everything a witness said in the witness box. But you may also decide to accept only some of what a witness said, and reject the rest.

(G.A. Ferguson and J.C. Bouck, *Canadian Criminal Jury Instructions* (2nd ed. 1989), at p. 4.12-2.)

103 I would dispose of the appeal as proposed by Cory J.

***Lamer C.J.C.*:**

104 I have read the reasons of Justice Cory and concur in his result.

105 I agree with my colleague that the trial judge erred in refusing to permit cross-examination on the medical records. The cross-examination was appropriate because it had a proper purpose — to determine whether there was evidence to support a defence of honest but mistaken belief or evidence to support an allegation of fabrication. The denial of the opportunity to cross-examine on the medical records deprived the accused of his right to a fair trial.

106 With respect to the defence of mistaken belief, I am in agreement with my colleague, Justice Sopinka.

107 Accordingly, I would allow the appeal and order a new trial on the ground that the trial judge erred in failing to allow the cross-examination of the complainant on her medical records.

***McLachlin J.* (dissenting) (*La Forest* and *Gonthier JJ.* concurring):**

108 This appeal raises two issues — the question of what must be established before the judge may put the defence of honest but mistaken belief to the jury in a case of sexual assault and the question of when cross-examination on sensitive medical records should be allowed in such a case. Both are issues of great importance, not only to the proper development of the criminal law, but also to the proper prosecution of one of the most serious maladies that afflicts our society, sexual assault.

109 While I agree with much of what my colleagues Cory J. and L'Heureux-Dubé J. say, I take a somewhat different approach to each of the two issues raised on this appeal. In the end, I would dismiss this appeal substantially for the reasons given by the Court of Appeal of British Columbia.

110 The facts have been detailed by my colleagues. On some things, the evidence is uncontradicted. There is no dispute that the two accused, Osolin and McCallum, went to the complainant's trailer and entered her bedroom after having been told she was "easy". There is no dispute that their intention was to have sexual intercourse with her. There is no dispute that Smith, the man she was with, was driven away. There is no dispute that Osolin carried the complainant out of the trailer and that she was protesting as he did so. There is no dispute that she was driven 40 miles to a remote cabin, where McCallum, the driver, left Osolin and the complainant. There is no dispute that Osolin tied the complainant up, spread-eagled on the bed, and then had sexual intercourse with her. There is no dispute that the complainant was found crying and hysterical on the highway at 3:30 a.m. in the morning, nor that she told the police that she had been raped. There is no dispute that her hysteria continued, and that she was taken to hospital. Finally, there is no dispute that her physical condition, including a bruised wrist and bruising and discolouration to the pubic area, was more consistent with resistance and rape than with consensual intercourse. Additionally, the complainant's version of struggle was confirmed by the discovery of her underpants about 20 feet from the trailer, where she said they had been torn off her after she was placed in the back seat of the car that took her to the remote cabin. The appellant admitted that the complainant made some protests over the course of the evening (C.O.A., at p. 471), that he overrode her complaints about her nakedness (C.O.A., at p. 497) and that he tends to adopt the attitude that "no" means "yes" until there is a clear indication of no consent (C.O.A., at p. 509).

111 On the issue of consent, the complainant's and Osolin's stories diverged entirely. The complainant maintained that she never consented to the abduction, and resisted as best she could throughout the long ordeal. Osolin, on the other hand, maintains that she was a willing participant in the night's events.

112 Osolin was charged with sexual assault and kidnapping. McCallum was charged with kidnapping. Osolin's defence, as revealed by his evidence, McCallum's evidence, and the nature of the cross-examination of the complainant, was that the complainant had consented. The theory of the defence was that the complainant had in fact consented to the sexual abduction and acts, and had fabricated the story that she had not consented after the fact to avoid confrontation with her parents. Osolin did not specifically deny that he had forcibly confined the complainant by taking her out of the trailer or having her driven to the cabin. He testified, however, that she seemed to be go ing along with things, albeit passively, and said in cross-examination that he had no doubt that everything that took place in the cabin took place by consent (C.O.A., at p. 458). The burden of his evidence was that the complainant had in fact consented; he never addressed the question of whether he might merely have had an honest belief in her consent, even though she did not consent.

113 The trial judge, while leaving it open to the jury to find that the complainant had consented, refused to leave with them the defence that Osolin had an honest but mistaken belief that she had consented, on the ground that the evidence did not give that defence an "air of reality" as required by the law. The jury convicted him of kidnapping and sexual assault and he was sentenced to six years in prison. The British Columbia Court of Appeal sustained the conviction: (1991), 7 B.C.A.C. 181, 15 W.A.C. 181, 10 C.R. (4th) 159. Osolin now appeals to this court.

Analysis

Restriction of Cross-examination

114 The complainant spent time in psychiatric care before and after the events at issue on the trial. Osolin's counsel sought and was granted production of her medical records for the purpose of permitting an expert to consider the complainant's competence to testify under oath. The validity of the order for production is not in issue on these proceedings.

115 Osolin's counsel sought leave to cross-examine the complainant on these records, and in particular on an entry to the effect that the complainant, subsequent to the events in issue, had expressed concern to her doctor "that her attitude and behaviour may have influenced the man to some extent" and that she was "having second thoughts about the entire case". Osolin's counsel told the judge that the purpose of the cross-examination was to show "what kind of person the complainant is".

116 I agree with my colleague Cory J.'s review of the principles governing the decision of the trial judge whether to permit cross-examination on matters such as this. I also agree with the emphasis my colleague L'Heureux-Dubé J. places both on the discretionary nature of the judge's decision where the evidence relates to the prior sexual conduct of the complainant, and on the caution which a court must exercise in permitting examination on matters like the complainant's background, which may have little or no relevance to the actual issues and at the same time may unduly prejudice her reputation and privacy. Moreover, as pointed out by my colleague L'Heureux-Dubé J., there may be special dangers associated with the use of psychiatric evidence in cross-examination. The rule is clear. Before cross-examination can be allowed on a complainant's prior sexual conduct, the defence must demonstrate that the cross-examination possesses "a degree of relevance which outweighs the damages and disadvantages presented by the admission of such evidence": *R. v. Seaboyer*[1991] 2 S.C.R. 577, at p. 634.

117 This then was the task of the trial judge. Faced with the application for cross-examination, he had to determine whether the defence had demonstrated a potential relevance to the cross-examination capable of outweighing the damage and invasion of privacy it might cause to the complainant. To be satisfied that the threshold of relevance is met, the trial judge, as I said in *Seaboyer* (at p. 634), "*must ensure that evidence is tendered for a legitimate purpose, and that it*

logically supports a defence". I specifically added: "*The fishing expeditions which unfortunately did occur in the past should not be permitted*." (Emphasis added.)

118 In order to meet this test, the accused must demonstrate that the cross-examination is directed at a "legitimate purpose", at a specific defence. Here counsel for the accused failed to do this. The only purpose he gave for wanting to cross-examine on the medical record was to show "what kind of person the complainant is". As Cory J. states, this is the very sort of improper purpose for which evidence *cannot* be adduced under the principles which this court adopted in *Seaboyer*, and that without something more, "the trial judge was correct in refusing to permit cross-examination for that purpose".

119 The question then is whether this "something more" was shown in this case. Counsel for Osolin did not offer anything more; his only purpose on the record was to discredit the complainant's character.

120 But it is argued that counsel's failure to adduce a relevant reason for the cross-examination does not end the inquiry imposed on the trial judge. It is suggested that the judge has an independent duty to examine the material available for cross-examination and to ensure that any relevant avenues for impeachment of the complainant which counsel for the accused may have overlooked are explored. It is further said that the trial judge failed to discharge this duty. He should, it is suggested, have insisted that cross-examination take place on the notation in question, not with a view to what it might show about the complainant's character, but rather for the purpose of showing that the complainant might have had a motive to falsely allege that she was the victim of a sexual assault, as well as on the question of whether she did anything which might have led Osolin to believe that she was consenting to his sexual advances. Accordingly, it is argued, there must be a new trial.

121 The Court of Appeal rejected this submission. Southin J.A., for the court, held that the failure of counsel to raise a valid reason for the cross-examination was fatal to this ground of appeal. My colleague Cory J., on the other hand, accepts this submission. Respectfully, I find myself in Southin J.A.'s camp.

122 My colleague Cory J. (at p. 23 [p. 26]) states that "quite apart from the submissions of the defence counsel, it is the duty of the trial judge to ensure that the accused's rights with regard to cross-examination, which are so essential to the defence, are protected". This statement seems to me to pose two difficulties.

123 The first difficulty is the implication that, contrary to the rule set out in *Seaboyer*, the onus will no longer lie solely upon the accusedto establish a legitimate purpose for the cross-examination. Instead, where defence counsel fails to demonstrate a legitimate purpose,the onus may now shift to the trial judge to determine independently whether there are any potential grounds for a legitimate cross-examination.

124 The second difficulty lies in what would follow upon a judicial determination that potential grounds for legitimate cross-examination remain to be explored. Cory J. (at p. 23 [p. 26]) says in such circumstances it is "appropriate to *permit* cross-examination". (Emphasis added.) But it is not a matter of *permitting*, since counsel has not requested the cross-examination for the legitimate purpose. In a case like this, where counsel has not requested permission to cross-examine on the matters which are legitimate, two options would seem to be open to the judge if he or she is to discharge his or her duty "to ensure that the accused's rights with regard to cross-examination, which are so essential to the defence, are protected". First, the judge could direct counsel to cross-examine on the untouched matter for the proper purpose. (It would seem insufficient to merely suggest such cross-examination, since if counsel declined, that would not ensure that the accused's rights are protected.) Second, the trial judge could himself undertake the omitted cross-examination. Both alternatives are fraught with difficulty. On the first, the trial judge usurps the right of counsel (and impliedly the accused) to conduct the case as they see fit. On the second, the trial judge finds himself drawn into the role of counsel.

125 It is my view that to place a duty on a trial judge to ensure that all legitimate grounds of cross-examination are explored is inconsistent with the nature of our trial process and would confuse and complicate the prosecution of criminal offences unduly. Our criminal trial system is essential adversarial. The Crown puts forward evidence directed to showing that the accused is guilty beyond a reasonable doubt. The accused points out weaknesses in the Crown's case and sometimes offers contrary evidence. The court, comprised of judge and jury, sits as neutral arbiter, charged with deciding, whether, at the close of all the evidence, the Crown has proven the accused guilty beyond a reasonable doubt.

126 The dangers of the judge abandoning the traditional role of neutral adjudicator have often been confirmed. The general rule has emerged that while judges may ask questions of clarification and amplification, they need not, indeed should not, take the case out of the hands of competent counsel and into their own hands: *Boran v. Wenger*, [1942] O.W.N. 185(C); *R. v. Ignat* (1965), 53 W.W.R. 248(Man. C.A.); *Majcenic v. Natale*[1968] 1 O.R. 189(C); and *Jones v. National Coal Board*[1957] 2 All E.R. 155(C.A.). Indeed, trial judges have been criticized and verdicts overturned precisely because judges have entered the arena and subjected the accused to their own cross-examination: *R. v. Brouillard*[1985] 1 S.C.R. 39; *R. v. Turlon*198949 C.C.C. (3d) 186 [70 C.R. (3d) 376] (Ont. C.A.); *R. v. Valley* (1986), 26 C.C.C. (3d) 207(Ont. C.A.), leave to appeal to Supreme Court of Canada refused, [1986] 1 S.C.R. xiii.

127 A number of considerations support this view of the proper role of the trial judge. First, the judge must not only be impartial; he or she must appear to be impartial; *R. v. Sussex JJ.; Ex p. McCarthy*[1924] 1 K.B. 256(D.C.), at p.259. A judge who takes up the role of counsel,whether for the Crown or for the defence, risks giving the appearance of partiality and courts the danger of psychological identification with the successful answers he or she elicits.

128 A second risk is that judicial intervention may harm the case for the defence. Defence counsel may have good reason for leaving untouched an area of cross-examination which may seem to be a fertile ground for exploration to a trial judge who lacks the opportunities available to counsel of exploring and considering the implications of raising the issue. In *Yuill v. Yuill*[1945] 1 All E.R. 183(C.A.), cited with approval in *Brouillard*, supra, Lord Greene M.R. explained, at p. 185 that: "It must always be borne in mind that the judge does not know what is in counsel's brief and has not the same facilities as counsel for an effective examination-in-chief or cross-examination."

129 Finally, it is questionable whether the efficient conduct of trials supports mandatory judicial intervention on cross-examination where counsel fails to explore potential areas of cross-examination. The trial judge already bears the heavy burden of running the trial in a fair and expeditious manner and listening to and evaluating the evidence. In a jury trial, he or she assumes the additional burden of ensuring that the jury is properly instructed. To add to this the duty to review potential areas of cross-examination which counsel has left untouched would place upon the trial judge yet another task, that of counsel — counsel, moreover, for both parties. The task might be time-consuming, as the present case illustrates. The medical records filed in the case at bar consisted of approximately 100 pages of reports. If the appellant is correct, the trial judge must examine all of these pages to see whether there may be some entry which might be a ground for cross-examination supportive of the defence. Presumably, in fairness, the judge would be obliged to do the same with respect to the Crown's case. Bearing these implications in mind, it seems to me that the only fair and practical rule is to leave it to counsel to choose the cross-examination upon which they will embark. The judge may ask questions by way of clarification and amplification. But he or she is not to be faulted for having failed to insist upon the cross-examination of an area which counsel has chosen to leave fallow.

130 My colleague Cory J. suggests that a court of appeal confronted by an unexplored avenue of cross-examination which might have led to a reasonable doubt as to guilt should direct a new trial to avoid a miscarriage of justice. Accepting for the purposes of this point that a court of appeal is bound to direct a new trial where it appears that counsel has chosen not to canvass a crucial point in cross-examination which might lead to a miscarriage of justice, I do not see this as such a case. It was argued that cross-examination on the notation in question might have led to an admission by the complainant that she fabricated the story of sexual assault to avoid confrontation with her parents. I agree with Southin J.A. in the Court of Appeal that to the extent that the evidence elicited might have had some slight evidentiary value with respect to the defence's theory that she had fabricated the story to avoid confrontation with her parents, no substantial wrong or miscarriage of justice can be said to have occurred. There was ample evidence before the jury of the difficult relationship that existed between the complainant and her parents and their disapproval of some of her conduct.

131 Before us, it was argued that cross-examination might also have supported the alternative theory that the accused honestly but mistakenly believed the complainant consented. There is a question, as my colleague L'Heureux-Dubé J. points out, as to the importance of any answers that might have been elicited, given the well-documented phenomenon of victim guilt in cases such as these. In any event, it is far from clear that answers favourable to the accused on this point would have made any difference to the jury's verdict in the context of all the evidence of the case. In this connection, I note that the trial judge permitted one Bragg to be cross-examined as to what he told Osolin about the complainant's engaging in sexual activity with one Dick the day of the events at issue. He also ruled that the complainant could be cross-examined as to her sexual activity on that day. In short, there was already a great deal of negative evidence before the jury about the complainant's "attitude and behaviour" on the day in question. In these circumstances, I find it impossible to conclude that defence counsel's failure to cross-examine on these same matters entitles Osolin to a new trial.

132 In assessing whether the trial judge should have intervened, it must be borne in mind that this line of questioning would have contradicted the theory of the defence at trial. The defence, as characterized by Osolin's evidence and his counsel's cross-examination of the complainant, was directed to showing that the complainant was a willing participant in the evening's events and had made up the story of abduction and sexual assault after the event to avoid confrontation with her parents. Questioning about whether the complainant, while not consenting, might have acted in a way which could have led Osolin to believe that she was consenting, would have contradicted the theory of the defence. This may explain why counsel may have chosen not to cross-examine on this point. He wanted to cross-examine for the purpose of showing the complainant's bad character, a purpose consistent with the theory that she had consented to Osolin's acts and was lying when she said otherwise. But he apparently did not wish to cross-examine on the contrary thesis that she had not consented, but that Osolin honestly but mistakenly believed that she had. Nor, presumably, would he have wished the trial judge to intervene to conduct an examination on that subject. To pursue this line of cross-examination would have been to put before the jury a version of events which he was urging the jury to reject.

133 Having chosen to conduct his case as he saw best at the time, Osolin comes to this court and asks for a new trial so that he can explore alternative avenues which he thought it best to eschew at the time, pleading that failure to grant him this new trial will amount to a fundamental miscarriage of justice. I cannot agree. An accused is entitled to a trial, in which he may cross-examine on as many defences as he chooses. He is not entitled to a series of trials, exploring one theory on one and another on a second.

134 For these reasons, I would not order a new trial on the ground of denial of cross-examination.

Honest but Mistaken Belief in Consent and the Air of Reality Test

135 Different defences may be raised to a charge of sexual assault. One is that the physical acts complained of never occurred. That defence was not raised here. Another is that while the acts occurred, the complainant consented to them. This was the theory of the defence in the case at bar. A third is that while the acts occurred and the complainant did not consent to them, the accused entertained an honest but mistaken belief that she was consenting. As such, he did not possess the necessary subjective mens rea or guilty mind to support a conviction.

136 As my colleagues point out, before any defence can be put to the jury, the evidence must provide a basis for that defence. This re quirement is sometimes described by saying that there must be an "air of reality" to the defence. To put a defence to the jury where this "air of reality" is lacking on the evidence would be to risk confusing the jury and to invite verdicts not supported by the evidence.

137 While the rule applies generally, it has attracted special attention in the context of trials for sexual assault. This is because one of the most common defences on such trials, the defence of honest but mistaken belief, is frequently asserted in cases where there is no evidentiary foundation for it, requiring the court to advise the jury that there is no air of reality to the defence.

138 In order to give an "air of reality" to the defence of honest but mistaken belief, there must be: (1) evidence of lack of consent to the sexual acts; and (2) evidence that notwithstanding the actual refusal, the accused honestly but mistakenly believed that the complainant was consenting.

139 The evidence of lack of consent in most cases is supplied by the complainant's testimony. To prove honest but mistaken belief, on the other hand, the accused typically testifies that he honestly believed that the complainant consented. Theoretically, such a belief could be asserted in every case, even where it is totally at odds with the evidence as to what happened. So it has been held that the bare assertion of the accused that he believed in consent is not enough to raise the defence of honest but mistaken belief; the assertion must be "supported to some degree by other evidence or circumstances": *R. v. B. (E.H.)*[1987] 1 S.C.R. 782, at p. 790. The support may come from the accused or from other sources; on this point I agree with Cory J.'s resolution of the confusion which existed in the earlier cases. But the support must exist. As Lord Morris of Borth-y-Gest put it, a "facile mouthing of some easy phrase of excuse" will not suffice: *Bratty v. Attorney-General for Northern Ireland*[1963] A.C. 386(H.L.), at p. 417.

140 It is suggested that this requirement is at variance with the general rule in criminal law that wherever there is some evidence supporting a defence, however weak, it must be left to the jury to determine the sufficiency of that evidence. Provided there is any evidence, it is suggested, it is for the jury to decide upon its sufficiency, not the judge. To hold otherwise would deprive the accused of his fundamental right to be tried by a jury.

141 It seems to me that this argument is met by the fact that the accused's mere assertion of his belief is not evidence of its honesty. The requirement that the belief be honestly held is not equivalent to an objective test of what the reasonable person would have believed. But nevertheless it does require some support arising from the circumstances. A belief which is totally unsupported is not an honestly held belief. A person who honestly believes something is a person who has looked at the circumstances and has drawn an honest inference from them. Therefore, for a belief to be honest, there must be some support for it in the circumstances. The level of support need not be so great as would permit the belief to be characterized as a reasonable belief. But some support there must be. A person who commits a sexual assault without some support in the circumstances for inferring the consent of the complainant has, at very least, been wilfully blind as to consent. The law draws a distinction between "honest belief" in consent, which arises from an inference, however mistaken, from the circumstances, and "wilful blindness" as to consent, which is belief not grounded on the circumstances, and which does not serve as a defence.

142 This brings me to the facts of this case. The theory of the defence, as noted, was that the complainant consented, but that she lied about her consent in order to avoid a confrontation with her parents. It was in this context that the accused testified that he believed that the complainant consented. However, when the time came to charge the jury, Osolin asked the trial judge to charge the jury on the additional defence of honest but mistaken belief, which was founded on the theory that the complainant had not consented. The trial judge, after noting that the complainant and the accused told widely different stories, and after reviewing the law on honest but mistaken belief and the need for support in the evidence giving the defence an air of reality, concluded:

> There must be evidence beyond the mere assertion of belief in consent by the accused. That evidence must appear from or be supported by sources other than the accused in order to give it an air of reality.
>
> I find that is lacking here, that there is not that other evidence, and consequently I am not going to charge the jury, and I am not going to permit counsel to refer to the defence of mistake of fact.

143 The Court of Appeal agreed. Southin J.A. held that the trial judge had erred in suggesting that the evidence needed to give the defence an air of reality must come from persons other than the accused. Nevertheless, she concluded that on the evidence there was no air of reality to the arguments that the accused's belief in consent deprived him of the necessary mens rea for the offences of kidnapping or sexual assault (at pp. 183-84 C.R.):

> The appellant never said that he honestly believed the taking of her to Parksville to be not against her will. He did not say he believed that this complainant who was naked was agreeing to go on a 40-mile ride on a cold March night with two comparative strangers both of whom

> were twice her size. He did not say that he had no intention to confine her against her will. If he had so testified, who would have believed him?
>
> . . . . .
>
> There is no more imprisoning state short of actual physical restraint than being without one's clothes. The best that the appellant said for himself was, "I wasn't thinking". That to me is, at the very least, recklessness or wilful blindness.

144 On the sexual assault charge, Southin J.A. held that had the abduction not occurred, it might have been that the issue of honest but mistaken belief should have been left to the jury. However, she concluded (at p. 184 C.R.):

> To my mind, an argument that a man who, knowingly or recklessly, forcibly confined a woman against her will can have an honest belief that, during her confinement, she was freely consenting to his sexual advances has no air of reality about it at all.

145 We are left with one question: whether there was evidence, from the accused or from some other source, supporting Osolin's assertion of honest belief. I agree with the courts below that there was none. The undisputed facts reviewed at the outset of these reasons simply do not admit of an honest belief. At the very most they were consistent with wilful blindness. Any man who drags a woman from her home naked and protesting, transports her to a remote place, and there ties her to the bed and has sex with her is at very least put on notice that she may not be consenting. His failure to inquire is consistent only with two states of mind: an intention to have his way without her consent; or wilful blindness as to whether she consented or not. To put it another way, no person, reasonable or otherwise, could *honestly* infer consent in such circumstances from the mere fact that at certain stages, the complainant may have been passively acquiescent. The evidence which Osolin put before the jury may have been, as the trial judge concluded, consistent with wilful blindness. It offered no support for the defence of honest but mistaken belief. As Osolin himself told the jury, "I wasn't thinking".

146 Before leaving this question, I should comment on two points. The first is the argument that the divergent stories of the complainant and the accused on consent, as a matter of law, necessarily preclude a third alternative, the defence of honest but mistaken belief. I am not so convinced as my colleagues that where the evidence consists of two diametrically opposed stories, one alleging lack of consent and the other consent, it is logically impossible to conceive of the defence of honest but mistaken belief arising. While it may rarely occur, it seems to me possible for a jury to accept parts of the testimonies of both the complainant and the accused, concluding that notwithstanding lack of actual consent, the accused honestly believed in consent. As A.W. Bryant states:

> ... the removal of this alternative plea on the basis that the testimony of the complainant and the accused are diametrically opposed, and that there is a lack of common ground for the defence is based, in part, on the premise that the complainant's version is complete —

> a questionable assumption in some cases. Moreover, a requirement for corroboration may wrongly encourage an accused to dovetail partially his testimony with that of the complainant in order to supply the necessary common ground for the defence.
>
> ("The Issue of Consent in the Crime of Sexual Assault" (1989) 68 Can. Bar Rev. 94, at p. 149.)

147 The second matter is the comment of my colleague Cory J. that the Court of Appeal erred in concluding that the kidnapping could not be used as a ground for rejecting the defence of mistake of fact. He reasons that this was incorrect since there had been no prior conviction for kidnapping. In other words, he sees the reasoning of the Court of Appeal as circular, in that it makes the inference that there is no defence with respect to the offence of sexual assault because there was none on kidnapping, which itself was in issue. I must say that I do not read the reasons of the Court of Appeal in this manner. It seems to me that Southin J.A. was saying only that the *evidence* of confinement robbed the defence of honest but mistaken belief of any foundation.

148 I agree for the reasons given by Cory J. that the section of the *Criminal Code* which requires the accused who raises the defence of honest but mistaken belief in consent to show that the defence has an air of reality, s. 265(4), does not violate the *Canadian Charter of Rights and Freedoms*.

Disposition

149 I would dismiss the appeal.

***L'Heureux-Dubé J.* (dissenting):**

150 I have had the advantage of the reasons of my colleagues and for the following reasons I do not agree with Cory J.'s reasons nor with his disposition of the appeal. I agree substantially with McLachlin J.'s reasons as well as the result she reaches. However, I wish to deal with additional points as well as different considerations on the points dealt with by my colleagues.

151 I will discuss the two issues raised in this appeal in the following order. First, does s. 265(4) of the *Criminal Code*, R.S.C. 1985, c. C-46, infringe the rights of the accused as guaranteed by ss. 11(*d*) or 11(*f*) of the *Canadian Charter of Rights and Freedoms*? Second, did the trial judge err in restricting the cross-examination of the complainant on her medical records? This second issue raises, in turn, questions concerning the privacy interest in medical records and the particular considerations which surround complainants in sexual assault trials.

Constitutionality of Section 265(4) of the Criminal Code

152 On the issue of the constitutionality of s.265(4) of the *Criminal Code*, I agree with my colleagues' reasons that the section infringes neither s. 11(*d*) nor s. 11(*f*) of the *Charter*. The general rule is that defences should not be put to the jury which do not arise on the evidence. As with any defence, this section simply requires that, in the case of assault, there be a factual foundation, or, to

put it more colloquially, an "air of reality" to a defence before the trial judge is required to leave it with the jury. Thus, the section conforms completely with normal trial procedure and the interests in ensuring that the jury is not distracted by extraneous matters in the trial of an issue.

153 As to its relevance in this particular case, in my opinion, the defence of mistaken belief in consent was completely unwarranted given both the evidence and the manner in which the defence was conducted. This case involves, as the trial judge put it, "a straight issue of consent or no consent". The complainant and the appellant each testified as to the events in issue. The evidence of each concerning the events preceding the assault was consistent up to a certain point. Specifically, there is no question that the complainant was taken by the appellant to a cabin 40 miles away in the woods in the winter without her clothes on; nor does the appellant contest that he overrode her objections in doing so.

154 However, their versions differed completely in respect of consent to sexual relations. The defence proceeded entirely on the basis that the complainant willingly and eagerly consented to sexual relations, not that he may have been mistaken about whether or not she consented. By contrast, the complainant testified that at no time did she consent to the sexual activity in question but had been subject to a series of assaults beginning when the appellant abducted her in a car. This testimony was corroborated by both physical evidence and the testimony of other witnesses.

155 By way of example, I shall recount but a portion of the evidence. The complainant testified that her panties had been ripped off her when she was taken away by the appellant in the car; ripped panties were found by the police near where the car had been parked. She testified that she was struck on the head while she was taken into the car and bound by the wrists when she was assaulted; medical evidence confirmed that she had bruises on her wrists and on her head. In addition, the police officer who found her naked by the side of the road at 3:30 a.m. testified that she cried uncontrollably for two hours afterwards and vomited in the police station.

156 Under these circumstances, there was no air of reality to the defence of mistaken belief in consent. The jury found the appellant guilty of sexual assault. While it was open to the jury to disbelieve the complainant and either believe or have a reasonable doubt as to the testimony of the appellant, the jury was obliged to reach their verdict on the basis of the evidence before them. Had the trial judge left the defence with the jury, he would have been inviting them to speculate on yet a third version of events wholly unsupported by the evidence of either party. To do so would have been an error on the part of the trial judge, subject to review on appeal.

Cross-examination on Medical Records

157 In this case, there was no challenge to the ability of the complainant to testify at the outset; the trial judge found her "quite capable of testifying" and noted that her competency had never been called into question. Nonetheless, because the appellant was aware that she had a history of hospital admissions for psychiatric problems, he sought an order for the production of

the complainant's medical records. The trial judge decided, on the basis of *Toohey v. Metropolitan Police Commissioner*[1965] 1 All E.R. 506(H.)(L.), and *R. v. Hawke*197522 C.C.C. (2d) 19 [29 C.R.N.S. 1] (Ont. C.A.), that in order to permit the accused the opportunity of full answer and defence, the medical records of the complainant should be made available to the defence. This was done for the sole purpose of permitting the defence to attempt to establish that the complainant suffered from a medical or psychiatric condition that rendered her testimony unreliable. Despite free use of the information in the records and the testimony of its own psychiatric expert, the defence was unable to succeed in demonstrating that the complainant was, for this reason, an unreliable witness.

158 However, having failed at this objective, once in possession of the medical records, the defence then argued that because the records were allowed in, it should be permitted unrestricted cross-examination on them to challenge the credibility of the complainant on the issue of consent. The trial judge refused to allow such cross-examination on the grounds that it would be a violation of the complainant's privacy. The Court of Appeal held that the trial judge had erred in refusing the cross-examination because of the complainant's right to privacy, but dismissed this ground of appeal because it was unable to ascertain the questions that the appellant's counsel intended to ask.

159 Cory J. is of the view that the trial judge should have permitted cross-examination on the July 9th notation in the medical records for the purpose of determining if there was an air of reality to the appellant's defence of mistaken belief in the complainant's consent.

160 I totally disagree with my colleague Cory J. on the issue of the cross-examination of the complainant on her medical records, as does my colleague McLachlin J. Furthermore, there is a prior issue which must be addressed: whether the records should have been disclosed to the appellant and admitted into evidence at all in the circumstances. In this case, the Crown has not cross-appealed the order for the production of the complainant's medical records to the appellant, although prior to the disclosure order, counsel argued vigorously before the trial judge that they were totally irrelevant and that their use would be highly prejudicial to the complainant and sidetrack the trial of the issue. However, as many of the concerns which I shall outline below are relevant to both the question of disclosure and the scope of cross-examination in the event that disclosure is ordered, I find it unavoidable to address the matter of disclosure to some degree as well in this case.

161 It must be recalled at the outset that, as is the case with witnesses in any trial, the defence ordinarily has no access to the medical records of the complainant in a sexual assault case. The reason is clear: such information is, in the vast majority of cases, irrelevant to the issue to be determined. As a matter of policy and procedure we do not permit random fishing expeditions and less so into matters that cannot be expected to have any bearing on the trial. Moreover, such an invasion of the privacy of the individual goes against the policy of privileged communications

between doctor and patient which some provinces, Quebec in particular, do protect unless a superior interest is at stake.

162 Thus the question becomes, whether, upon the release of such records, the right of the accused to make full answer and defence entails the right to cross-examine on information generated from medical records that, except for the extraordinary circumstance of a challenge to the competence of a witness or the reliability of her testimony, would be completely unavailable and even unknown to the accused. In my opinion it does not. Moreover, in my view, the starting point to the examination of this question is not the wide ability of the accused to cross-examine the complainant, but, rather, the following two considerations which arise much earlier in the trial process: the fundamental entitlement of us all, guaranteed by s. 8 of the *Charter*, to privacy and control over personal information obtained to facilitate medical treatment and the principle that information that is not relevant to an issue is to be excluded.

163 Hence, the following two interrelated questions must be ad dressed. First, under what circumstances is disclosure of the psychiatric or medical history of a witness imperative to the interests of justice and the ability of the accused to fully answer the accusations he faces? In other words, when and why are such records relevant? Second, should the use of such information, even if disclosed to the defence, be limited?

164 In my view, these issues must be examined in light of the general expectation held by society that the privacy interest in information obtained for medical and therapeutic purposes will be respected. First, the existing rules regarding challenges to the competence of witnesses and the reliability of testimony must be examined. Second, one must consider the evidentiary principles governing the admission of evidence and cross-examination. Third, the policy concerns raised by permitting widespread use of medical records must be addressed. Finally, the particular concerns which surround challenges to the credibility of witnesses in sexual assault trials must be confronted.

Analysis

1. Privacy

165 This court has recognized that the value of privacy is fundamental to the notions of dignity and autonomy of the person (*R. v. Pohoretsky*[1987] 1 S.C.R. 945, and *R. v. Dyment*[1988] 2 S.C.R. 417). Equally, privacy in relation to personal information and, in particular, the ability to control the purpose and manner of its disclosure, is necessary to ensure the dignity and integrity of the individual. In the words of La Forest J. in *Dyment*, supra, at pp. 429-30, while

> We may, for one reason or another, wish or be compelled to reveal such information ... situations abound where the reasonable expectations of the individual that the information

> shall remain confidential to the persons to whom, and restricted to the purposes for which it is divulged, must be protected.

We also recognize that it is often important that privacy interests be respected at the point of disclosure if they are to be protected at all, as they often cannot be vindicated after the intrusion has already occurred (*Canada (Director of Investigation & Research, Combines Investigation Branch) v. Southam Inc.*[1984] 2 S.C.R. 145, and *Dyment*, at p. 430).

166 The importance of privacy as a fundamental value in our society is underscored by the protection afforded to *everyone* under s. 8 of the *Charter* "to be secure against unreasonable search or seizure". This value finds expression in such legislation as the *Privacy Act*, R.S.C. 1985, c. P-21, which restricts the purposes for which information may be used to those for which it was received.

167 The question of privacy of medical information was extensively discussed in the reasons of La Forest J. in *Dyment*, supra. In that case, La Forest J. noted that the confidentiality of the doctor-patient relationship has long been respected as an important social value. Protection of information is necessary because persons are especially vulnerable in such circumstances; in order to protect their life or health, they are required to reveal information of an intimate character. La Forest J. also observed in *Dyment*, on the basis of the Department of Communications/Department of Justice Task Force report on *Privacy and Computers* (1972), that hospitals have been identified as a specific area of concern in the protection of privacy. As the *Report of the Commission of Inquiry into the Confidentiality of Health Information* (Ontario 1980) found, in vol. 2, at p. 91, there are concerns that persons in need of medical care might be deterred from seeking valuable and needed treatment if the exchange of information were routine and easily available. Thus, the report concluded that "physicians, hospital employees and other health-care workers ought not to be made part of the law enforcement machinery of the state". Not only would trust in the administration of justice be undermined by such practices, but so would the effective operation of medical care.

168 The decision in *Dyment* clearly establishes the commitment of this court to the value of privacy of medical information. In addition, the court has also recognized the fiduciary nature of the doctor-patient relationship and the special duties that arise from this relationship of trust and confidence in *McInerney v. MacDonald*[1992] 2 S.C.R. 138, and *Norberg v. Wynrib*[1992] 2 S.C.R. 226.

169 In light of these general principles, the court has seen fit to protect privacy interests in relation to specific and limited medical activities such as the taking of a blood sample where the interests of the accused are at stake (see *R. v. Dersch*, S.C.C., No. 22483, October 21, 1993 [reported 25 C.R. (4th) 88]). There is no doubt that any attempt by the Crown to conduct a wide-ranging inquiry into the entire medical history of a criminal accused would be met with concerns about prejudice to the accused and irrelevance to the issue at trial.

170 However, while it was the rights of the accused that were at stake in *Dyment*, as well as in *Dersch*, supra, the interest in the privacy of medical records was recognized in the former case as a broad and independent value, separate and distinct from considerations about the fairness of the trial process. Thus, the privacy interest discussed in *Dyment* may be seen as an interest that pertains to all of us which may arise in a number of different circumstances. Indeed, it would be odd if the protection of medical records were to be available only to those accused of criminal offences. Such a finding could hardly inspire confidence in the administration of justice. In my opinion, the inescapable conclusion is that the arguments expressed in *Dyment* in respect of privacy interests are equally applicable, if not more compelling, in the case of witnesses called by the Crown in a criminal matter.

171 Because the trial judge in this case based the disclosure order on the following jurisprudence, I shall next turn to an examination of the rules governing the challenges to the competence and the reliability of witnesses.

2. Competence and Challenges to the Reliability of Testimony

172 In the present case, the trial judge, relying on the rule in *Toohey*, supra, followed by the Ontario Court of Appeal in *Hawke*, supra, ordered the disclosure of the complainant's records to the appellant in order to permit him to attempt to establish the unreliability of the complainant's testimony.

173 The basic rule as to challenges to the competency of witnesses is as follows. All witnesses, with the exception of children under a specified age, are presumed competent to testify unless and until found otherwise due to some condition which renders it unsafe for the trier of fact to rely on the testimony. A finding that the witness suffers from a particular mental or psychiatric condition does not necessarily or in itself disqualify a witness; in order to disqualify a witness, the witness' particular condition must be such as to substantially negative the trustworthiness of the evidence on the specific subject.

174 This issue was canvassed extensively by Dubin J.A. (now C.J.O.) in *Hawke*, supra. As he noted, citing *McCormick's Handbook on the Law of Evidence* (2nd ed. 1972), at p. 93, para. 45, "a distinction must be made between attacks on competency and attacks on credibility". Wigmore, for his part, has this to say:

> This broad and rational principle — that the derangement or defect, in order to disqualify, must be such as substantially negatives trustworthiness upon the *specific subject of the testimony* — is now practically everywhere accepted.
>
> . . . . .
>
> *First*, the mere fact of derangement or defect does not *in itself exclude* the witness; the various forms of monomania are no longer treated as equivalent to complete lunacy;

> *Second*, the inquiry is always as to the relation of the derangement or defect to the *subject to be testified* about. If on this subject no aberration appears, the person is acceptable, however untrustworthy on other subjects... [Emphasis in original.]
>
> (*Wigmore on Evidence* (3rd ed. 1940), vol. 2, at pp. 585-86, para. 492.)

175 From these general principles, it is apparent that, in order to challenge the competency of a witness to testify, it must be established that the witness is *unable* to give reliable evidence on the specific issue in question. In addition, as an exception to the general rule which provides that an expert may not testify as to the credibility of a witness, expert testimony is permitted to establish that the witness suffers from some "hidden defect" which affects the reliability of the testimony. However, as both the trial judge and the Court of Appeal found in this case, this situation must be distinguished from that of calling an expert to establish that a witness, though capable of testifying reliably, chooses not to do so.

176 The general principle is set out as follows in *Toohey*, supra. In that case, Lord Pearce, speaking for all the law lords, held at p. 512 that:

> Medical evidence is admissible to show that a witness suffers from some disease or defect or abnormality of mind that affects the reliability of his evidence. Such evidence is not confined to a general opinion of the unreliability of the witness, but may give all the matters necessary to show not only the foundation of and reasons for the diagnosis but also the extent to which the credibility of the witness is affected.

177 In *Hawke*, the Ontario Court of Appeal followed *Toohey* and held that the trial judge had erred in rejecting psychiatric evidence given by the doctors of a crucial witness in a murder trial. At the time of the trial, the witness had been in the care of these doctors for over four years for treatment of serious psychiatric disturbance. The doctors testified in a voir dire, on the basis of an examination of her made the preceding evening, that the witness had been actively hallucinating while giving evidence on the stand during the trial. Moreover, they testified that the nature of the hallucination was such that it directly affected the truth of that testimony. As is apparent, such circumstances caused the case to fall squarely within the rule in *Toohey*.

178 However, such cases are clearly exceptional and this jurisprudence does not permit the exploration of the psychiatric history of a witness simply on the basis that the defence hopes such material may be relevant or useful to impugn the witness' testimony. Nor does it require the trial judge to order the disclosure of the complainant's medical records in order to permit the defence to attempt to establish that a witness' evidence may be unreliable. It is clear that the rule in *Toohey* is intended to ensure that, when there are serious concerns about the reliability of a witness due to mental or psychiatric disturbance, there is a mechanism by which those concerns can be brought to light at trial. Furthermore, it is also clear that expert evidence is permitted only for the limited

purpose of establishing that some aspect of the witness' condition may affect the reliability of the witness' testimony on the issue in question; otherwise, such evidence, as both courts below found in the present case, may be inadmissible. Such evidence is not intended to provide easy access to fishing expeditions on the part of the defence where the psychiatric history of a witness may be marginal or totally irrelevant to the issue to be decided. Nor, in my opinion, can the rule in *Toohey* be used to provide a method of gathering all sorts of other information which, although, no doubt, of interest to the defence in its attempts to undermine the credibility of the witness, would otherwise remain beyond its reach.

179 Moreover, this jurisprudence does not mandate the disclosure of medical records to the defence in order to allow it to establish the unreliability of a witness' testimony. In the event that the defence has established that, for example, because of the demeanour or behaviour of a witness, such an investigation is crucial to the fairness of the trial, the usual method would be, as was the case in *Hawke*, to call evidence from the witness' own doctor to testify as to whether there is anything in the nature of the witness' psychiatric or mental condition which would bear specifically on her ability to give reliable evidence on the matter in issue.

3. Limitations on Cross-examination

180 In my view, in the event that disclosure is required, the limited purposes for which such evidence is available in the first place indicate that restrictions on the scope of cross-examination are also warranted. However, my colleague Cory J. found that, once a witness' medical records are admitted, cross-examination must then be allowed on any information garnered from the records which may be relevant to an issue in the case. Although my colleague himself finds that defence counsel's submissions as regards the purpose of cross-examination appeared "to be the very sort of improper purpose for which evidence cannot be adduced", he still finds that it was the duty of the trial judge "to permit cross-examination with regard to the July 9 record, particularly to determine if it would throw any light either upon a possible motive of the complainant to allege that she was the victim of sexual assault or with regard to her conduct which might have led the appellant to believe that she was consenting to sexual advances" [at p. 26]. For the following reasons, I disagree.

181 Medical records only become relevant if there is serious reason to believe that the competence to testify, which we normally presume in all adult witnesses, is in question. To the extent that such records are necessary to establish that the witness is incapable of giving reliable testimony in relation to the specific matter in issue, they remain relevant. If the alleged unreliability cannot be established, then, once again, the information in the records becomes tangential and cross-examination on such information will be impermissible simply on the grounds that it is either clearly irrelevant or too remote and of scant probative value.

182 Given the limitations on the exploration of a witness' particular mental or psychiatric state I have discussed above in regards to *Toohey* and *Hawke*, in my opinion it follows that cross-

examination on the medical records that extends beyond the scope of establishing the unreliability of the witness' testimony due to that mental condition should also be curtailed. In other words, cross-examination on medical records must be restricted to the purpose for which they were introduced. The defence may not argue that, because the medical records were relevant to the issue of the witness' competence to testify or reliability as to the issue to be decided, it may then cross-examine on all the information contained therein for whatever use it may be to the rest of the defence's case.

183 There may be instances, as in the present case, in which the defence argues that the records contain information that is relevant to the issues to be decided. In my opinion, both on basic evidentiary principles and for the policy reasons which I shall discuss below, cross-examination on such information should, except in extraordinary cases, nonetheless remain impermissible.

184 In the words of McCormick, supra, at p. 438, "relevance is not always enough". Trial judges possess the undoubted discretion to both exclude evidence and limit cross-examination on matters which, although arguably relevant to the issue, are outweighed by their potential to prejudice the trial of the issue. Central among these concerns are the following: such facts may unduly arouse sentiments of prejudice, hostility or sympathy; they may distract the trier of fact from the main issue to be decided; and the exploration of the issue may consume an undue amount of time. (See also: *Wigmore on Evidence*, vol. 1A (Tillers rev. 1983), at p. 969.)

185 In my opinion, the nature of medical records is such that all of these concerns would often be engaged by unlimited cross-examination. Such evidence is, in the vast majority of cases, completely marginal to the central issue of the trial. It may well invite prejudice against the witness by the trier of fact. Furthermore, the process of proof and counterproof to establish the reliability of the evidence entails large amounts of time and may potentially sidetrack the trial of the case. For these reasons, its prejudicial effect on the witness, and also in many cases on the trial process itself, will, even in the event that the medical records are relevant to the trial, outweigh its probative value. More specifically, particularly in the case of complainants in sexual assaults trials, there is serious risk that such information will be used to draw impermissible inferences and encourage the trier of fact to rely on myths about the credibility of sexual assault victims to the prejudice of both the witness and the trial process.

4. Policy Concerns Regarding the Disclosure of Medical Records

186 As I have discussed above, this court has already acknowledged in *Dyment*, supra, that there are serious dangers in the unrestricted use of information obtained in a doctor-patient or other form of therapeutic relationship. For the purposes of this discussion, it is important to explore the following concerns as they pertain to the initial disclosure of medical records and the limitations on cross-examination subsequent to any disclosure. These are but the most obvious concerns; further research and information may very well disclose other dangers.

187 First, common sense dictates that if people are aware that medical records can may very well be obtained to attack the credibility of a witness, they may be reluctant to seek needed and valuable treatment if there is any prospect that they may be required to testify at trial, particularly if there is any connection between the events at trial and the subjects of discussion in the treatment process. Few people are comfortable with the public disclosure of such information, and many people may fear that such disclosure would not be entirely without effect on other areas of their lives.

188 In addition, routine disclosure of medical records and unrestricted cross-examination upon disclosure threaten to function very unfairly against anyone who has undergone mental or psychiatric therapy, whatever the precipitating event or nature of the treatment, as compared to other members of the public. Such persons would be subject to an invasion of their privacy not suffered by other witnesses who are required to testify. They may have to answer to details of their personal life reflected in their records and effectively overcome a presumption, most often entirely unfounded, that their medical history is relevant to their credibility and ability to testify on the matter in issue.

189 Moreover, medical records concerning statements made in the course of therapy are both hearsay and inherently problematic as regards reliability. A witness' concerns expressed in the course of therapy after the fact, even assuming they are correctly understood and reliably noted, cannot be equated with evidence given in the course of a trial. Both the context in which the statements are made and the expectations of the parties are entirely different. In a trial, a witness is sworn to testify as to the particular events in issue. By con trast, in therapy an entire spectrum of factors such as personal history, thoughts, emotions as well as particular acts may inform the dialogue between therapist and patient. Thus, there is serious risk that such statements could be taken piecemeal out of the context in which they were made to provide a foundation for entirely unwarranted inferences by the trier of fact.

190 Finally, credibility is an issue in many trials but particularly in trials involving sexual assault. In my view, if disclosure is accepted as relevant in such cases, in any such trial, nothing will prevent any accused from requesting in any case the medical and psychiatric records of the complainant and cross-examining her on all matters in the record.

191 In light of these concerns, courts must weigh carefully the cost of such disclosure, not only in personal terms to the persons subject to disclosure orders or cross-examination on information elicited from such records, but also to the effective prosecution of the very issue at hand. If the net result is to discourage witnesses from reporting and coming forward with evidence, then, in my view, it cannot be said that such practices would advance either the trial process itself or enhance the general goals of the administration of justice.

192 In addition to these general concerns which may affect all witnesses, in my opinion, it is important to look at the specific position of the complainant in a sexual assault trial.

5. Sexual Assault

193 It is not without significance that this challenge to the credibility of the witness has arisen in the context of a sexual assault trial. It has, since 1983, by reason of the now s. 277 of the *Criminal Code*, been impermissible to challenge the credibility of a complainant by adducing evidence about her sexual reputation. Moreover, Parliament has recently amended the *Criminal Code* (*An Act to amend the Criminal Code (sexual assault)*, S.C. 1992, c. 38, s. 2), to replace the former s. 276 of the Code which was held unconstitutional by this Court in *R. v. Seaboyer*[1991] 2 S.C.R. 577. The former s. 276 prevented the accused, subject to a number of exceptions, from adducing evidence of the complainant's sexual activity with anyone other than the accused. The amendments strongly evidence Parliament's desire to instate guidelines to prevent the diversion of sexual assault trials into inquiries into the moral character and past behaviour of the complainant. In my view, there is a real risk that the use of medical records may become the means by which counsel indirectly bring evidence concerning the complainant before the trier of fact which they are no longer permitted to do directly. Moreover, because of the beliefs which have typically informed notions of relevance and credibility in sexual assault trials, the mere existence of challenges to credibility on mental or psychiatric grounds in a sexual assault trial raises serious questions about the persistence of rape myths.

194 Historically, a host of factors were deemed relevant to the credibility of complainants in sexual assault trials that did not bear on the credibility of witnesses in any other trial and which functioned to the prejudice of victims of sexual assault. In *Seaboyer*, supra, I discussed at length the hurdles that complainants faced in sexual assault trials due to these unfounded presumptions. They include myths that deem certain types of women "unrapable" and others, because of their occupations or previous sexual history, unworthy of belief. These myths suggest that women by their behaviour or appearance may be responsible for the occurrence of sexual assault. They suggest that drug use or dependence on social assistance are relevant to the issue of credibility as to consent. They suggest that the presence of certain emotional reactions and immediate reporting of the assault, despite all of the barriers that might discourage such reports, lend credibility to the assault report, whereas the opposite reactions lead to the conclusion that the complainant must be fabricating the event. Furthermore, they are built on the suggestion that women, out of spite, fickleness or fantasy and despite the obvious trauma for victims in many, if not most, sexual assault trials, are inclined to lie about sexual assault. The net result has been that sexual assaults are, and continue to be, underreported and underprosecuted; furthermore, the level of convictions that result in those cases that do reach the courts is significantly lower than for other offences.

195 It is against this backdrop that challenges to the credibility of sexual assault victims on psychiatric grounds must be examined. There is absolutely no evidence to suggest that false allegations are more common in sexual assaults than in other offences; indeed, given the data indicating the strong disincentives to reporting, it seems much more likely that the opposite is

true. Nonetheless, myths about the extraordinary need for caution with respect to the credibility of complainants continue to play a role in the prosecution of sexual assaults. To illustrate their persistence, it is only necessary to point out that, apart from cases of sexual assault, it is rare to encounter a suggestion that the psychiatric history of a witness is at all relevant to the trial of the issue. Moreover, trial judges are normally unlikely to even entertain such submissions unless the defence is able to conclusively establish beforehand that an inquiry into a witness' medical history is crucial to the determination of the issue at bar.

196 In the face of such practices, the question that must be asked then is, why are medical records deemed, or more likely to be deemed, both relevant and necessary in sexual assault trials?

197 Relevance is typically described in such terms as "whatever ac cords with common sense" (P.K. McWilliams, *Canadian Criminal Evidence* (3rd ed. 1990), at p. 11-32) or that which is "logically probative" of the matter in issue, the definition adopted by this court in *R. v. Morris*[1983] 2 S.C.R. 190. While we may, at first blush, think that the question of the relevance of evidence is a relatively straightforward matter to determine, as I stated in *Seaboyer*, supra, at pp. 679-80:

> Whatever the test, be it one of experience, common sense or logic, it is a decision particularly vulnerable to the application of private beliefs. Regardless of the definition used, the content of any relevancy decision will be filled by the particular judge's experience, common sense and/or logic. For the most part there will be general agreement as to that which is relevant and the determination will not be problematic. However, there are certain areas of inquiry where experience, common sense and logic are informed by stereotype and myth. As I have made clear, this area of the law has been particularly prone to the utilization of stereotype in determinations of relevance and again, as was demonstrated earlier, this appears to be the unfortunate concomitant of a society which, to a large measure, holds these beliefs. *It would also appear that recognition of the large role that stereotype may play in such determinations has had surprisingly little impact in this area of the law*. [Emphasis added.]

198 Despite the fact that there is much wider recognition, both among those involved in the administration of justice and among the public at large, that unfounded beliefs about sexual assault victims prejudicially affect both the victims and the trial of the issue, their force and effect has not been eliminated. Of their very nature, beliefs will inform notions of relevance. However, as they often function unconsciously, their effect can be unacknowledged and identifying them may be a difficult and elusive process. In recognition of this fact, Parliament, in the amendments to the *Criminal Code*, has now expressly directed the judge to take into account, in determining whether evidence should be admissible, the following matters:

> 276. ...

(3) In determining whether evidence is admissible under subsection (2), the judge, provincial court judge or justice shall take into account

. . . . .

(*b*) society's interest in encouraging the reporting of sexual assault offences;

. . . . .

(*d*) the need to remove from the fact-finding process any dis criminatory belief or bias;

(*e*) the risk that the evidence may unduly arouse sentiments of prejudice, sympathy or hostility in the jury;

(*f*) the potential prejudice to the complainant's personal dignity and right of privacy;

(*g*) the right of the complainant and of every individual to personal security and to the full protection and benefit of the law ...

199 Because of this, in my view, evidence which normally lies outside the purview of the trial process but is deemed relevant to the credibility of sexual assault complainants must be carefully, and perhaps sceptically, scrutinized. In my opinion, the best way to examine the question of relevance is to place the proposed use of psychiatric evidence in the circumstances of the ordinary trial.

200 Credibility is a central issue in many criminal cases. Moreover, the entire trial process is structured to provide the trier of fact with opportunities to assess the veracity of witnesses. However, as I have discussed above, the competence of witnesses to testify is normally presumed and challenges to the reliability of evidence on the basis of the mental or psychiatric condition of the witness rarely form part of the trial process. Unless we are to resurrect, consciously or unconsciously, the myth that complainants in sexual assault trials are inherently more untrustworthy than witnesses in any other trial where credibility is an issue, challenges to a witness' testimony on mental or psychiatric grounds must be measured against the same standard of relevance in sexual assault trials as in the trial of any other offence. Thus, even a request, let alone an order, for the production of a complainant's medical records should be an extraordinary event.

201 Moreover, the costs to both the witnesses and the trial process of both admitting medical records and permitting cross-examination of the complainant by the defence on the material contained in them must be clearly confronted. In my opinion, for the following reasons, the inescapable conclusion is that such practices would only frustrate further our still inadequate attempts to extend to victims of sexual assault the protection of the justice system to which they are entitled.

202 One of the most powerful disincentives to reporting sexual assaults is women's fear of further victimization at the hands of the criminal justice system; as I discussed in *Seaboyer*, supra, at p. 650, almost half of unreported incidents may be traced to this perception on the part of sexual

assault victims. With good reason, women have come to believe that their reports will not be taken seriously by police and that the trial process itself will be yet another experience of trauma. It must be obvious that if, in addition to the current disincentives, such victims face the revelation of intimate details of their lives via the release of their medical records, the disincentive to reporting could only increase.

203 Two alternatives seem likely. If victims of sexual assaults feared that their medical records could be deemed relevant to the assault, then they may very well make the decision to forego medical treatment if they intend to report the assault or if charges are already outstanding. Those that did undergo treatment may be reluctant to fully disclose information out of fear that such information might be used against them, either in the trial or, because of the public nature of the trial process, in other areas of their lives. Such a decision may very well prevent a discussion of matters that are vital to both the course of therapy and their ultimate well-being.

204 On the other hand, victims who choose to undergo therapy, as well as those for whom therapy is essential for their very survival, would be less likely to come forward with complaints about the assaults. This, of necessity, would lead to lack of prosecution and conviction in such cases and may, in turn, result in both continued victimization and increased risk of assault to other potential victims.

205 Furthermore, the nature of therapy is such that mere disclosure itself could be prejudicial to the health of the witness.

206 Indeed, recent reports indicate some support for these very concerns. As a consequence of recent decisions in Nova Scotia (*R. v. R. (K.A.)* (1993), 121 N.S.R. (2d) 242(C.A.), leave to appeal to S.C.C. refused October 14, 1993 [reported 25 C.R. (4th) 103 (note)]) and British Columbia (*R. v. O'Connor* (1992), 18 C.R. (4th) 98(B.C. S.C.)), groups representing, among others, both victims of sexual assault and disabled persons have expressed serious concern about these very outcomes (*The Globe and Mail*, May 15, 1993, at p. D3, and July 15, 1993, at p. A7; and the *Calgary Herald*, July 16, 1993, at p. A12).

207 Ironically, then, a procedure justified by the accused's right to full answer and defence risks frustrating the object of protecting victims of sexual assault by becoming the means by which offenders escape prosecution.

208 It must be recalled that experts called by the defence in their attempts to impugn the reliability of the complainant are entitled and expected to discuss the foundations of their opinions. Under such circumstances, it seems impossible to prevent the disclosure of information from the medical records about the witness' behaviour and background which, although irrelevant to the issues, because of the persistence of beliefs about sexual assault victims, may unfairly prejudice the complainant in the eyes of the jury. This, in turn, may prejudice the trial by diverting the focus

of the jury to the character of the complainant and away from consideration of the narrow issue before it, the question of the assault.

209 In my view, to ensure against such consequences, victims of sexual assault must be secure beforehand in knowing that their medical records will be unavailable to the defence.

Conclusion

210 I would conclude, then, that the compulsion to disclose such records may only occur where there is serious reason to believe that, absent such disclosure, a miscarriage of justice is likely. Given the premium placed on the confidentiality of medical records in our society, and the high degree of prejudice to the witness caused by delving into psychiatric records, in my view, such records should only be disclosed when there is cogent evidence to suggest that: the competence of the witness to testify is in serious doubt or the witness' testimony with respect to the particular issue to be decided is unreliable because of the witness' medical condition; and furthermore, that without such disclosure, there would be serious prejudice to the accused's right to make full answer and defence. Mere suggestion, speculation or possibility raised on the part of the defence, as is the case here, that such records may be relevant cannot be sufficient.

211 Because the issue of disclosure was not argued in this case and remains to be fully canvassed by this court, I refrain from a more specific discussion of what must ordinarily be established to meet this threshold at this time.

212 However, in the event that medical records are released to the defence, in my view, their use must be limited to the specific purpose for which they were released. In other words, their use is limited to establishing that the witness' testimony is, by reason of a medical condition, unreliable. The defence may not ordinarily make further use of the records to obtain evidence on other issues to be decided. While there may be instances in which, because the evidence revealed is both directly relevant to the matter in issue and carries high probative value and inability to make further use of such information may lead to a miscarriage of justice, such instances will be rare indeed and even then, for the reasons which I have discussed above, defence counsel may not use these records to obtain information with which to impugn the credibility of the witness generally. Medical records, particularly psychiatric records, potentially provide a gold mine of material for defence lawyers in this regard. Therefore, in the extraordinary event that medical records are admitted into evidence, courts must take particular care in the case of sexual assault trials that medical records are not used to confront complainants about past sexual history or invoke rape mythology by raising issues which might be perceived by the trier of fact as establishing the "bad character" of the complainant, which is precisely what the defence here alleged: "what kind of person the complainant is".

213 In conclusion, I feel compelled to point out that the defence normally has no access to the medical records of a witness. Unless we are prepared to accept the argument that access to medical records is to be provided in every case in which credibility is an issue (which, for reasons

of relevance, we do not), I fail to see how the inability to access this information, or to fully cross-examine the complainant on these records, prevents the accused from making full answer and defence. Such an argument would imply an entitlement on the part of the accused to virtually unrestricted latitude to expand the focus of the trial. The rights of the accused to both adduce evidence and cross-examine are not unlimited but must be first, circumscribed by the question of relevance and second, balanced by countervailing factors such as the privacy interests of the witness and the prejudice to both the witness and the trial process.

Application to the Case

214 In the present case, counsel to the appellant originally sought disclosure of the complainant's entire medical record and full cross-examination on all of the complainant's psychiatric problems, all her medication and all her counselling. Prior to disclosure, counsel freely admitted that he did not know what he would find and that the records might not supply him with anything of assistance, but he nonetheless claimed that they were necessary to make full answer and defence. The trial judge was apparently of the view that, because it was possible that the complainant might be suffering from a severe psychiatric illness, her medical records should be disclosed.

215 In my opinion, there is nothing in the record of this case to suggest that there were sufficient grounds to warrant an order for the disclosure of the records to the defence in the first place. The issue was the narrow one of consent to sexual relations with the appellant on the day in question. There was no evidence that the complainant was incapable of giving reliable testimony in general, let alone reliable testimony as to the particular issue to be decided. Rather, the opposite was true. The complainant was able to, and did give, prior to the order for disclosure, a clear, full and detailed account of the events. Nothing prevented the defence from conducting a full cross-examination of the complainant as to those events.

216 In addition, there was absolutely no evidence that the complainant was in fact suffering from a condition that would affect her capacity to give reliable testimony; the only evidence was that she had been admitted to the psychiatric ward on several occasions because of difficulties with her family and problems related to low self-esteem. Moreover, the complainant herself had already admitted her psych iatric history prior to the release of her medical records. Thus, there was no evidence of a "hidden defect" in her mental condition that necessitated revelation by psychiatric testimony.

217 However, given the trial judge's understanding that he was required to order the disclosure of the complainant's medical records, in my opinion, it was not only proper but essential for him to restrict the purposes for which they could be used. Nor did the trial judge err in concluding that the privacy of the complainant was an important value which should play a role in determining the scope of the use of the medical records. Finally, the trial judge was entirely correct in refusing to allow the defence to cross-examine on the records to attempt to elicit information to establish

the defence of mistaken belief in consent. The evidence in the medical records was, of necessity, totally irrelevant and without any probative value as regards this issue.

218 Despite the production of the medical records, the appellant was unable to establish via the complainant's doctor or its own expert witness that the complainant suffered from some defect of the mind that *prevented* her from reliably testifying as to consent to sexual relations on that day. The appellant's counsel cross-examined the complainant's own psychiatrist, Dr. MacTavish, in a voir dire on the basis of those records. However, Dr. MacTavish rejected the proposition that the complainant suffered from a personality disorder and, when asked directly about it by the trial judge, expressly stated that he thought her evidence was capable of being relied upon at face value.

219 However, once the appellant was in possession of the medical records, he then argued that, because the records were allowed in, he should be permitted unrestricted cross-examination on them to challenge the credibility of the complainant as to the issue of consent. For the reasons I have discussed, in my view the trial judge's discussion to prevent the cross-examination was correct. Moreover, it is clear that the appellant intended to use these records to establish the very sort of prejudice to the complainant which informs rape myths.

220 In my opinion, once the appellant was unable to establish that the complainant was unable to give reliable testimony, the trial judge was entirely correct in finding that this was the end of any use of her medical records in the trial.

221 Contrary to the finding of the Court of Appeal, we do have a record, drawn from the submissions of the appellant's counsel which preceded the disclosure order and those preceding the ruling on the cross-examination, of the questions and line of inquiry that the defence intended to pursue in cross-examining the complainant on her medical records. Counsel to the appellant frankly admitted that he wanted to adduce evidence concerning her parents' reaction to the assault because "that relates directly to what kind of person the complainant is". Moreover, the cross-examination of her psychiatrist, Dr. MacTavish, on those records in the voir dire also clearly reveals the manner in which the appellant regarded the material as relevant. Both sources disclose that the defence intended to use the information gained from the record to wage a wide-ranging attack on the credibility of the complainant and establish her "bad character". This is evident in the voir dire of Dr. MacTavish, in which the defence raised such issues as her past use of drugs and alcohol, difficulties in social relations, previous history of sexual relations, and fights with her mother. I can only conclude that the defence hoped to use expert testimony on the medical records to invite the jury to draw inferences about the credibility of the complainant based on, among other things, her past sexual history. These are precisely the inferences based upon myths which work to the prejudice of complainants in sexual assault and which Parliament, in its amendments to the law governing sexual assault, has attempted to prevent.

222 As to the proposed cross-examination of the complainant, in his submissions before this court, the appellant urged that the July 9th notation in the complainant's medical record, to the effect that she was concerned that her behaviour may have influenced the appellant's behaviour, was relevant to the defences of consent and mistaken belief in consent. He also contended that entries in her medical records indicating that she had a turbulent relationship with her parents were relevant to the defence theory that she made up the allegations of the assault to avoid a confrontation with her parents after she had been out all night.

223 With regard to the July 9th notation, I am unable to see how this statement, four and a half months after the incident, can be at all relevant to the issues of consent or the appellant's mistaken belief in consent at the time. The complainant's reflections on how the situation might have been avoided, even assuming they are correct, can have no probative value as to whether or not there was consent to the assault or mistaken belief in consent on the part of the appellant. In any event, it is hardly surprising that such statements are to be found in her medical records; in this, as in other traumatic situations such as the death of a loved one, especially by suicide, it is not uncommon for people to blame themselves for the event. It is well-known that victims of sexual assault in particular often feel responsible for not having done enough to prevent the attack.

224 Furthermore, as the Court of Appeal noted in its reasons, there is no evidence that the medical record contained any prior inconsistent statements relevant to the complainant's testimony on the issue of consent. The trial judge, who heard all of the evidence and read all of the medical records, was unable to find any relevance to the proposed cross-examination and accordingly refused to permit the cross-examination. Nor does the appellant allege that the records contain prior inconsistent statements. In my opinion, the appellant clearly has not established that he has been prevented from making full answer and defence by the trial judge's ruling that he may not cross-examine the complainant on her psychiatric records.

225 On the issue of consent, the jury already had the benefit of the complainant's direct testimony as to the events themselves and the absence of the complainant's consent. She was cross-examined extensively on this issue. In addition, the appellant also testified as to his "expectations" about what would happen. Therefore, there was no need to resort to second hand reports in the medical records and no reason to believe that anything would be gained by questioning her further on this point, particularly as the appellant would have been bound by her answers on this collateral issue.

226 As to the issue of the accused's honest but mistaken belief in consent, the complainant's thoughts about the assault after the fact are completely irrelevant. The defence of mistaken belief in consent, as opposed to the defence of consent, normally only arises where the complainant and the accused tell essentially the same story about what occurred but differ in their interpretations as to whether the activity in question amounted to consent (see *Director of Public Prosecutions v. Morgan*, [1976] A.C. 182(H.)(L.) and *R. v. Pappajohn*[1980] 2 S.C.R. 120). In the present case,

any mistake of perception or interpretation that might have existed was a matter located solely in the mind of the appellant; nothing in the subsequent comments of the complainant could add to, detract from, or have any relevance to presence or absence of that belief at the time.

227 The material in the medical records concerning the complainant's relationship with her parents is also completely irrelevant to the issue of whether she was assaulted. Thus, any cross-examination in this area would be impermissible. But, in any event, the jury was already aware of the complainant's difficulties with her parents and the theory of the defence that she invented the story of the assault to avoid repercussions with her parents. Again, there is no evidence that further cross-examination on this issue would have had any effect on the outcome of the trial.

228 In summary, important as cross-examination is, and I agree with Cory J. on this, I cannot agree that the appellant was denied the opportunity to make full answer and defence because he was unable to cross-examine the complainant on her medical record. There is nothing to suggest that the material in the records for this proposed cross-examination was anything other than irrelevant to the issue of her consent to the assault. Moreover, it is obvious that it would have been highly prejudicial and that its purpose was to attack the credibility of the complainant in a general way by putting before the jury every difficulty in her personal life in the hope that they would then draw nega tive inferences about her character and credibility. Cross-examination for this purpose is clearly impermissible; furthermore, it could only have prejudiced the trial by distracting the jury from the narrow issue of consent to the assault on that particular event.

Disposition

229 In the result, I find that s. 265(4) of the *Criminal Code* is constitutional and, like McLachlin J., I would dismiss the appeal.

Appeal allowed; new trial ordered.

COURT OF APPEAL FOR BRITISH COLUMBIA

Please see in particular para. 89 (*per* Fisher J.A.) and paras. 164 and 167 (*per* Hunter J.A. in concurring reasons).

Citation: *R. v. Samji,* 2017 BCCA 415

Date: 20171201
Docket: CA43961

Leave to appeal refused: 2018 CanLII 48394 (SCC)

Between:

Regina

Respondent

And

Rashida Abdulrasul Samji

Appellant

Before: The Honourable Chief Justice Bauman
The Honourable Mr. Justice Hunter
The Honourable Madam Justice Fisher

On appeal from: An order of the Provincial Court of British Columbia, dated May 26, 2016 (*R. v. Samji*, 2016 BCPC 145, Vancouver Docket No. 232139).

Counsel for the Appellant:	R. Peck, Q.C. M. Shah
Counsel for the Respondent:	L. Vizsolyi
Place and Date of Hearing:	Vancouver, British Columbia October 6, 2017
Place and Date of Judgment:	Vancouver, British Columbia December 1, 2017

Written Reasons by:
The Honourable Madam Justice Fisher

Concurred in by:
The Honourable Chief Justice Bauman

Concurring Reasons by:
The Honourable Mr. Justice Hunter (Page 36, para. 129)

Summary:

In administrative proceedings before the BC Securities Commission, the appellant was found to have perpetrated a fraud under s. 57(b) of the Securities Act arising from a Ponzi scheme she operated for nine years. The Commission imposed penalties against her that included an administrative monetary penalty of $33M. The Crown also laid charges under the Criminal Code for theft and fraud arising from the same factual matrix. At her criminal trial, the appellant sought a stay of proceedings on the basis that the $33M penalty was a "true penal consequence" and that the criminal proceedings constituted double jeopardy, contrary to s. 11(h) of the Charter, or alternatively were an abuse of process, contrary to s. 7 of the Charter. The trial judge refused to grant a stay. On the basis of an agreed statement of facts, the appellant was convicted of the criminal charges and sentenced to six years' incarceration for the fraud convictions. She seeks to appeal her convictions on the basis that the trial judge erred in finding that (a) the administrative monetary penalty did not constitute a true penal consequence for the purposes of s. 11 of the Charter; (b) s. 11(h) of the Charter did not preclude the criminal proceedings; and (c) the criminal proceedings did not amount to an abuse of process contrary to s. 7 of the Charter.

Held: Appeal dismissed. Addressing the retrospective approach taken by the appellant, the trial judge was correct in refusing to order a stay of proceedings under s. 11(h) of the Charter. The Commission issued an administrative monetary penalty consonant with its regulatory mandate under the Securities Act. While substantial, the AMP was not punitive in purpose or effect. It was a protective and preventative order designed to deter similar fraudulent conduct, not to denounce the appellant's conduct or reflect her moral blameworthiness. A stay under s. 7 of the Charter was not warranted either, as the appellant has not answered to society at large for her conduct, and a stay would likely cause the public to lose confidence in the integrity of the justice system. A concurring judgment, applying a prospective analysis, would dismiss the appeal on the basis that ss. 161 and 162 of the Securities Act do not create an offence within the meaning of s. 11 of the Charter.

Reasons for Judgment of the Honourable Madam Justice Fisher:

Introduction

[1] Section 11 of the *Charter of Rights and Freedoms* provides certain rights to a person "charged with an offence". One of those rights, in s. 11(h), is the right not to be tried or punished twice for the same offence (often described as the rule against double jeopardy).

[2] The primary issue in this appeal is whether an accused is entitled to a stay of criminal proceedings in respect of a matter that has already been addressed in

regulatory proceedings in which a very substantial monetary penalty has been imposed. It asks the question of when an administrative sanction becomes a "true penal consequence" that triggers the application of s. 11 of the *Charter*.

[3] The appellant, Rashida Abdulrasul Samji, was charged with 14 counts of theft and 14 counts of fraud, contrary to ss. 334(a) and 380(1) of the *Criminal Code*, R.S.C. 1985, c. C-46. She was also subject to regulatory proceedings before the British Columbia Securities Commission (the Commission), which found that she had committed fraud, contrary to s. 57(b) of the *Securities Act*, R.S.B.C. 1996, c. 418 (the *Act*). Both the criminal and regulatory proceedings arose from a fraudulent Ponzi scheme that the appellant was found to have operated over a period of nine years, which put at risk approximately $100M from more than 200 investors. The Commission proceeded against the appellant before the criminal trial commenced, and imposed sanctions against her that included a disgorgement order under s. 161(1)(g) of the *Act* in the amount of $10,811,799 and an administrative monetary penalty (AMP) under s. 162 in the amount of $33M.

[4] At her criminal trial in Provincial Court, the appellant sought a stay of proceedings under s. 24(1) of the *Charter* on the basis that the $33M AMP constituted "a true penal consequence", such that a subsequent criminal proceeding was precluded by s. 11(h) of the *Charter*, or alternatively constituted an abuse of process contrary to s. 7 of the *Charter*. The trial judge dismissed the appellant's application and convicted her of all counts in the indictment on the basis of an agreed statement of facts (*R. v. Samji*, 2016 BCPC 145). He subsequently imposed a sentence of six years' imprisonment for the fraud convictions (*R. v. Samji*, 2016 BCPC 301).

[5] The appellant now appeals her convictions on the grounds that the trial judge erred in law by finding that (a) the AMP did not constitute a true penal consequence; (b) s. 11(h) of the *Charter* did not preclude the criminal proceedings; and (c) the criminal proceedings did not amount to an abuse of process contrary to s. 7 of the *Charter*.

[6] For the reasons which follow, I would dismiss the appeal.

<u>The facts</u>

1. The Ponzi scheme

[7] The trial judge succinctly described a Ponzi scheme as

> … a fraudulent investment operation that lures investors by promising high returns. It pays investors with the money contributed by subsequent investors and not with profits earned by a genuine investment. It is named after Charles Ponzi, who famously perpetrated such a scheme in the United States in the early 20th century.
>
> (at para. 1)

[8] The appellant, who was a licenced notary public, operated a Ponzi scheme from 2003 to early 2012. She falsely told investors that the investment was connected to the wine business through a private company in Vancouver known as the Mark Anthony Group Inc. She promised investors that their money would be kept safe in her notary trust account and would be used to secure letters of comfort for the Mark Anthony Group. She also promised investors that they would receive a 12% annual return, payable one month after the date of investment. Many investors opted to roll over their investments in lieu of their capital being repaid.

[9] The Mark Anthony Group had no involvement in this scheme. None of the investors' money was held in the appellant's trust account, none was used to invest in wineries or wine-related businesses, and no letters of comfort were ever provided. Investors' money was received and distributed by the appellant's two companies and used to pay other investors.

[10] The appellant's status as a notary public played a significant role in her perpetuation of the fraudulent scheme. In *Jer v. Society of Notaries Public of British Columbia*, 2015 BCCA 257, leave to appeal ref'd [2015] S.C.C.A. No. 345, a class proceeding launched against the appellant and others, this court affirmed the trial judge's conclusion that the funds invested by the investor class members were entrusted to and received by the appellant in her capacity as a notary public.

[11] By the end of January 2012, both the Royal Canadian Mounted Police (RCMP) and the Commission had commenced investigations into the appellant's activities, the RCMP on January 30 and the Commission on January 31. The Commission also made an order freezing the appellant's bank accounts and assets.

[12] On February 7, 2012, the Society of Notaries Public of British Columbia suspended the appellant and appointed a custodian over her notary practice. On March 6, 2012, the appellant resigned from the Society.

[13] In April 2012, the Commission issued a notice of hearing. News of the allegations prompted several lawsuits, including the class action proceeding referred to above.

[14] On December 5, 2012, the appellant and her companies were assigned into bankruptcy.

2. The criminal investigation

[15] The criminal investigation focused on 14 investors who deposited $16,503,397 into the appellant's bank accounts in relation to the Ponzi scheme. Of the 14 investors, 13 of them incurred net losses totaling $10,497,217.

[16] An information was sworn on November 6, 2013.

3. The Commission proceedings

[17] The Commission proceeded against the appellant under ss. 161 and 162 of the *Act*. These provisions authorize the Commission to impose administrative sanctions it considers to be in the public interest where it has found, after a hearing, that a person has contravened the *Act*, the regulations or a decision. Monetary sanctions include disgorgement orders under s. 161(1)(g) and AMPs under s. 162. Section 162 authorizes the Commission to order an AMP of "not more than $1 million for each contravention".

[18] The Commission held a hearing into the liability of the appellant and her companies over a period of 13 days in November and December 2013 and March

2014. The appellant was represented by counsel but did not attend in person. In a decision dated July 16, 2014, indexed as *Samji (Re)*, 2014 BCSECCOM 286, the Commission found that the appellant had perpetrated a fraud, contrary to s. 57(b) of the *Act*, by trading securities to at least 200 investors for proceeds of at least $100M. It also found that the companies, wholly owned and controlled by the appellant, had participated in the fraud by receiving and distributing the funds raised by the Ponzi scheme.

[19] The Commission held a hearing into sanctions on December 9, 2014. Again, the appellant was represented by counsel but did not attend in person. The executive director sought sanctions against the appellant and her companies that included a disgorgement order of not less than $100M and an AMP of not less than $100M. The appellant opposed the imposition of either a disgorgement order or AMP but submitted that if either was considered, a disgorgement order should be for an amount equal to the monies she obtained less monies received from related bankruptcy, civil and/or criminal proceedings, and an AMP should be for no more than $1M.

[20] The Commission considered orders in the magnitude proposed by the executive director to be punitive and inappropriate, and those proposed by the appellant insufficient. In a decision dated January 16, 2015, indexed as *Samji (Re)*, 2015 BCSECCOM 29 (the Sanctions Decision), it imposed the disgorgement order of $10,811,799 based on a forensic accounting analysis of the difference between the monies deposited by investors and the monies paid out to them. It imposed the AMP of $33M as an amount that reflected the seriousness of the appellant's misconduct and "the other factors relevant to sanctions", and served "as a meaningful and substantial general deterrent to others who would engage in similar misconduct" (Sanctions Decision at para. 56). Both sanctions were imposed against the appellant and her two companies.

[21] The appellant, who was assigned into bankruptcy before the Commission hearings began, is unable to pay, and has not made any payments in respect of

either the disgorgement order or the AMP. She has not sought to challenge the Sanctions Decision by way of an appeal to this Court, which is provided under s. 167 of the *Act*.

Section 11 of the *Charter* and the *Wigglesworth* test

[22] As the appellant's primary submission before us and before the trial judge was grounded in s. 11 of the *Charter* and the test established in *R. v. Wigglesworth*, [1987] 2 S.C.R. 541, I will first review this test and how it has been interpreted in several key cases.

[23] In *Wigglesworth*, the Supreme Court of Canada set parameters for determining when a person is "charged with an offence" within the meaning of s. 11 of the *Charter*. Wilson J., for the Court, favoured a narrow interpretation of s. 11 rights, restricted to "the most serious offences known to our law" and only 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" (at 554, 558).

[24] In *Wigglesworth*, an RCMP officer assaulted a civilian and was charged and found guilty of a "major service offence" contrary to the *Royal Canadian Mounted Police Act*, R.S.C. 1970, c. R-9. He was also charged with assault contrary to what was then s. 245 of the *Criminal Code*. Like this case, the officer sought a stay of the criminal proceedings on the basis that he was being tried and punished for the same offence and was entitled to the protection of s. 11(h) of the *Charter*.

[25] To determine whether a person is "charged with an offence" under s. 11, Wilson J. developed a two-part test: a matter can fall within s. 11 because (1) it is a criminal proceeding by its nature, or (2) a conviction in respect of the offence may lead to a true penal consequence (at 559). She defined a "true penal consequence" that would attract the application of s. 11 as

> … 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.
>
> (at 561)

[26] She added two caveats:

> First, the possibility of a fine may be fully consonant with the maintenance of discipline and order within a limited private sphere of activity and thus may not attract the application of s. 11. It is my view that if a body or an official has an unlimited power to fine, and if it does not afford the rights enumerated under s. 11, it cannot impose fines designed to redress the harm done to society at large. Instead, it is restricted to the power to impose fines in order to achieve the particular private purpose. One *indicium* of the purpose of a particular fine is how the body is to dispose of the fines that it collects. If, as in the case of proceedings under the *Royal Canadian Mounted Police Act*, the fines are not to form part of the Consolidated Revenue Fund but are to be used for the benefit of the Force, it is more likely that the fines are purely an internal or private matter of discipline: *Royal Canadian Mounted Police Act*, s. 45. The second caveat I would raise is that it is difficult to conceive of the possibility of a particular proceeding failing what I have called the "by nature" test but passing what I have called the "true penal consequence" test. I have grave doubts whether any body or official which exists in order to achieve some administrative or private disciplinary purpose can ever imprison an individual. Such a deprivation of liberty seems justified as being in accordance with fundamental justice under s. 7 of the *Charter* only when a public wrong or transgression against society, as opposed to an internal wrong, is committed. However, as this was not argued before us in this appeal I shall assume that it is possible that the "by nature" test can be failed but the "true penal consequence" test passed. Assuming such a situation is possible, it seems to me that in cases where the two tests conflict the "by nature" test must give way to the "true penal consequence" test. If an individual is to be subject to penal consequences such as imprisonment--the most severe deprivation of liberty known to our law--then he or she, in my opinion, should be entitled to the highest procedural protection known to our law.
>
> (at 561-562)

[27] Applying the test, Wilson J. determined that the proceedings before the RCMP Service Court failed the "by nature" test but passed the "true penal consequence test" because an officer charged under the Code of Discipline risked imprisonment for a maximum period of one year. This was so despite the fact that the officer in that case received only a $300 fine. Nevertheless, she did not accept that the officer was entitled to the protection of s. 11(h) because he was not being tried and punished for the same offence in the subsequent criminal proceeding.

Finding the "offences" quite different, she held that the accused had accounted to his profession and also had to account to society at large for his conduct (at 563, 566).

[28] The *Wigglesworth* test was somewhat refined in *Martineau v. Canada (Minister of National Revenue)*, 2004 SCC 81 and *Guindon v. Canada*, 2015 SCC 41.

[29] The issue in *Martineau* was whether the appellant could avail himself of the right against self-incrimination guaranteed by s. 11(c) of the *Charter* in the course of a proceeding under s. 135 of the *Customs Act*, R.S.C. 1985, c. 1 (2nd Supp.). In *Guindon*, the issue was whether proceedings under s. 163.2 of the *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.) created a true criminal offence and therefore engaged the procedural protections in s. 11. The analysis by the Supreme Court in both cases demonstrates that there is some overlap between the first and second parts of the *Wigglesworth* test.

[30] In *Martineau*, Fish J. for the court considered the purpose of the sanction (there a demand for payment of the value of goods) to be relevant to the first part of the test, determining the nature of the proceeding. In rejecting an argument that the purpose of the sanction was punitive, he found that its purpose was not to redress a wrong done to society at large, but rather to ensure compliance with the *Customs Act* and to deter others from noncompliance. In assessing whether the amount demanded ($315,000) constituted a true penal consequence under the second part, Fish J. again considered the purpose of the sanction as well as its magnitude. He found that the purpose was neither to punish the offender nor to elicit societal condemnation, and the amount, being determined by a mathematical calculation, was civil in nature and purely economic (at para. 62).

[31] In *Guindon*, the court was divided as to whether the merits of the appeal should be considered in the absence of notice of constitutional question. The majority was of the view that the court should exercise its discretion to do so, and went on to consider whether the appellant was a person "charged with an offence" under s. 11 of the *Charter*. In doing so, the majority acknowledged that the

"*Wigglesworth/Martineau* tests" have been subject to criticism, in that "the distinction between the criminal in nature and true penal consequence tests is unclear, the reasoning is circular, or the tests cannot properly account for the particular context of modern administrative monetary penalties" (at para. 48).

[32] However, they went on to explain the independent value of each part of the test despite some overlap in the analysis, emphasizing the importance of considering all relevant factors:

> [49] When the criminal in nature test is understood as considering only the nature of the proceedings, the independent value of each test becomes clear. The criminal in nature test identifies provisions that are criminal because Parliament or the legislature has provided for proceedings whose attributes and purpose show that the penalty is to be imposed via criminal proceedings. The true penal consequence test, on the other hand, looks at whether an ostensibly administrative or regulatory provision nonetheless engages s. 11 of the *Charter* because it may result in punitive consequences. While there is inevitably some overlap in the analysis, the important thing is to consider all relevant factors, acknowledging that only rarely, as in *Wigglesworth*, will the two branches of the test lead to different conclusions.
>
> [50] Moreover, the analysis is not circular: both tests ask distinct questions that evaluate the two different ways in which a provision could be a criminal offence for the purpose of s. 11. The criminal in nature test focuses on the process while the penal consequences test focuses on its potential impact on the person subject to the proceeding.

[33] That said, to avoid "unnecessary repetition", the majority considered the purpose of the sanction only in assessing whether it was a true penal consequence (at para. 52). In doing so, they addressed the issue of monetary penalties in some detail, indicating that a penalty can be punitive in purpose *or* effect:

> [76] … A monetary penalty may or may not be a true penal consequence. It will be so when it is, in purpose or effect, punitive. Whether this is the case is assessed by looking at considerations such as the magnitude of the fine, to whom it is paid, whether its magnitude is determined by regulatory considerations rather than principles of criminal sentencing, and whether stigma is associated with the penalty: see, e.g., *Canada (Attorney General) v. United States Steel Corp.*, 2011 FCA 176 (CanLII), 333 D.L.R. (4th) 1, at paras. 76-77.

[34] The majority made it clear that the magnitude of the sanction by itself is not determinative. A sanction may constitute a true penal consequence where the

amount is out of proportion to what is required to achieve regulatory purposes. In doing so, they recognized that very large penalties can be imposed and may be necessary in order to deter non-compliance with an administrative scheme:

> [80] Some statutes prescribe very high administrative monetary penalties, at times over a million dollars, and these have been upheld where it is demonstrated that the penalty serves regulatory purposes. In some cases, sizable penalties are necessary so the penalty is not simply considered a cost of doing business …

[35] They concluded that the relevant question is not the amount of the penalty “in absolute terms” but rather whether the amount serves regulatory, not penal purposes (at para. 81).

The decision of the Provincial Court judge

[36] The trial judge considered the *Wigglesworth* test as “expanded” in *Martineau* and “confirmed” in *Guindon* along with additional factors relevant to the true penal consequence test. He noted that a very large AMP does not automatically render it a true penal consequence and, as recognized in *Guindon*, the amount must be sufficient so that it is not simply considered “a cost of doing business” (at para. 20). He considered all of this in the context of the provisions of the *Act*, the facts of the case, the appellant’s personal and financial circumstances, and the possible stigma associated with the Commission proceedings.

[37] The trial judge noted that relief from an excessively harsh AMP can be sought through an appeal but the appellant in her stay application was not seeking to avoid the consequences of the AMP; she was attacking only its purpose and effect. He stated that his ruling did not review the appropriateness of the sanctions imposed by the Commission but only whether the $33M AMP was imposed to redress the wrong done to society at large (at paras. 21, 82–83).

[38] Despite the appellant’s acknowledgement that the Commission proceedings were not criminal in nature, the trial judge contrasted the administrative process leading to the imposition of the AMP with the “hallmarks” of a criminal proceeding. He noted that the Commission in this case elected to proceed with administrative

penalties pursuant to ss. 161 and 162 of the *Act* rather than quasi-criminal offences pursuant to s. 155(1). He considered the broad scope of s. 57(b), which prohibits anyone from directly or indirectly engaging or participating in conduct relating to securities if the person knows or reasonably should know that the conduct perpetrates a fraud. Viewing s. 57(b) along with ss. 161 and 162, he concluded that together they have a regulatory purpose to promote honesty, protect investors and foster public confidence in the capital markets. He described how hearings pursuant to ss. 161 and 162 differ quite significantly from criminal proceedings and concluded that the process leading up to the imposition of the $33M AMP was not criminal in nature (at paras. 90–93).

[39] In assessing whether the AMP constituted a true penal consequence, the trial judge assessed both its purpose and its effect on the appellant.

[40] In assessing its purpose, the judge relied "almost exclusively" on the reasoning of the Commission in its Sanctions Decision, discussing the magnitude of the AMP, its recipient, and the applicability of sentencing principles (at para. 101). Implicit in his reasons is his acceptance of the Commission's assessment that the magnitude of the AMP was directly tied to its objective of deterring non-compliance with the *Act*. He considered that the recipient of any payments made towards the AMP was not the Consolidated Revenue Fund, but a fund to be used for operational regulation of the markets, investor education and payments to individuals making successful claims. He also considered that sentencing principles such as deterrence and proportionality were not unique to criminal proceedings. He accepted the Commission's application of the relevant factors to consider in making orders under ss. 161 and 162, as set out in its decision, *Re Eron Mortgage Corporation*, [2000] 7 BCSC Weekly Summary 22 [*Eron Mortgage*].

[41] The judge accepted the Commission's conclusion that the sanctions imposed against the appellant were "protective and preventative", intended to serve as "a meaningful and substantial deterrent" to the appellant and others.

[42] In assessing the effect of the AMP on the appellant, the trial judge found that the stigma attached to her arose largely from the Commission's findings that she perpetrated a fraud, and not from the proceedings themselves. He noted that these findings attracted media attention and negatively impacted the appellant's life in many facets. In addition to losing her professional standing, the appellant had been excluded by her family and community and had found it difficult to obtain employment. However, he found that the stigma caused by the media publications was to be expected, stating that "[i]individuals who commit securities fraud should reasonably expect that their misconduct would likely be scrutinized by the Commission" (at para. 124). He acknowledged that the label "fraudster" carried a significant social stigma but concluded that this reflected only the social repugnance of the appellant's misconduct and was not comparable to that attached to a criminal conviction (at para. 129).

[43] Importantly, the judge concluded that the stigma suffered by the appellant did not reflect the degree of fault for her perpetration of the Ponzi scheme. He found that the factors considered by the Commission "were only considered in the context of the Commission's mandate to regulate the securities industry and to deter participants in the securities industry from non-compliance with the *Act*", and the sanctions imposed on the appellant "did not redress or condemn the moral blameworthiness" of her conduct (at para. 130).

[44] The judge accepted that the AMP was significant and he assumed that the appellant would remain obligated to pay it after a discharge from bankruptcy. However, he did not consider that it interfered with her life, liberty or security: she was unlikely to ever be able to pay any part of either the AMP or the disgorgement order, the Commission had taken no steps to enforce payment, and default of payment would not result in imprisonment. He also considered the fact that the appellant had elected not to challenge the sanctions as she was entitled to do under s. 167 of the *Act*.

[45] Accordingly, the trial judge concluded that the sanctions imposed on the appellant, including the AMP, did not amount to a true penal consequence and therefore s. 11(h) of the *Charter* did not preclude a criminal prosecution against her.

[46] The trial judge also concluded that the criminal proceedings did not amount to an abuse of process contrary to s. 7 of the *Charter*. He found that the appellant's fair trial interests had not been compromised or prejudiced by the criminal proceedings, which provided all of the protections in s. 11 of the *Charter*, including the presumption of innocence. He noted that the appellant was being tried for two different offences by two separate and independent entities and held that her misconduct had not been redressed to society at large.

[47] Accordingly, he found no basis to grant a stay of proceedings.

On appeal

[48] In this appeal, the appellant acknowledged that the proceedings before the Commission were administrative in nature such that the first part of the *Wigglesworth* test does not apply, but submitted that the $33M AMP imposed constitutes a true penal consequence. On this basis, the appellant says that she is entitled to the protections in s. 11 of the *Charter*, including the protection against double jeopardy in s. 11(h).

[49] The appellant contends that the trial judge erred in finding that an AMP of $33M was not a true penal consequence in the circumstances of this case. She says that if a penalty of this magnitude does not meet the second part of the *Wigglesworth* test, no case involving a fine ever can.

[50] The appellant submitted that the factors relevant in assessing a true penal consequence support a finding in her favour. She says that $33M is out of proportion to what is required for deterrence and the effect on her is punitive, especially when considered along with the $10,811,799 disgorgement order. She says that this is illustrated by the Commission's consideration of traditional criminal law sentencing principles that include denunciation, retribution, and an assessment of moral

blameworthiness. All of this, she says, supports a conclusion, contrary to that of the trial judge, that the AMP was imposed to redress society at large.

[51] The respondent submitted that the trial judge committed no error in concluding that the $33M AMP was not a true penal consequence, as it was appropriate in the context of the seriousness of the appellant's fraudulent scheme, the factors relevant to sanctions, and the Commission's statutory mandate.

[52] The respondent pointed out that if the AMP is found to be a true penal consequence, the implications are significant: not only would the Commission have acted outside of its jurisdiction and mandate in imposing the penalty, but also, all of the rights guaranteed under s. 11 of the *Charter* would apply to the Commission's proceedings. This would call into question all of the Commission's administrative procedures that allow it to act quickly in the public interest.

<u>Analysis</u>

[53] This appeal was presented and argued on the basis of the $33M AMP that was actually imposed on the appellant. This approach posed an analytical dilemma for this court in the context in which the appeal was brought. The implications of a determination that this AMP is a true penal consequence would mean that all of the rights guaranteed in s. 11 of the *Charter* apply to the Commission's proceedings against the appellant under ss. 161 and 162 of the *Act*, notwithstanding that she seeks only a stay of subsequent criminal proceedings. Such a determination on a retrospective basis would call into question the validity of proceedings already concluded, yet the question of validity is not before us. Related to this, the appellant's assertion that the AMP is a true penal consequence yet a valid sanction is irreconcilable with recognized limitations on the Commission's statutory power.

[54] Justice Hunter has addressed this dilemma directly by taking a prospective approach and analyzing only the statutory power of the Commission to impose AMPs. I agree with his approach, as it provides a solid basis for constitutional analysis in the context here. I also agree, consistent with *Lavallee v. Alberta Securities Commission*, 2010 ABCA 48 and *Rowan v. Ontario Securities*

Commission, 2012 ONCA 208, that s. 162 does not authorize AMPs that are true penal consequences and that this appeal could be disposed of on that basis.

[55] That said, as the entire foundation for this appeal is the actual penalty imposed, I have conducted my analysis on this basis. As I discuss below, there is authority to support this approach generally and this was not a matter of disagreement between the parties. However, as my analysis will show, the dilemma I describe above illustrates why an appeal under s. 167 of the *Act*, rather than an application for a stay of proceedings under s. 11(h) of the *Charter*, is the appropriate way to address whether an AMP constitutes a true penal consequence.

[56] I will address the following issues:

1. What is the standard of review?
2. Was the appellant, in the proceedings before the Commission, a person charged with an offence within the meaning of s. 11 of the *Charter*?
3. If s. 11 of the *Charter* is engaged, does s. 11(h) preclude a criminal prosecution for the "same offence"?
4. If s. 11 is not engaged, is the criminal proceeding an abuse of process contrary to s. 7 of the *Charter*?

1. The standard of review

[57] The circumstances here are somewhat unusual, in that the trial judge was asked to consider the remedy of a stay under s. 24(1) of the *Charter* primarily on the basis of a determination that a monetary penalty imposed by an administrative tribunal constituted a true penal consequence that engaged the application of s. 11 of the *Charter*. In addressing this, the trial judge was careful to state that his ruling did not review "the appropriateness of the sanctions imposed by the Commission" but rather whether the AMP was imposed to redress the wrong done to society at large. In doing so, the judge relied in part on the Commission's expertise; in

determining whether the purpose of the AMP was punitive, he relied “almost exclusively” on the Commission’s reasoning in the Sanctions Decision.

[58] Were this court reviewing the Sanctions Decision by way of an appeal under the *Act*, the reasonableness standard would apply where the issue concerned the tribunal’s interpretation of its home statute, especially in its determination of how the statute should be interpreted to further its pubic interest mandate: *Poonian v. British Columbia Securities Commission*, 2017 BCCA 207 at paras. 30, 49; *Cartaway Resources Corp. (Re)*, 2004 SCC 26 at paras. 46, 63–64; *Walker v. British Columbia (Securities Commission)*, 2011 BCCA 415 at para. 21. It is likely that the reasonableness standard would also apply to a determination of what AMP would be sufficient to deter the misconduct in issue.

[59] However, the primary issue before the trial judge, and indeed before us in this appeal, is whether the appellant was a person charged with an offence in the proceedings before the Commission on the basis that the AMP imposed against her constituted a true penal consequence within the meaning of s. 11 of the *Charter*.

[60] Notwithstanding that an assessment of the amount of an AMP requires consideration of the public interest that is within the expertise of the Commission, the question of whether the AMP is a true penal consequence under s. 11 of the *Charter* is a question of law to be reviewed on a standard of correctness.

[61] I am satisfied that the trial judge came to the correct conclusions of law on the questions before him, which I will now address.

2. Was the appellant, in the proceedings before the Commission, a person charged with an offence within the meaning of s. 11 of the *Charter*?

[62] It is clear, as conceded by the appellant, that an AMP issued by the Commission under s. 162 of the *Act* does not involve a process that is criminal in nature. Such a process can be contrasted with s. 155 of the *Act*, which creates true offences that are prosecuted by the Crown, with all of the protections of s. 11 of the *Charter*.

[63] The appellant relied on *Rowan* as authority for framing her case on the basis of the $33M AMP that was actually imposed.

[64] In *Rowan*, the appellants were seeking, through the appeal process, to strike down s. 127(1) of the *Securities Act*, R.S.O. 1990, c. S.5, which allowed the imposition of AMPs of $1M "for each failure to comply" (the equivalent of s. 162 of the *Act*). They argued that the potential size of an AMP was so large that it carried the risk of true penal consequences, such that a person was "charged with an offence" from the outset and the procedural protections under s. 11(d) of the *Charter* were engaged.

[65] Sharpe J.A. for the court held (at para. 46) that there is "now an established line of authority holding that the power of an administrative tribunal to impose substantive monetary penalties is to be assessed on the basis of the penalty imposed rather than on penalties that are theoretically possible". He considered this to be consistent with the general principle that legislation which confers an imprecise discretion does not confer the power to infringe *Charter* rights (*per Slaight Communications Inc. v. Davidson*, [1989] 1 S.C.R. 1038) and with the following passage in *Wigglesworth*:

> … if a body or an official has an unlimited power to fine, and if it does not afford the rights enumerated under s. 11, it cannot impose fines designed to redress the harm done to society at large. Instead, it is restricted to the power to impose fines in order to achieve the particular private purpose.

[66] However, in *Wigglesworth*, it was the possibility of imprisonment, not the actual penalty imposed, which was determinative of a true penal consequence. In *Rowan*, Sharpe J.A. rejected the argument of the appellants to follow the actual holding in *Wigglesworth* and assess whether s. 11 applied *ex ante*, on the basis of the potential penalty, not *ex post*, on the basis of the actual penalty. He did so on the basis that the power to order imprisonment was "so obviously penal in nature and so exceptional in the setting of administrative tribunals that the mere possibility of a sentence of imprisonment" was sufficient to constitute a true penal consequence. He declined to extend reasoning "intended to meet the exceptional and rarely

encountered power to imprison" to the power to impose monetary penalties, preferring to apply the language in the passage in *Wigglesworth* quoted above which, he stated, dealt with "the power to fine that is commonly encountered in administrative proceedings" (at paras. 44–45).

[67] In contrast to *Rowan*, the appellant in this case is not seeking to challenge the AMP by way of an appeal under the *Act* and the validity of the AMP is not before us. As Justice Hunter points out, the court's examination of the penalty imposed in *Rowan* is consistent with its exercise of appellate jurisdiction in relation to the Commission's decision. Here, the matter is before us in the same way as it was before the court in *Wigglesworth*. I agree with my colleague that in this context, the *Wigglesworth* test should be applied to any potential penalty – not just imprisonment – which may lead to a true penal consequence.

[68] However, the appellant's reliance on *Rowan* to support a general retrospective, or *ex post*, approach is not without foundation. While I agree with Justice Hunter that *Rowan* and the other authorities he cites are distinguishable from the circumstances here in various ways, (most notably, none of them considered this issue in the context of an appeal from conviction due to the refusal to grant a stay of proceedings under s. 11(h) of the *Charter*), some of them do lend support to an *ex post* approach in assessing whether monetary penalties issued by valid administrative agencies are true penal consequences.

[69] In *Guindon*, the majority described the true penal consequences test as one focused on the purpose and effect on the person subject to the proceeding, but it distinguished imprisonment from a monetary penalty (at para. 76):

> Imprisonment is always a true penal consequence. A provision that includes the possibility of imprisonment will be criminal no matter the actual sanction imposed: see *Wigglesworth*, at p. 562. <u>A monetary penalty may or may not be a true penal consequence. It will be so when it is, in purpose or effect, punitive</u>. Whether this is the case is assessed by looking at considerations such as the magnitude of the fine, to whom it is paid, whether its magnitude is determined by regulatory considerations rather than principles of criminal sentencing, and whether stigma is associated with the penalty …
>
> [My emphasis.]

[70] An *ex post* approach is not necessarily required to assess the purpose of a monetary penalty but it may be required to assess the effect on the person subject to it. Although the court in *Guindon* held that the penal consequences test "focuses on the potential impact on the person subject to the proceeding" (at para. 50) it rejected an approach requiring an arbitrary upper limit on administrative penalties (at para. 79):

> The analysis must ask whether the amount of the penalty, considered with the other relevant factors, is in keeping with the nature of the misconduct and the penalty necessary to serve regulatory purposes, such as promoting compliance and deterring non-compliance, not focus on an arbitrary threshold which may bear no relation to the particular administrative regime and policy goals …
>
> [My emphasis in both.]

[71] In both of these passages, the court referred to *Canada (Attorney General) v. United States Steel Corp.*, 2011 FCA 176 [*US Steel*], a decision also relied on in *Rowan*. In *US Steel*, the Federal Court of Appeal held (at para. 80) that a "statutory power to impose fines that comes along with little statutory guidance will not be subject to s. 11 as long as it is exercised in a way so as to achieve proper administrative aims" (my emphasis).

[72] In my view, these authorities establish that a court exercising direct appellate review of an administrative penalty may properly consider the actual penalty imposed in assessing whether it constitutes a true penal consequence. If the court determines that the penalty does constitute a true penal consequence, it has the power, *inter alia*, to set such a penalty aside. In this case, however, the court is not exercising direct appellate review of the AMP and the only remedy sought is a stay of subsequent criminal proceedings. In this rather unique context, I share the concerns expressed by Justice Hunter about the implications of considering the actual penalty imposed.

[73] However, as these concerns were not canvassed during the appeal, I am prepared to address the issue the appellant has placed before this court: whether the $33M AMP imposed on her constitutes a true penal consequence. Later, I will

further explore why it is very difficult to meet the true penal consequences test where a proceeding is not criminal by nature, a concern expressed by Wilson J. in *Wigglesworth* and raised by the appellant here.

Does the $33M AMP constitute a true penal consequence?

[74] There is no question that the $33M AMP imposed against the appellant and her companies is a very substantial sanction, higher than any of the sanctions imposed in the cases cited before us. Its magnitude, however, is but one factor to consider in determining whether an AMP has true penal consequences. As the court said in *Guindon* at para. 77:

> The magnitude of the sanction on its own is not determinative. However, if the amount at issue is out of proportion to the amount required to achieve regulatory purposes, this consideration suggests that it will constitute a true penal consequence and that the provision will attract the protection of s. 11 of the *Charter*. This is not to say that very large penalties cannot be imposed under administrative monetary penalty regimes. Sometimes significant penalties are necessary in order to deter non-compliance with an administrative scheme: see *Rowan v. Ontario Securities Commission*, 2012 ONCA 208, 110 O.R. (3d) 492, at para. 49. The amount of the penalty should reflect the objective of deterring non-compliance with the administrative or regulatory scheme.

[75] The essence of the appellant's submission is fourfold: (1) the magnitude of the AMP is out of proportion to the amount required to achieve regulatory purposes, especially when considered in the context of the disgorgement order that was designed to strip away any profit; (2) the AMP was determined by the application of traditional criminal sentencing principles and was designed not only to deter non-compliance but also to denounce her conduct and seek retribution; (3) the stigma associated with the AMP in the circumstances here is comparable to that attached to a criminal conviction; and (4) the AMP is punitive in its effect on her.

[76] I am unable to accept this submission for the following reasons.

Magnitude

[77] Given the magnitude of the fraud perpetrated by the appellant – $100M obtained from over 200 investors over a nine-year period – I cannot conclude that a

$33M AMP is out of proportion to the amount required to deter non-compliance with the *Act*. Section 162, authorizing AMPs of up to $1M for each contravention, provides the Commission with substantial tools to effect meaningful deterrence. As the Court recognized in *Guindon*, sizable penalties are necessary so that they are not simply considered a cost of doing business. The Commission found that the appellant contravened s. 57(b) hundreds of times, thus presenting the possibility of an extremely significant sanction (Sanctions Decision at para. 51).

[78] Similar provisions in Alberta and Ontario securities legislation authorizing AMPs of up to $1M per contravention were held not to attract true penal consequences in *Lavallee* and *Rowan*. In *Rowan*, Sharpe J.A. stated at para. 49:

> Penalties of up to $1 million per infraction are, in my view, entirely in keeping with the Commission’s mandate to regulate the capital markets where enormous sums of money are involved and where substantial penalties are necessary to remove economic incentives for non-compliance with market rules.

[79] I recognize that the sanctions imposed in *Rowan*, *Guindon* and other cases cited by the appellant were of a different level of magnitude than the AMP imposed in this case. However, the circumstances in those cases were very different. For example, *Rowan* involved failing to report trades and failing to ensure compliance with regulatory requirements; AMPs totaling $1.2M were imposed against an investment dealer, its president and chairman. In *Guindon,* a lawyer was assessed penalties under the *Income Tax Act* totaling $546,747 for making false statements in donation receipts issued on behalf of a charity.

[80] A case that bears a closer comparison to the penalty imposed here is *Michaels v. British Columbia (Securities Commission)*, 2016 BCCA 144. There, the Commission imposed an AMP of $17.5M against an individual for contraventions of the *Act* that included fraud under s. 57(b). Michaels had advised 484 clients to purchase over $65M worth of exempt market securities, almost all of which became worthless. In doing so, he was paid $5.8M in commissions and marketing fees.

[81] Michaels appealed the Commission's findings of liability and the AMP to this court. While the court was not considering whether the AMP was a true penal consequence for the purpose of s. 11 of the *Charter*, it accepted as "clear, principled and intelligible" the Commission's reasons for imposing an AMP of $17.5M (at para. 128).

[82] In assessing the quantum in *Michaels*, the Commission had considered submissions from the executive director for a penalty of $65M and from Michaels for a penalty in the $3.8M range. It did not agree that either amount was appropriate for the following reasons:

> [51] … The seriousness of Michaels' misconduct and the catastrophic losses that have been suffered by the investors through his misconduct justify a significant administrative penalty. A significant administrative penalty is warranted both as a specific deterrent to Michaels who has not been deterred by the previous sanctions imposed on him, and as a general deterrent to others who would commit fraud, make serious misrepresentations or provide investment advice without being registered to do so and callously recommend unsuitable investments to others for personal gain.
>
> [52] The appropriate starting place in this case is to look at the $5.8 million benefit that Michaels received personally from his misconduct. A two to three times multiplier of this amount, consistent with the cases reviewed in *IAC* [*Re Independent Academies Canada Inc*. 2014 BCSECCOM 260], is appropriate in the circumstances. This will place the administrative penalty in excess of those levied in fraud cases (as described in *IAC*) where the amounts derived from the misconduct are smaller, without making the amount so large as to exceed the purposes of specific and general deterrence.

[83] While the fraud in *Michaels* was serious, the fraud in this case was even more so; no actual securities ever existed, significantly more money was obtained from investors, and almost $11M was never repaid. The Commission did not accept the submissions on quantum from the executive director ($100M) or the appellant (no more than $1M) for the following reasons:

> [54] We do not agree with the executive director's submissions regarding the quantum of the appropriate administrative penalty. While the number of contraventions under the Act could support an administrative penalty in the amount proposed by the executive director, we do not think it is in the public interest to do so. Even though the amount suggested by the executive director does not exceed the amount raised by the respondents, an administrative penalty of $100 million goes beyond any meaningful bounds of deterrence for the respondents or others.

> [55] We do not agree with the respondents' submission that an administrative penalty of $1 million is appropriate in the circumstances. The magnitude and duration of the fraudulent investment scheme and the number of investors affected justify a significant penalty. A significant penalty also is warranted both as a specific deterrent to the respondents and as a general deterrent to others who would engage in similar fraudulent schemes.
>
> [56] In the circumstances, an administrative penalty of $33 million is appropriate. It reflects the seriousness of the respondents' misconduct and the other factors relevant to sanctions, making it appropriate for the respondents personally. It also serves as a meaningful and substantial general deterrent to others who would engage in similar misconduct.

[84] This reasoning was accepted by the trial judge without comment.

[85] It is unfortunate that the Commission did not more fully explain how it arrived at the amount of $33M. The respondent submitted that it appears to have been determined by way of the formula used in previous orders, such as *Michaels*, where the amount of the "ill-gotten" gain is multiplied by a factor of two or three. It does appear to conform to this formula using a factor of three, as the ill-gotten gain in this case, reflected in the disgorgement order, is almost $11M.

[86] The appellant submitted that a monetary penalty that is fixed or determined by a mathematical calculation, without regard to other criminal sentencing principles, is more likely to be non-punitive. This was the circumstance in *Martineau*. However, applying a mathematical calculation may not show that a penalty was imposed for proper purposes, and a penalty may be non-punitive in the absence of a mathematical calculation. *US Steel* shows that a statutory power to impose monetary penalties with little statutory guidance "will not be subject to section 11 as long as it is exercised in a way so as to achieve proper administrative aims". In this case, whether or not the Commission applied the formula used in *Michaels*, it is clear that the amount was considered to serve as a meaningful general deterrent by reflecting the seriousness of the appellant's conduct.

[87] I do not agree with the appellant's submission that the AMP, combined with the disgorgement order, exceeded her profit by so much ($33M) that is goes beyond mere deterrence and becomes punitive. As this court held in *Poonian*, the purpose of a disgorgement order under s. 161(1)(g) of the *Act* is neither punitive nor

compensatory; rather it is to compel a wrongdoer to give up any ill-gotten amounts. In this respect, the existence of a disgorgement order is not a relevant consideration in assessing whether an AMP under s. 162 is a true penal consequence, especially in relation to its purpose.

[88] Finally, the magnitude of the penalty cannot be considered in isolation. Other factors are important, such as whether the proceeds are used for the benefit of third parties, whether the amount is determined by regulatory considerations distinct from the principles of criminal liability and sentencing, and whether the effect of the sanction on the appellant creates a stigma that is comparable to a criminal conviction: *Guindon* at paras. 76–77; *US Steel* at paras. 74–77.

[89] The appellant acknowledges that the proceeds of an AMP are not paid into the Consolidated Revenue Fund, but are used to educate securities market participants and members of the public. With respect to the effect of the sanction, it is my view that this is to be considered in relation to whether there is a stigma associated with the penalty. I interpret this from para. 76 of *Guindon*, which I repeat here for convenience:

> … A monetary penalty may or may not be a true penal consequence. It will be so when it is, in purpose or effect, punitive. Whether this is the case is assessed by looking at considerations such as the magnitude of the fine, to whom it is paid, whether its magnitude is determined by regulatory considerations rather than principles of criminal sentencing, and whether stigma is associated with the penalty …
>
> [Emphasis added.]

[90] Therefore, I will consider the other two factors: regulatory or criminal sentencing principles, and stigma and effect.

Criminal sentencing principles

[91] There is no dispute that general deterrence is an appropriate consideration in making orders that are protective and preventative, and more specifically, for administrative penalties under s. 162 of the *Act*: *Cartaway* at paras. 60–61; *Guindon* at para. 83; *Rowan* at para. 51; *Lavallee* at para. 25.

[92] However, the appellant asserts that in this case the Commission fixed the amount in a purely discretionary way, with regard to traditional sentencing principles that are not tied to the objective of deterring non-compliance with the *Act*, exemplified by its consideration of the seriousness of the conduct, the harm suffered by investors, the damage done to the integrity of the capital markets, aggravating and mitigating factors, past conduct and orders made in similar cases. She also asserts that the factors applied by the Commission stemming from *Eron Mortgage* are flawed in that they parallel the principles in s. 718 of the *Criminal Code* and the common law.

[93] In my view, the appellant's characterization of what factors are relevant to a consideration of deterrence is far too narrow and not supported by the authorities. A consideration of factors such as the seriousness of the appellant's conduct and the damage done to the capital markets are matters that the Commission is entitled to weigh in determining a penalty that will be a meaningful deterrent to others.

[94] In *Cartaway*, LeBel J. held that a penalty imposed under s. 162 of the *Act* should take into account the entire context as well as the preservation of the public interest. At paras. 65–66, he considered that an increased fine sent a "clear message to other actors in the British Columbia securities market" that a breach of the prospectus requirements would be dealt with severely, noting that

> [t]he Commission stressed the seriousness of the respondents' conduct and the damage done to the integrity of the capital markets, and found that when making an order that is in the public interest, "[w]e are obliged to take whatever remedial steps we determine are appropriate to maintain the public's confidence in the fairness of our markets"…

[95] He considered the penalty to be reasonable globally, noting as well that the Commission "weighed the aggravating and mitigating factors" in determining the appropriate penalty.

[96] It is also my view that the factors set out in *Eron Mortgage* are in accordance with the principles in *Cartaway*. They are reproduced in the trial judge's decision at para. 114:

> In making orders under section 161 and 162 of the Act, the Commission must consider what is in the public interest in the context of its mandate to regulate trading in securities. [Relevant factors include]:
>
> - the seriousness of respondent's conduct,
> - the harm suffered by investors as a result of the respondent's conduct,
> - the damage done to the integrity of the capital markets in British Columbia by the respondent's conduct,
> - the extent to which the respondent was enriched,
> - factors that mitigate the respondent's conduct,
> - the respondent's past conduct,
> - the risk to investors and the capital markets posed by the respondent's continued participation in the capital markets of British Columbia,
> - the respondent's fitness to be a registrant or to bear the responsibilities associated with being a director, officer or advisor to issuers,
> - the need to demonstrate the consequences of inappropriate conduct to those who enjoy the benefits of access to the capital markets,
> - the need to deter those who participate in the capital markets from engaging in inappropriate conduct, and
> - orders made by the Commission in similar circumstances in the past.

[97] The trial judge made no error in accepting that sentencing principles such as deterrence and proportionality are not unique to criminal proceedings, or that the Commission's application of these factors is relevant to the determination of an AMP under s. 162 of the *Act*. The jurisprudence is clear that such considerations are relevant to crafting an effective sanction in the context of regulating the capital markets. While some factors may also be relevant to the principles in s. 718 of the *Criminal Code*, the entire purpose for their consideration is to inform what is needed to effectively deter, specifically and generally, the particular misconduct in issue in the context of securities regulation.

[98] I do not accept the appellant's submission that the description of her conduct in the Sanctions Decision as "egregious" and "at the highest end of the scale of seriousness" implies that the Commission was concerned with the moral blameworthiness of her conduct and the need for a large penalty to denounce it.

Relating an AMP to the magnitude of the misconduct and the harm done to investors are particularly important factors when considering general deterrence. In *Alberta (Securities Commission) v. Brost*, 2008 ABCA 326 the court concluded that an amendment increasing the potential magnitude of an AMP to $1M per contravention reflected a legislative intent "that the Commission should fit the sanction to the circumstances, including the magnitude of the illegality and the need to encourage lawful conduct by those involved with securities" (at para. 54). I agree with this, as well as the respondent's submission that consideration of the harm to investors reflects the protective purposes of the AMP.

[99] It cannot be the case that simply because the Commission has discretion and tries to achieve proportionality in its sanction decisions that an AMP therefore imposes true penal consequences. To say that would provide an incentive to reduce proportionality in sanction decisions to save them from *Charter* scrutiny. It may also lead to greater injustice if the Commission is forced to follow a rigid mathematical formula instead of tailoring the sanction to better protect markets and deter future fraud.

[100] As recognized in *Brost*, any penalty may be regarded by the person on whom it is imposed as "punitive". However, this does not answer the question of whether its effect is punitive in the sense of redressing harm done to society. A penalty may be punitive "in the broad sense of the word" for some purposes, but not "in the narrow sense of the word" if it is not imposed as punishment for the wrongdoer's past transgressions or moral failings: see *Thow v. British Columbia (Securities Commission)*, 2009 BCCA 46 at para. 49.

[101] In my view, the amount of the AMP in this case was determined by regulatory factors distinct from criminal sentencing principles. I do not agree with the appellant that some of the language in the Sanctions Decision suggested that the Commission took into account principles other than deterrence. When considered in its overall context, the Sanctions Decision was focused on an AMP that would address both specific and general deterrence, as summarized at para. 56:

> In the circumstances, an administrative penalty of $33 million is appropriate. It reflects the seriousness of the respondents' misconduct and the other factors relevant to sanctions, making it appropriate for the respondents personally. It also serves as a meaningful and substantial general deterrent to others who would engage in similar misconduct.
>
> [Emphasis added.]

[102] All of the factors referred to by the Commission, and accepted by the trial judge, were assessed in the context of a protective and preventative order designed to deter similar conduct, not to denounce the appellant's conduct and reflect the extent of her moral blameworthiness.

Stigma and effect

[103] There is no dispute that the appellant has been stigmatized. Fraud is a serious allegation that carries a stigma. However, the trial judge considered that the stigma arose largely from the Commission's findings and reflected only the social repugnance of the appellant's misconduct. He also considered that the significant media attention to this case was not exceptional given the scrutiny one should expect would be given to those who commit securities fraud. I find no error in the judge's conclusion that the stigma suffered by the appellant did not reflect the degree of fault for her perpetration of the scheme and was not comparable to that attached to a criminal conviction.

[104] The appellant submitted that the effect of the $33M AMP is a "virtual life sentence in debtor's prison with no hope of escape". I appreciate that $33M is a crushing debt, but so is half that amount. I also appreciate that the appellant will likely never be able to pay it, but it does not necessarily follow from this that the AMP is punitive in effect.

[105] First of all, the appellant cannot be imprisoned for failing to pay an AMP. It can only be enforced pursuant to s. 163 of the *Act* as if it were a judgment of the Supreme Court. Second, the Commission's ability to enforce the AMP is very limited. Because the appellant declared bankruptcy before the penalty was imposed, the

Commission will not be able to seize any assets, and any attempt to garnish her wages will be limited.

[106] Given the timing of the appellant's bankruptcy, it is true that she will likely remain obligated to pay the AMP after a discharge. However, the Commission has not yet taken any enforcement measures and it is unlikely to do so here, where the appellant has extremely limited assets and little prospect in the foreseeable future of acquiring any. In any event, I agree with the respondent that the stress associated with long-term indebtedness does not in itself render the effect of the AMP to be punitive. As the judge noted, one may question why, in these circumstances, the appellant chose not to challenge the AMP by way of an appeal to this Court under s. 167 of the *Act*.

Conclusion

[107] For all of these reasons, it is my view that the trial judge was correct in concluding that the AMP imposed by the Commission does not amount to a true penal consequence. Its quantum was determined by regulatory considerations that focused on general deterrence, distinct from the criminal law sentencing principles of denunciation and retribution. Any proceeds realized on an AMP are allocated by the Commission for the benefit of third parties. The stigma resulting from the Commission's findings of fraud against the appellant is not equivalent to a criminal conviction, and the effect of the AMP on her, while significant, cannot be said to be truly punitive.

Is the true penal consequence test impossible to achieve?

[108] As noted above, the appellant suggested that if a penalty of the magnitude here does not meet the second part of the *Wigglesworth* test, no case involving a fine ever can. In other words, the test is a chimera; it is illusory and impossible to achieve.

[109] There is no question that it is indeed difficult to meet the second part of the *Wigglesworth* test where a proceeding fails the first part. In my view, this flows from

the fact that in such circumstances, the inquiry is directed to a penalty issued pursuant to valid administrative proceedings operating within a defined statutory mandate. Wilson J. recognized this in *Wigglesworth,* as she found the possibility of a particular proceeding failing the by nature test but passing the true penal consequence test “difficult to conceive”, and the court in *Guindon* acknowledged the same. Nevertheless, Wilson J. found *Wigglesworth* to be the unusual case where the true penal consequence test applied to proceedings that were not criminal in nature. We were referred to no case since *Wigglesworth* (other than the minority judgment in *R. v. Shubley*, [1990] 1 S.C.R. 3) which has come to the same conclusion.

[110] The appellant characterized this case as involving the confluence of administrative and criminal law. I agree with that, but the appellant’s submission focused on criminal law without properly addressing administrative law principles. She relied on the AMP imposed on her to engage the application of s. 11(h) of the *Charter* but at the same time asserted that the AMP was beyond the Commission’s legislative mandate. This is inconsistent.

[111] If the AMP was beyond the Commission’s mandate (and this was not disputed), such a sanction is vulnerable to be set aside on appeal as invalid. However, rather than challenging the sanction by way of an appeal, the appellant chose to seek a stay of proceedings on the assumption that the AMP is a valid and enforceable order.

[112] *Wigglesworth* did not directly address the validity of a penalty with true penal consequences imposed by an administrative tribunal, as this was not before the court. However, the reasons of Wilson J. indicate that she was concerned about this. In the unusual circumstances there, where the RCMP Service Court had the power to imprison, she expressed “grave doubts” whether any administrative body or official could ever imprison an individual. This was stated in the context of her “second caveat” to the proposition that punitive forms of disciplinary measures such as fines or imprisonment are indistinguishable from criminal punishment (at 561–561):

> … I have grave doubts whether any body or official which exists in order to achieve some administrative or private disciplinary purpose can ever imprison an individual. Such a deprivation of liberty seems justified as being in accordance with fundamental justice under s. 7 of the *Charter* only when a public wrong or transgression against society, as opposed to an internal wrong, is committed. However, as this was not argued before us in this appeal I shall assume that it is possible that the "by nature" test can be failed but the "true penal consequence" test passed …
>
> [Emphasis added.]

[113] What I read from this "caveat" is that the assumption that the "by nature" test can be failed but the "true penal consequence" test passed is predicated upon a valid and enforceable punitive order having been imposed by the administrative body. Otherwise, there would be no basis to consider a stay of subsequent criminal proceedings as contrary to s. 11(h). In other words, the *Wigglesworth* test assumes, without deciding, that an administrative body could issue a valid sanction that imposes "true penal consequences" upon an individual.

[114] The trial judge was alive to this issue, having raised the question of whether the appellant's application for a stay was a collateral attack on the Commission's order. He concluded that it was not, since the appellant was not seeking to avoid the consequences of the sanction.

[115] In *Wigglesworth*, Wilson J. made it clear that the power of an administrative body to fine without attracting the application of s. 11 is restricted to the power to do so "in order to achieve the particular private purpose". Similarly, in *Rowan*, Sharpe J.A. held, at para. 41, that the appropriate remedy to protect the rights guaranteed by s. 11 where there is unlimited power to impose a fine is

> … to limit the tribunal's discretion so that it may only impose penalties that are consistent with the purpose of maintaining discipline and order within a particular sphere of activity.

[116] In my view, an AMP cannot be a true penal consequence for the purpose of s. 11 of the *Charter* and remain a valid exercise of administrative power, or at least an enforceable sanction. The Commission's jurisdiction under ss. 161 and 162 of the *Act* is clearly limited to sanctions that are not penal in nature. Therefore, an AMP

imposed under s. 162 by its very nature is limited to the objectives under the *Act*, and unless directly challenged on appeal, it is presumptively valid and not a true penal consequence.

[117] As Justice Hunter points out, if the Commission imposes a sanction that oversteps this jurisdiction, the appropriate remedy is by way of an appeal under s. 167. To seek a stay of validly constituted criminal proceedings under s. 11(h) of the *Charter* on the basis of a sanction imposed that, if truly punitive, ought to be overturned on appeal, illustrates why the two parts of the *Wigglesworth* test will rarely, if ever, lead to different conclusions, and why my colleague's approach provides a sensible basis for analysis in the context in which this appeal was brought.

3. Does s. 11(h) of the *Charter* preclude a criminal prosecution for the "same offence"?

[118] In the absence of a finding that the AMP constitutes a true penal consequence, the appellant is not a person "charged with an offence" within the meaning of s. 11 of the *Charter*. Thus s. 11(h) of the *Charter* does not preclude a criminal prosecution against her for fraud under s. 380 of the *Criminal Code*.

4. Is the criminal proceeding an abuse of process contrary to s. 7 of the *Charter*?

[119] The appellant contends, in the alternative, that the criminal prosecution against her is an abuse of process, contrary to s. 7 of the *Charter*. 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.

[120] The appellant relied on the following *obiter* comment by the majority in *Guindon*, at para. 69, to support her argument:

> Should an individual be assessed an administrative monetary penalty and subsequently face criminal prosecution for the same conduct (or vice versa), that individual may argue that bringing the second proceedings in the particular circumstances is an abuse of process. [2]

[121] In the referenced footnote, the court noted that ss. 238(3) and 239(3) of the *Income Tax Act* "prevent an individual from being liable for any penalty assessed under the administrative monetary penalty provisions after the individual is convicted of an offence under the Act for the same conduct". In other words, the *Income Tax Act* itself precludes such a course of action.

[122] The appellant referred to other statutes that expressly preclude a prosecution for an offence after an administrative penalty has been imposed: see, for example, ss. 164(3) and (4) of the *Business Practices and Consumer Protection Act*, S.B.C. 2004, c. 2. She also referred to the options under the *Act* to pursue either an administrative penalty under s. 162 or to prosecute an offence under either s. 57(b) of the *Act* or s. 380 of the *Criminal Code*, arguing that it "would offend society's fundamental notions of decency and fair play for the state to pursue both a significant AMP and a criminal prosecution for the exact same misconduct".

[123] The trial judge considered these arguments and concluded, rightly in my view, that the prosecutorial conduct in advancing the criminal proceeding did not amount to an abuse of process contrary to s. 7 of the *Charter*.

[124] A stay of proceedings for an abuse of process is the most drastic remedy a criminal court can order and will be warranted only in "the clearest of cases": *R. v. Babos*, 2014 SCC 16 at paras. 30–31. As set out in *R. v. O'Connor*, [1995] 4 S.C.R. 411, such cases generally fall into two categories: (1) the main category, where state conduct compromises the fairness of an accused's trial; and (2) a residual category, where state conduct does not compromise trial fairness but risks undermining the integrity of the judicial process. The appellant's argument relies on the residual category.

[125] As discussed in *Babos* at para. 35, when the residual category is invoked,

> … the question is whether the state has engaged in conduct that is offensive to societal notions of fair play and decency and whether proceeding with a trial in the face of that conduct would be harmful to the integrity of the justice system.

[126] I do not agree with the appellant that the state conduct in proceeding with a criminal prosecution after the conclusion of the Commission's administrative proceedings offends society's fundamental notions of decency and fair play. The criminal proceedings have been pending for a long time. The investigation commenced in January 2012, around the same time as the Commission investigation, and the information was sworn in November 2013, before almost all of the proceedings before the Commission. There is nothing in the *Act* – in contrast to the legislation referred to by the appellant – which precludes a *Criminal Code* prosecution following the imposition of an AMP. In my opinion, the *obiter* comments in *Guindon* do not support a finding of abuse of process in the circumstances here.

[127] I agree with the trial judge that the appellant's conduct has not been redressed to society at large and that a stay of proceedings in this case would likely cause the public to lose confidence in the integrity of the justice system.

Conclusion

[128] For all of these reasons, I would dismiss the appeal.

"The Honourable Madam Justice Fisher"

I AGREE:

"The Honourable Chief Justice Bauman"

Reasons for Judgment of the Honourable Mr. Justice Hunter:

[129] I have had the privilege of reading in draft the judgment of Justice Fisher and I agree with her that this appeal must be dismissed. I write separately to express my opinion that the proper approach to resolving the issues in this case is not to assess the legal character of the $33 million penalty that was imposed by the tribunal, but rather to analyze the nature of the statutory jurisdiction being exercised by the tribunal. This exercise is prospective, not retrospective.

[130] The central question in this appeal is whether Ms. Samji was "charged with an offence" within the meaning of s. 11 of the *Charter of Rights and Freedoms* when the British Columbia Securities Commission instituted proceedings against her under ss. 161 and 162 of the *Securities Act*, R.S.B.C. 1996, c. 418. For ease of reference, I will refer to an offence within the meaning of s. 11 of the *Charter* as a s. 11 offence.

[131] If Ms. Samji was charged with a s. 11 offence and "found guilty and punished for the offence" in the words of s. 11(h), the next question is whether the *Criminal Code* offence with which she was subsequently charged was the same offence, in which case the protection against double jeopardy would require a stay of the criminal charge. But if she was not charged with a s.11 offence before the Securities Commission, s. 11 has no application to her *Criminal Code* charge and the appeal based on s. 11(h) must fail, without regard for the sanction actually imposed by the Commission.

Analysis of the s. 11 Issue

[132] The appellant has approached this appeal on the footing that the central question I have described is to be resolved by examining the $33 million penalty imposed by the Securities Commission and determining whether it was a "true penal consequence".

[133] In my respectful view, whether the penalty actually imposed was a true penal consequence is not relevant to the determination as to whether Ms. Samji was charged with a s. 11 offence. The appellant's approach conflates two separate

questions. The first is whether any person subject to an enforcement proceeding under s. 161 of the *Securities Act* is charged with a s. 11 offence. The second is whether the sanction issued in this particular case by the Commission is *intra vires* the Commission or invalid because it is a true penal consequence.

[134] Whether Ms. Samji was charged with a s. 11 offence must in my view be determined by analyzing the statute under which the proceedings took place, not by assessing the ultimate outcome. If s. 161 is criminal in nature or provides for true penal consequences, s. 11 applies to all s. 161 proceedings. If not, s. 11 applies to none of them. In neither case is the penalty actually imposed a factor in the analysis.

[135] There has been no suggestion that s. 161 establishes a process that is "criminal by nature" within the meaning of the *Wigglesworth* test. The sole issue is whether the "true penal consequences" test has been met.

[136] Whether the sanction actually imposed by the Commission is *intra vires* must be determined after the sanction has been imposed. The appropriate forum for such a determination is an appeal of an administrative monetary penalty pursuant to s. 167 of the *Act*.

[137] If the penalty is a true penal consequence and if the Commission does not have the authority to impose true penal consequences, it is *ultra vires* and must be set aside if challenged. If it is not a true penal consequence, it stands, subject to any other considerations that might apply to appellate review of the exercise of statutory authority. In neither case can it provide the basis for a stay of proceedings of an otherwise valid criminal charge. An *ultra vires* sanction by an administrative tribunal cannot bar an otherwise valid criminal charge.

[138] Ms. Samji did not appeal the $33 million administrative monetary penalty. The consequence of her failure to appeal is in my view that the monetary penalty stands, whether or not it is *ultra vires* as a true penal consequence. To analyze the penalty as if this were an appeal or judicial review of the Commission's decision would be tantamount to a collateral attack on the sanction without the benefit of submissions

by the Commission. The proper forum for such an analysis is an appeal of the Commission's decision.

[139] For these reasons, as will be developed further in this judgment, I do not consider it necessary or appropriate to decide whether the $33 million administrative monetary penalty is a true penal consequence. The question that arises in a s. 11(h) challenge is whether Ms. Samji was charged with an offence when the Commission instituted s. 161 proceedings against her. I conclude she was not, by analyzing ss. 161 and 162 by reference to the *Wigglesworth* test but without regard to the sanction eventually imposed by the Commission.

[140] Before explaining why I believe this issue must be decided without regard to the sanction imposed, I should explain why I regard the analytical structure in which to resolve this issue as sufficiently important to prepare separate reasons, given that I am in agreement with my colleague as to the disposition of this appeal.

[141] If s. 11 applies to an administrative proceeding, a panoply of constitutional protections accrues to the person charged including the presumption of innocence, the right not to testify, the right to be tried by an independent tribunal and other rights typically associated with criminal as opposed to regulatory proceedings. If a statutory process to which s. 11 applies cannot be read as providing for these protections, it would be constitutionally invalid: *Guindon v. Canada*, 2015 SCC 41 at para. 41.

[142] Under the approach that permits consideration of the penalty actually imposed in determining whether a s. 11 offence has been created, no one would know whether a proceeding was subject to the protections of s. 11 until the proceeding was over, the sanction had been imposed, and a reviewing court had determined whether or not the sanction was a true penal consequence. That in my view is not a workable theory of constitutional analysis and is not required by the *Charter* or the jurisprudence of the Supreme Court of Canada.

[143] As I read Justice Wilson's judgment in *Wigglesworth*, the test she proposed and the Court adopted resolves this problem. For every statutory regime that

provides an administrative tribunal with the authority to impose penalties, an analysis of the statute will determine whether or not a person subject to the jurisdiction of the tribunal has been charged with a s. 11 offence and is therefore entitled to s. 11 protection. In no circumstance is it necessary to await the ultimate decision of the tribunal to make that determination.

[144] Before turning to the test developed in *Wigglesworth*, I propose setting out the statutory framework at issue and how this Court has interpreted these remedial provisions.

Statutory Framework

[145] The *Securities Act* of British Columbia contains two very different mechanisms for enforcement of the statutory requirements.

[146] Section 155 is an explicit offence provision. It reads in part as follows:

> 155 (1) A person who does any of the following commits an offence:
>
> (a) fails to file, provide, deliver or send a record that
>
> (i) is required to be filed, provided, delivered or sent under this Act, or
>
> (ii) is required to be filed, provided, delivered or sent under this Act within the time required under this Act;
>
> (b) contravenes any of section 34, 49 to 57, 57.2, 57.3, 57.5, 57.6, 58, 59, 61, 85 (b), 87, 121, 122, 124, 125, 148 or 168.1 (1) of this Act;
>
> (c) fails to comply with a decision made under this Act;
>
> (d) contravenes any of the provisions of the regulations that are specified by regulation for the purpose of this paragraph;
>
> (e) contravenes any of the provisions of the commission rules that are specified by regulation for the purpose of this paragraph.
>
> (2) A person that commits an offence under this Act is liable to a fine of not more than $3 million, or to imprisonment for not more than 3 years, or both.
>
> …

[147] This provision is clearly a s. 11 offence provision. Imprisonment is a possible penalty. If a person was charged under this section, s. 11 protections would apply. Ms. Samji was not charged with an offence under s. 155.

[148] By contrast, ss. 161 and 162, the sections at issue in this appeal, are regulatory provisions designed to protect the integrity of capital markets.

[149] The provisions at issue fall under the heading “Enforcement Orders” and read in part as follows:

> 161 (1) If the commission or the executive director considers it to be in the public interest, the commission or the executive director, after a hearing, may order one or more of the following:
>
> (a) that a person comply with or cease contravening, and that the directors and officers of the person cause the person to comply with or cease contravening,
>
> (i) a provision of this Act or the regulations,
>
> (ii) a decision, whether or not the decision has been filed under section 163, or
>
> (iii) a bylaw, rule, or other regulatory instrument or policy or a direction, decision, order or ruling made under a bylaw, rule or other regulatory instrument or policy of a self regulatory body, exchange or quotation and trade reporting system, as the case may be, that has been recognized by the commission under section 24;
>
> (b) that
>
> (i) all persons,
>
> (ii) the person or persons named in the order, or
>
> (iii) one or more classes of persons
>
> cease trading in, or be prohibited from purchasing, any securities or exchange contracts, a specified security or exchange contract or a specified class of securities or class of exchange contracts;
>
> …
>
> (d) that a person
>
> (i) resign any position that the person holds as a director or officer of an issuer or registrant,
>
> (ii) is prohibited from becoming or acting as a director or officer of any issuer or registrant,
>
> (iii) is prohibited from becoming or acting as a registrant or promoter,
>
> (iv) is prohibited from acting in a management or consultative capacity in connection with activities in the securities market, or
>
> (v) is prohibited from engaging in investor relations activities;

> …
>
> (g) if a person has not complied with this Act, the regulations or a decision of the commission or the executive director, that the person pay to the commission any amount obtained, or payment or loss avoided, directly or indirectly, as a result of the failure to comply or the contravention;
>
> …
>
> **Administrative penalty**
>
> 162 If the commission, after a hearing,
>
> (a) determines that a person has contravened
>
> (i) a provision of this Act or of the regulations, or
>
> (ii) a decision, whether or not the decision has been filed under section 163, and
>
> (b) considers it to be in the public interest to make the order,
>
> the commission may order the person to pay the commission an administrative penalty of not more than $1 million for each contravention.

<u>Prior Consideration of ss. 161 and 162</u>

[150] Public interest jurisdiction similar to s. 161 has been described as "neither remedial nor punitive: it is protective and preventive, intended to be exercised to prevent likely future harm" to the capital markets: *Committee for the Equal Treatment of Asbestos Minority Shareholders v. Ontario (Securities Commission)*, 2001 SCC 37 at para. 42.

[151] In considering similar legislation in Ontario in the *Asbestos* judgment, the Supreme Court of Canada has described the array of sanctions available to Securities Commissions:

> [43] The enforcement techniques in the Act span a broad spectrum from purely regulatory or administrative sanctions to serious criminal penalties. The administrative sanctions are the most frequently used sanctions and are grouped together in s. 127 as "Orders in the public interest". Such orders are not punitive: *Re Albino* (1991), 14 O.S.C.B. 365. Rather, the purpose of an order under s. 127 is to restrain future conduct that is likely to be prejudicial to the public interest in fair and efficient capital markets. The role of the OSC under s. 127 is to protect the public interest by removing from the capital markets those whose past conduct is so abusive as to warrant apprehension of future conduct detrimental to the integrity of the capital markets.

[152] In *Thow v. British Columbia (Securities Commission),* 2009 BCCA 46, this Court held at para. 30 that the comments of the Supreme Court of Canada in *Asbestos* applied to the broadened powers under s. 161 of the *Securities Act*. The principles arising from *Asbestos*, as well as a subsequent decision referred to by my colleague, *Re Cartaway Resources Corp*., 2004 SCC 26, were summarized in this way:

> [38] *Asbestos* and *Cartaway* establish that securities commissions, not being criminal courts, may not impose penalties that are "punitive" in the sense of being designed to punish an offender for past transgressions. They may, however, impose penalties that place burdens (even very heavy burdens) on offenders, as long as the penalties are designed to encourage compliance with regulations in the future. In essence, penalties may be directed at general or specific deterrence and at protection of the public; penalties that are purely retributive or denunciatory, however, are not appropriately imposed by administrative tribunals.
>
> [39] *Asbestos* and *Cartaway*, then, are cases about the proper role of administrative tribunals in administering regulatory regimes. They concern the limits of proper administrative sanctions. In defining those limits, the Supreme Court of Canada distinguished between penal orders that function to punish an offender and those that attempt to protect society. The former are the exclusive purview of the courts administering in punishing offences; the latter may be imposed, as well, by administrative bodies.

[153] In *Walker v. British Columbia (Securities Commission)*, 2011 BCCA 415 at para. 74, this Court referred to these comments and applied them to ss. 161 and 162, the penalty provisions relevant to this appeal:

> … As discussed above, the Commission, in its powers under ss. 161 and 162 of the *Act*, is not imposing penal sanctions, but is acting under its mandate to protect the public by providing specific and general deterrence. This deterrence, as it is not penal, is not necessarily related to the other ways Walker has been affected by other aspects of his act.

[154] The other monetary penalty that is available to the Commission is the disgorgement provision in s. 161(1)(g). This Court has recently confirmed that the purpose of this provision is "to deter persons from contravening the *Act* by removing the incentive to contravene" and specifically "not to punish the contravener": *Poonian v. British Columbia Securities Commission*, 2017 BCCA 207 at para. 143.

[155] With that summary of the legislative provisions at issue in this appeal, I turn to the test in *Wigglesworth*.

<u>The *Wigglesworth* Test</u>

[156] In *Wigglesworth*, the appellant had been charged with what was described as a “major service offence” under the *Royal Canadian Mounted Police Act*, R.S.C. 1970, c. R-9. The offence was punishable by a fine or imprisonment for up to one year.

[157] Mr. Wigglesworth had been assessed a fine of $300. Section 11(h) of the *Charter* reads in relevant part that, “Any person charged with an offence has the right … if found guilty and punished for the offence, not to be tried or punished for it again …” Relying on s. 11(h) of the *Charter*, he sought a stay of a subsequent *Criminal Code* charge that was based on the same conduct. This is the same argument that is advanced in this appeal.

[158] Thus, the first question before the Court was whether Mr. Wigglesworth had been charged with a s. 11 offence when he was charged with the major service offence under the *Royal Canadian Mounted Police Act.*

[159] Consideration of this issue led to the *Wigglesworth* test referred to by my colleague which I regard as dispositive of the present appeal. The test was described as follows (at 559):

> While it is easy to state that those involved in a criminal or penal matter are to enjoy the rights guaranteed by s. 11, it is difficult to formulate a precise test to be applied in determining whether specific proceedings are proceedings in respect of a criminal or penal matter so as to fall within the ambit of the section. The phrase “criminal and penal matters” which appears in the marginal note would seem to suggest that a matter could fall within s. 11 either because by its very nature it is a criminal proceeding or because a conviction in respect of the offence <u>may lead</u> to a true penal consequence. I believe that a matter could fall within s. 11 under either branch.
>
> [Emphasis added.]

[160] The Court held that the major service offence of which Mr. Wigglesworth had been convicted was not criminal by nature, but nevertheless fell within s. 11 for the following reason (at 563–564):

> … But it is apparent that an officer charged under the Code of Discipline faces a true penal consequence. He or she may be imprisoned for one year pursuant to s. 36(1) of the *Royal Canadian Mounted Police Act* if he or she is found guilty of a major service offence. As was stated by Joyal J. in *Van Rassel v. Canada*, [1987] 1 F.C. 473, a case which also dealt with a s. 11(*h*) claim with respect to proceedings for a major service offence under the *Royal Canadian Mounted Police Act*, "The statute as a consequence [of the provision for imprisonment] is as much a penal statute as is the *Criminal Code*" (at p. 484). This would seem, therefore, to be that unusual case where proceedings have failed the "by nature" test but have passed the "true penal consequence" test.

[161] Mr. Wigglesworth faced a true penal consequence not because of the penalty imposed (which was minor), but because he was in jeopardy of a sentence of imprisonment. The analysis depended on the statutory authority of the tribunal viewed at the outset, not on the penalty actually imposed.

[162] I can find no indication in *Wigglesworth* that the answer to the question whether Mr. Wigglesworth had been charged with a s. 11 offence was in any way affected by the penalty actually imposed. The analysis in the judgment seems to be entirely a prospective one, based on what penalty he could have incurred, having in mind the statutory authority of the tribunal.

[163] Justice Wilson elaborated on the concept of true penal consequences in this way (at 561):

> In my opinion, a true penal consequence which would attract the application of s. 11 is 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.

[164] It is this language that seems to have led to what I consider to be an erroneous approach – an assessment of a fine actually imposed to determine whether it "would appear to be imposed for the purpose of redressing the wrong done to society". The appellant has interpreted this as a requirement to determine

whether a particular penalty "would appear to have been imposed for the purpose of redressing the wrong done to society", but in my view the analysis should properly be on the legislative intent, not the tribunal's intention. The tribunal's intention or purpose in imposing the penalty will be relevant to assessing on appeal or judicial review whether the exercise of statutory authority was lawful or appropriate, but it is the legislative intent that determines whether the proceeding "may lead to a true penal consequence."

[165] When the relevant sanction is a substantial fine rather than imprisonment, it may be difficult to determine by a statutory analysis whether the legislative intent was to provide the tribunal with the authority to impose a true penal consequence. However, Justice Wilson in *Wigglesworth* has provided the operative principle to assist in making that determination (at 561):

> … It is my view that if a body or an official has an unlimited power to fine, and if it does not afford the rights enumerated under s. 11, it cannot impose fines designed to redress the harm done to society at large. Instead, it is restricted to the power to impose fines in order to achieve the particular private purpose.

[166] Thus, if an administrative tribunal exercising regulatory authority in a particular area has the power to impose monetary penalties that could theoretically amount to true penal consequences, that power must be restricted to monetary penalties that are intended to achieve the purposes of the empowering legislation. A penalty that was a true penal consequence would be *ultra vires*.

[167] The *Wigglesworth* test provides a workable standard to determine at the outset of proceedings whether a person subject to administrative penalties has been charged with a s. 11 offence and is entitled to the protection of s. 11 rights. If the statute creates a process that is criminal by nature, s. 11 applies. If the statute authorizes the tribunal to impose a penalty that has a true penal consequence, s. 11 applies, regardless of what penalty the tribunal ultimately imposes.

[168] If the statute is unclear as to whether it authorizes the tribunal to impose a penalty that has a true penal consequence but permits the tribunal to impose a fine

of indeterminate amount, the dictum of Wilson J. applies. The statutory authority will be interpreted so as to exclude the authority to impose true penal consequences and s. 11 will not apply to the administrative proceedings, regardless of the ultimate sanction imposed.

Subsequent Considerations of the *Wigglesworth* Test

[169] My colleague has expressed the view that there is authority to support the approach of considering the actual penalty imposed in order to determine whether s. 11 is engaged, and I acknowledge that there are passages in some of the decisions she cites that may seem inconsistent with what I consider to be the clear direction of *Wigglesworth*. In my view, however, these apparent inconsistencies arise from the appellate context in which these cases have been decided and not from any change in the prospective nature of the *Wigglesworth* test.

[170] To assess this proposition, I propose to review three cases that are binding on this Court, *Martineau v. M.N.R.*, 2004 SCC 81, *Guindon v. Canada,* 2015 SCC 41, and *Goodwin v. British Columbia (Superintendent of Motor Vehicles)*, 2015 SCC 46, as well as two judgments of appellate courts that are not binding but require respectful consideration, *Lavallee v. Alberta (Securities Commission)*, 2010 ABCA 48 and *Rowan v. Ontario (Securities Commission)*, 2012 ONCA 208.

1. *Martineau v. M.N.R.*

[171] The issue in *Martineau* was described by the Supreme Court of Canada as 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.), avail himself of the right against self-incrimination guaranteed by s. 11 of the *Charter*. The appellant had received a written notice from a customs officer demanding that the appellant pay $315,458 which was the deemed value of goods he allegedly attempted to export by making false statements.

[172] The procedure for appealing such an order was an action under s. 135 of the *Customs Act*. Mr. Martineau availed himself of that opportunity and commenced the

s. 135 action. In that unusual context, the Court was called upon to determine whether the demand for payment amounted to a s. 11 offence that entitled him to invoke the protection against self-incrimination and thereby avoid testifying at an examination for discovery. The Court held that it did not.

[173] While the Court did respond to (and reject) an argument that the magnitude of the amount claimed demonstrated that it was a true penal consequence as explained in *Wigglesworth*, the ratio of the decision in my view can be found in the conclusion of the judgment, which I reproduce in full:

> [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.
>
> [88] In this context, <u>an analysis of s. 124 of the *CA* [*Customs Act*] 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*.</u>
>
> [89] 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.
>
> [Emphasis added.]

[174] Since this was an appeal of the sanction imposed, some consideration of the appropriateness of the sanction was a necessary part of the appellate process. However, it was the analysis of the statutory scheme, not a consideration of the specific demand made, that determined whether Mr. Martineau was charged with an offence within the meaning of s. 11. This seems to me consistent with the *Wigglesworth* prospective test.

2. *Guindon v. Canada*

[175] In *Guindon*, the question was whether s. 163.2 of the *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.), which imposes monetary penalties on every person who makes a false statement that could be used by another person for purposes of the

Income Tax Act creates an offence within the meaning of s. 11. This question also arose in the context of an appeal from the decision of a statutory decision-maker.

[176] The Court summarized its conclusions at the outset of its judgment:

> [4] … The substantive issue is whether s. 163.2(4) creates a true criminal offence and therefore engages the protections provided for under s. 11.
>
> [5] … In our view, proceedings under s. 163.2 are of an administrative nature. Ms. Guindon therefore is not a person “charged with an offence” and accordingly the protections under s. 11 of the *Charter* do not apply. In the result, we would dismiss the appeal.

[177] After reviewing the facts, the Court reiterated the question to be addressed in this way:

> [41] … The basic question is whether, as Ms. Guindon submits, s. 163.2 creates “an offence” for the purposes of s. 11 and the answer depends, as we shall explain, on whether s. 163.2 is criminal in nature or provides for true penal consequences. In our view, neither is the case and s. 11 does not apply to these proceedings.
>
> [Emphasis added.]

[178] This is the basic question in the case at bar – whether ss. 161 and 162 of the *Securities Act* create an offence for the purposes of s. 11.

[179] Justice Fisher has referenced the key paragraphs in *Guindon* in her judgment, but I would like to set these paragraphs out again in order to emphasize what in my view are the prospective elements of the test as reiterated in *Guindon*:

> [49] When the criminal in nature test is understood as considering only the nature of the proceedings, the independent value of each test becomes clear. The criminal in nature test identifies provisions that are criminal because Parliament or the legislature has provided for proceedings whose attributes and purpose show that the penalty is to be imposed via criminal proceedings. The true penal consequence test, on the other hand, looks at whether an ostensibly administrative or regulatory provision nonetheless engages s. 11 of the *Charter* because it may result in punitive consequences. While there is inevitably some overlap in the analysis, the important thing is to consider all relevant factors, acknowledging that only rarely, as in *Wigglesworth*, will the two branches of the test lead to different conclusions.
>
> [50] Moreover, the analysis is not circular: both tests ask distinct questions that evaluate the two different ways in which a provision could be a criminal offence for the purpose of s. 11. The criminal in nature test focuses on the

> process while the penal consequences test focuses on its potential impact on the person subject to the proceeding.
>
> [Emphasis added.]

[180] I acknowledge that in paras. 75 to 81 the Court did discuss the principles applicable to true penal consequence with reference to cases in which sanctions had already been imposed, but in my view the more salient passage is the one that immediately follows this discussion and applies it to the case before the Court:

> [82] Section 163.2 of the *ITA* does not impose any "true penal consequence".

[181] In addition, the Court considered whether the penalty imposed was a true penal consequence, a consideration that is likely the source of the after-the-fact analysis asserted by the appellant in this appeal. However, I do not discern a nexus between the comments of the Court on this point and the answer to the question whether Ms. Guindon was charged with an offence when monetary penalties were assessed against her.

[182] Since the Court was exercising appellate jurisdiction over the decision imposing the penalties, it was necessary for the penalty to be reviewed. In the case at bar, Ms. Samji has not appealed the sanction imposed on her, and it is unnecessary for us to review that sanction.

[183] The final conclusion of the Court on the s. 11 issue focuses on the statutory scheme, not the specific penalty imposed:

> [89] We conclude that the proceeding under s. 163.2 is not criminal in nature and does not lead to the imposition of true penal consequences. We agree with Stratas J.A., writing for the Federal Court of Appeal, that "the assessment of a penalty under section 163.2 is not the equivalent of being 'charged with a [criminal] offence.' Accordingly, none of the section 11 rights apply in section 163.2 proceedings": para. 37.

[184] I conclude from the manner in which the Court stated the question and the emphasis on potential impact, that the Court did not intend to alter the s. 11 test from a test based on the statutory scheme to include an after-the-fact assessment of the penalty imposed.

3. *Goodwin v. British Columbia (Superintendent of Motor Vehicles)*

[185] Shortly after *Guindon*, the Supreme Court of Canada again commented on the s. 11 analysis, this time in the context of a challenge to British Columbia's immediate roadside prohibition regime referred to as ARP.

[186] The issue had arisen as a challenge to the constitutional validity of the ARP provisions based on several grounds, including the argument that the ARP regime created a s. 11 offence. The trial judge, in a judgment indexed as *Sivia v. British Columbia (Superintendent of Motor Vehicles)*, 2011 BCSC 1639, had approached the issue in this way:

> [166] The impugned provisions of the *MVA* that create the ARP regime provide for the suspension of an individual's license, and for the imposition of monetary penalties and other costs. …
>
> [167] In order to determine if these penalties and costs amount to "true penal consequences" I must look at the consequences of the ARP regime as a whole …

[187] After examining the penalties available under the statutory provisions, Sigurdson J. concluded that "the ARP regime does not impose true penal consequences" (at para. 181). This approach of considering the s. 11 issue by examining the sanctions available under the statutory regime rather than the penalties imposed on the appellants is in keeping with the *Wigglesworth* test as explained earlier in this judgment.

[188] The judgment of Sigurdson J. was affirmed by this Court in *Sivia v. British Columbia (Superintendent of Motor Vehicles)*, 2014 BCCA 79 and by the Supreme Court of Canada *sub. nom. Goodwin v. British Columbia*. The Supreme Court of Canada summarized its decision by stating that "s. 11 of the *Charter* is not engaged as the provincial regime does not create an 'offence'" (para. 4).

[189] The Supreme Court in *Goodwin* also confirmed the *Wigglesworth* analytical framework, characterizing *Guindon* as a reaffirmation of the *Wigglesworth* test:

> [40] This Court recently reviewed and reaffirmed the s. 11 analytical framework developed in *Wigglesworth* and *Martineau*: see *Guindon v. Canada*, 2015 SCC 41, [2015] 3 S.C.R. 3. In *Wigglesworth*, this Court

> concluded that s. 11 protections only apply 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. Writing for the majority, Wilson J. stated that a matter falls within s. 11 where "by its very nature it is a criminal proceeding" or where a conviction "may lead to a true penal consequence": p. 559. By contrast, administrative matters "instituted for the protection of the public in accordance with the policy of a statute" do not attract s. 11 protections: p. 560.

[190] After rejecting the argument that the roadside prohibitions met the criminal by nature test, the Court went on to assess the penal consequences test by reference to the possible sanctions in the statute:

> [46] Whether such penalties amount to penal consequences must of course be assessed relative to the conduct in question and the regulatory objective. The driving prohibition relates directly to the regulatory terms and conditions under which a person may be licensed to drive. Vehicle impoundment is directly related to the removal of drivers from the road, and drivers may apply to the Superintendent for review, including on compassionate and economic hardship grounds: *MVA*, ss. 262 and 263. The fine is capped at $500: *Motor Vehicle Act Regulations*, B.C. Reg. 26/58, s. 43.09. The remaining costs are tied to the various remedial programs, including installation of an ignition interlock device, and are incidental to the scheme's objective of getting drivers and vehicles off the road. Such costs can hardly be considered to be penal, particularly when viewed in light of the public interest in removing a drunk driver from a roadway once detected.

[191] This appears to me to be consistent with the prospective approach in *Wigglesworth*.

4. *Lavallee v. Alberta (Securities Commission)*, 2010 ABCA 48

[192] The judgment of the Alberta Court of Appeal in *Lavallee* arose in a statutory setting more similar to the case at bar.

[193] The Alberta Securities Commission had issued two notices of hearing, each alleging fraudulent and illegal activity under provisions of the Alberta *Securities Act*, R.S.A. 2000, c. S-4 (the "*Alberta Act*"), analogous to s. 161 of the BC Act that is engaged in this appeal. The *Alberta Act* contained a provision similar to s. 162 of the *BC Act* that exposed the subject of such a notice to the possibility of administrative penalties of up to $1 million for each contravention.

[194] Mr. Lavallee took the position that the potential penalties were penal consequences, triggering the application of s. 11. The hearing had not yet taken place when the case reached the courts, so no issue could arise in respect of the penalty actually imposed.

[195] The specific issue raised by Mr. Lavallee was a constitutional challenge to provisions not relevant to the case at bar, but in order to resolve the issue it was necessary for the Court to decide whether Mr. Lavallee was facing penal consequences such that s. 11 was engaged. The trial court had held that the potential administrative penalty of $1 million per contravention was not a true penal consequence in light of the "legislative intent to ensure that the penalties are not simply considered another cost of doing business" (at para. 23). The Alberta Court of Appeal agreed.

[196] This analysis was conducted on an examination of the statutory scheme, not on a review of penalties which had not yet been imposed. It is consistent with the *Wigglesworth* test.

5. *Rowan v. Ontario (Securities Commission)*

[197] *Rowan* was a case similar to *Lavallee,* except that *Rowan* was an appeal of the decision of the Ontario Securities Commission, including the penalties that had been imposed by the Commission on the appellants. The appellants brought their appeal initially to the Ontario Divisional Court and then with leave to the Ontario Court of Appeal.

[198] It is this appellate context that in my view explains what at first blush appears to be some inconsistency in the Ontario Court of Appeal's analysis of the issues before it.

[199] The appellants had been the subject of enforcement proceedings under the Ontario *Securities Act,* R.S.O. 1990, c. S-5, similar in nature to the provisions at issue in *Lavallee* and to s. 161 of the *BC Act*. The Ontario Securities Commission found that the appellants had breached Ontario securities law and had engaged in

conduct contrary to the public interest (as is the case with the appellant at bar). The Commission went on to impose administrative monetary penalties against the three appellants totalling approximately $1.2 million.

[200] The central ground of appeal in *Rowan* was whether the section of the Ontario *Securities Act* that provided remedial authority to the Ontario Securities Commission to impose administrative penalties of up to $1 million per contravention, as s. 162 does for the British Columbia Securities Commission, was constitutionally invalid as constituting a true penal consequence. Citing *Lavallee* with approval, the Ontario Court of Appeal rejected this argument and held that the provision permitting administrative penalties of up to $1 million "is not *prima facie* penal" (at para. 52).

[201] Much of the Court's analysis is entirely consistent with the *Wigglesworth* test, but portions of the judgment appear to be influenced by the fact that the Court was hearing an appeal of the Commission's decision, including its sanctions.

[202] For example, the Court summarized its decision in para. 5 as follows;

> In my view, the Commission and the Divisional Court correctly concluded that the only remedy available to the appellants under s. 11(d) of the Charter is to limit the authority of the Commission to impose AMPs [administrative monetary penalties] to levels that qualify as administrative, rather than penal, sanctions. The AMPs at issue here do not transgress that limit. Accordingly, I would dismiss the constitutional challenge to s. 127(1)(9). I would also dismiss the other grounds of appeal on the basis that [the] Divisional Court properly concluded that the Commission's reasons are to be reviewed on a standard of reasonableness, and that they met that standard. The Commission provided careful and detailed reasons for its decision, making all the necessary findings to support the sanctions it imposed. I agree with the Divisional Court that the appellants have failed to show any basis for appellate intervention.

[203] The first sentence is consistent with the principle expressed by Wilson J. in *Wigglesworth* that I reproduced earlier in these reasons, and is consistent with the proposition that the Ontario Securities Commission did not have the jurisdiction to impose true penal consequences, which answers the s. 11 question. The balance of the paragraph considers the decision as made, but in the context of an appellate court reviewing the validity of sanctions imposed by an administrative tribunal.

[204] In a similar vein, the Ontario Court of Appeal relied on Wilson J.'s statement of principle to reject an argument that a statutory provision analogous to s. 162 of the *BC Act* should be struck down on the basis that it could authorize the imposition of a penalty of unlimited magnitude:

> [41] … the appropriate remedy to protect the rights guaranteed by s. 11 in the case of an unlimited power to impose a fine is not to nullify the power altogether, but rather to limit the tribunal's discretion so that it may only impose penalties that are consistent with the purpose of maintaining discipline and order within a particular sphere of activity.

[205] I recognize that in *Rowan* the Court appeared to reject what it characterized as an "*ex ante*" approach, but the analysis the Court followed to consider the s. 11 offence question appears to be largely based on such an approach. To the extent that the Court found it necessary to examine the actual penalty imposed, such an examination is consistent with the exercise of appellate jurisdiction in relation to the Commission's decision. It was necessary to examine the sanctions actually imposed as part of the appellate function of the Court, independent of the issue whether the Ontario *Securities Act* created a s. 11 offence.

[206] In the case at bar, while this Court is exercising an appellate jurisdiction, it is not the jurisdiction exercised by the Ontario Court of Appeal in *Rowan*. The validity and legality of the Commission's decision is not before us, as it was before the Ontario Court of Appeal. What we must decide is whether Ms. Samji was charged with a s. 11 offence in the proceeding initiated by the Commission. In my view, the answer to this question depends solely on the jurisdiction invoked by the Commission. It is to that issue that I now turn.

Application of the *Wigglesworth* test to the *Securities Act*

[207] In contradistinction to s. 155, there is nothing in the *Securities Act* that indicates that the Legislature intended to confer upon the Commission authority when conducting proceedings under s. 161 of the *Act* to impose penalties that have true penal consequences. Both the structure of the *Act* and this Court's jurisprudence are inconsistent with such a conclusion.

[208] Earlier in this judgment, I referred to judgments of this Court culminating in *Walker* that explained that ss. 161 and 162 are not penal in nature.

[209] The Court in *Walker* was dealing with a version of s. 162 that specified lower maximum administrative monetary penalties than the statute at issue in this appeal. The current s. 162 authorizes penalties to a maximum of $1 million per contravention. While the allowable penalty has increased, the principle in *Walker* remains sound.

[210] As previously noted, both the Alberta Court of Appeal in *Lavallee* and the Ontario Court of Appeal in *Rowan* have held that the comparable sections of their Securities Acts that include the same $1 million per contravention provision do not amount to true penal consequences.

[211] I agree, and would apply the same reasoning to s. 162. As the Supreme Court of Canada stated in *Guindon* at para. 80: "In some cases, sizable penalties are necessary so that the penalty is not simply considered a cost of doing business."

[212] As well, unlike fines arising from s. 155 proceedings, administrative monetary penalties are paid to the Commission to be used for costs involved in the administration and enforcement of the *Act* and for any costs involved in operating the Commission: *Securities Act*, s. 15. In *Wigglesworth*, Wilson J. held that "One *indicium* of the purpose of a particular fine is how the body is to dispose of the fines that it collects": at 561. The fact that the monetary penalties are to be used for the benefit of the Commission is a further indication of legislative intent that the monetary penalties are not penal in nature.

[213] Accordingly, in my opinion, neither s. 161 nor s. 162 authorize the Securities Commission to impose penalties that have true penal consequences. That being so, when Ms. Samji became the subject of proceedings under s. 161, she was not charged with an offence within the meaning of s. 11. As a result, there is no foundation for a stay pursuant to s. 11(h) and the appeal on that basis must be dismissed.

[214] Whether the administrative penalty actually imposed on Ms. Samji was a true penal consequence is not relevant to the analysis in my view. I express no opinion on the subject. If Ms. Samji wished to challenge the penalty, the appropriate forum to do so would have been an appeal under s. 167, at which the Commission would have been a respondent pursuant to s. 167(5).

[215] An appeal of the Commission's decision was the mechanism by which the administrative monetary penalty came before this Court in *Michaels v. British Columbia (Securities Commission)*, 2016 BCCA 144. Ms. Samji has chosen not to challenge the Commission's penalty by seeking leave to appeal it. That decision precludes our examination of the validity of the penalty in this proceeding. Under the *Wigglesworth* test, such an examination is unnecessary in any event.

The s. 7 Ground of Appeal

[216] I agree that Ms. Samji's ground of appeal based on s. 7 of the *Charter* must be dismissed for the reasons given by Justice Fisher.

Disposition

[217] For these reasons I agree with my colleague that the appeal must be dismissed.

"The Honourable Mr. Justice Hunter"

Please see in particular para. 39

Her Majesty The Queen *Appellant*

v.

Harjit Singh Shoker *Respondent*

and

Attorney General of Canada and Criminal Lawyers' Association (Ontario) *Interveners*

Indexed as: R. *v.* Shoker

Neutral citation: 2006 SCC 44.

File No.: 30779.

2006: February 14; 2006: October 13.

Present: McLachlin C.J. and Bastarache, Binnie, LeBel, Fish, Abella and Charron JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Criminal law — Sentencing — Probation — Accused convicted of entering a dwelling house with intent to commit sexual assault and sentenced to incarceration followed by two years of probation subject to conditions — Probation order requires accused to abstain from consumption and possession of alcohol and non-prescription narcotics and to provide bodily substances on demand by probation officer or peace officer to monitor compliance with abstention condition — Whether sentencing judge had jurisdiction under Criminal Code to authorize search and seizure of bodily substances as part of probation order — Criminal Code, R.S.C. 1985, c. C-46, ss. 732.1(3)(c), 732.1(3)(h).

The accused was convicted of breaking and entering a dwelling house with intent to commit sexual assault. A psychological pre-sentencing report revealed that accused blamed his drug use for his behaviour and recommended requiring the accused to submit to random urinalysis to manage his risk in the community. The accused was sentenced to imprisonment followed by probation. The probation order required that he abstain

c.

Harjit Singh Shoker *Intimé*

et

Procureur général du Canada et Criminal Lawyers' Association (Ontario) *Intervenants*

Répertorié : R. *c.* Shoker

Référence neutre : 2006 CSC 44.

N° du greffe : 30779.

2006 : 14 février; 2006 : 13 octobre.

Présents : La juge en chef McLachlin et les juges Bastarache, Binnie, LeBel, Fish, Abella et Charron.

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

Droit criminel — Détermination de la peine — Probation — Accusé déclaré coupable d'introduction dans une maison d'habitation avec l'intention d'y commettre une agression sexuelle et condamné à une peine d'emprisonnement suivie d'une période de probation de deux ans assortie de certaines conditions — Ordonnance de probation intimant à l'accusé de s'abstenir de consommer et de posséder de l'alcool et des narcotiques non vendus sur ordonnance et de fournir, à la demande d'un agent de probation ou d'un agent de la paix, des échantillons de substances corporelles permettant de vérifier si la condition interdisant la consommation et la possession de ces substances est respectée — Le Code criminel habilite-t-il un juge chargé de la détermination de la peine à autoriser le prélèvement de substances corporelles dans le cadre d'une ordonnance de probation? — Code criminel, L.R.C. 1985, ch. C-46, art. 732.1(3)c), 732.1(3)h).

L'accusé est déclaré coupable d'introduction par effraction dans une maison d'habitation avec l'intention d'y commettre une agression sexuelle. Un rapport psychologique prédécisionnel révèle que l'accusé attribue son comportement à sa consommation de drogue, et recommande de l'obliger à se soumettre à des analyses d'urine au hasard afin de gérer le risque qu'il présente pour la société. L'accusé est condamné à une absolutely from the consumption and possession of alcohol and non-prescription narcotics and, to determine compliance with the abstention condition, that he submit to urinalysis, blood tests or breathalyzer tests upon the demand of a peace officer or probation officer. The order also stated that any positive reading would be a breach of the abstention condition. A majority of the Court of Appeal held that ss. 732.1(3)(*c*) and 732.1(3)(*h*) of the *Criminal Code* grant a sentencing judge statutory authority to include a monitoring condition in a probation order but that compelling the accused to provide bodily samples, in the absence of a governing regulatory or statutory framework, is contrary to s. 8 of the *Canadian Charter of Rights and Freedoms*. The Court of Appeal also held that the sentencing judge had no jurisdiction to predetermine that a positive reading was a breach of probation.

Held: The appeal should be dismissed.

Per McLachlin C.J. and Binnie, Fish, Abella and Charron JJ.: The majority of the Court of Appeal was correct to delete that part of the probation order compelling the accused to provide bodily samples and stating that any positive reading will be a breach of probation. Although a condition requiring abstention from consumption and possession of alcohol and non-prescription narcotics is authorized under the *Criminal Code*, and was reasonable in the accused's circumstances, the sentencing judge had no authority under ss. 732.1(3)(*c*) and 732.1(3)(*h*) of the *Code* to authorize a search and seizure of bodily substances as part of a probation order. Nor did he have jurisdiction to predetermine that any positive reading would constitute a breach of probation. [3] [17] [26]

Section 732.1(3)(*c*), which allows an abstention condition, defines a criminal offence, but enforcement powers are not implicit from the simple creation of an offence. While the power to demand bodily samples and the resulting analyses would undoubtedly assist in the enforcement of a s. 732.1(3)(*c*) abstention condition, it cannot be implied on that basis. Under s. 732.1(3)(*h*), a court is given a broad power to craft other reasonable conditions for the purpose of protecting society and for facilitating the accused's reintegration into the

peine d'emprisonnement suivie d'une période de probation. L'ordonnance de probation lui intime de s'abstenir totalement de consommer et de posséder de l'alcool et des narcotiques non vendus sur ordonnance et de se soumettre, à la demande d'un agent de la paix ou d'un agent de probation, à des analyses de sang, d'urine et d'haleine permettant de vérifier si la condition interdisant la consommation et la possession de ces substances est respectée. L'ordonnance précise également que tout résultat d'analyse positif constituera une violation de cette condition. Les juges majoritaires de la Cour d'appel concluent que les al. 732.1(3)*c*) et *h*) du *Code criminel* habilitent le juge chargé de la détermination de la peine à inclure une condition en matière de surveillance dans une ordonnance de probation, mais que, en l'absence de cadre réglementaire ou législatif, obliger l'accusé à fournir des échantillons de substances corporelles va à l'encontre de l'art. 8 de la *Charte canadienne des droits et libertés*. La Cour d'appel statue également que le juge chargé de la détermination de la peine n'avait pas compétence pour décider d'avance qu'un résultat d'analyse positif constituerait une violation de l'ordonnance de probation.

Arrêt : Le pourvoi est rejeté.

La juge en chef McLachlin et les juges Binnie, Fish, Abella et Charron : Les juges majoritaires de la Cour d'appel ont eu raison de supprimer la partie de l'ordonnance de probation obligeant l'accusé à fournir des échantillons de substances corporelles et précisant que tout résultat d'analyse positif constituera une violation de l'ordonnance de probation. Bien qu'une condition intimant de s'abstenir de consommer et de posséder de l'alcool et des narcotiques non vendus sur ordonnance soit autorisée par le *Code criminel* et qu'elle fût raisonnable compte tenu de la situation de l'accusé, les al. 732.1(3)*c*) et *h*) du *Code* n'habilitaient pas le juge chargé de la détermination de la peine à autoriser le prélèvement de substances corporelles dans le cadre d'une ordonnance de probation. Ce juge n'avait pas non plus compétence pour décider d'avance que tout résultat d'analyse positif constituerait une violation de l'ordonnance de probation. [3] [17] [26]

L'alinéa 732.1(3)*c*), qui permet d'imposer une condition interdisant la consommation de certaines substances, définit une infraction criminelle, mais les pouvoirs d'exécution ne découlent pas de la simple création d'une infraction. Même s'il ne fait aucun doute que le pouvoir de demander des échantillons de substances corporelles et les analyses qui en découleraient aideraient à exécuter une condition interdisant la consommation de certaines substances, imposée en vertu de l'al. 732.1(3)*c*), cela n'est pas suffisant pour conclure que ce pouvoir community. However, s. 732.1(3)(*h*) is not unlimited and must be read in context. The conditions set out in s. 732.1(3) can assist in delineating the scope of this residual provision. These listed conditions relate to conduct, or abstention from conduct, the fulfilment of which has no incriminating consequence for the probationer. When a condition may pose a risk, such as participating in a treatment program, the consent of the probationer is required. Conditions compelling bodily samples to facilitate the gathering of evidence for enforcement purposes do not simply monitor the probationer's behaviour and, as such, are of a different kind and, because of their potential effect, absent the probationer's consent to such conditions, raise constitutional concerns. The seizure of bodily samples must be subject to stringent standards and safeguards to meet constitutional requirements. Where Parliament authorizes the collection of bodily samples, it uses clear language and sets out standards and safeguards for collecting these samples. Parliament has not provided a scheme under s. 732.1(3) for collecting bodily samples and such a scheme cannot be judicially enacted. [20-25]

Per Bastarache and LeBel JJ.: Under well-established rules of statutory interpretation, s. 732.1(3)(*h*) of the *Criminal Code* grants authority to include monitoring procedures in probation orders, including the condition imposed on the accused that he provide bodily samples. Section 732.1(3)(*h*) must be read in the context of probation and sentencing. A probation order addresses the imperatives of the protection of society and the rehabilitation of the accused. Sentencing judges are required to devise terms that are reasonable in the sense that they complement these objectives and the terms set out in s. 732.1(3). The residual clause allows judges to frame conditions to fit the distinct situation of each accused. So long as a reasonable condition can be connected with the categories of terms contemplated by the *Code*, it is grounded in an implied, but solid, statutory authority. Although the *Code* provides for conditions concerning alcohol and drug use, it is silent about monitoring these conditions. This Court has acknowledged implied statutory powers when the need for them flows from the substantive provisions of a law, and the need for a monitoring mechanism may arise from the

existe implicitement. L'alinéa 732.1(3)*h*) confère au tribunal un vaste pouvoir de concevoir d'autres conditions raisonnables destinées à protéger la société et à faciliter la réinsertion sociale de l'accusé. Cependant, l'al. 732.1(3)*h*) n'a pas une portée illimitée et doit être interprété dans son contexte. Les conditions énumérées au par. 732.1(3) peuvent aider à circonscrire la portée de cette disposition résiduelle. Le respect de ces conditions, qui ont trait à un comportement ou à une abstention d'adopter un comportement, n'a aucune conséquence incriminante pour le probationnaire. Une condition susceptible de présenter un risque, comme celle intimant de participer à un programme de traitement, ne peut être imposée qu'avec le consentement du probationnaire. Du fait qu'elles ne permettent pas simplement de surveiller le comportement du probationnaire, les conditions obligeant à fournir des échantillons de substances corporelles dans le but de faciliter l'obtention d'éléments de preuve aux fins d'exécution sont différentes et soulèvent, à cause de leur effet potentiel, des questions d'ordre constitutionnel dans le cas où le probationnaire n'y a pas consenti. Le prélèvement d'échantillons de substances corporelles doit être assujetti à des normes et à des garanties rigoureuses qui permettent de satisfaire aux exigences de la Constitution. Dans les cas où le législateur autorise le prélèvement d'échantillons de substances corporelles, il le dit clairement et il établit des normes et des garanties applicables au prélèvement de ces échantillons. Le législateur n'a prescrit aucun régime de prélèvement d'échantillons de substances corporelles au par. 732.1(3) et il n'appartient pas à un tribunal d'édicter un tel régime. [20-25]

Les juges Bastarache et LeBel : Des règles d'interprétation législative bien établies veulent que l'al. 732.1(3)*h*) du *Code criminel* permette d'inclure des modes de surveillance dans une ordonnance de probation, y compris la condition obligeant l'accusé à fournir des échantillons de substances corporelles. L'alinéa 732.1(3)*h*) doit être interprété dans le contexte de la probation et de la détermination de la peine. Une ordonnance de probation donne suite aux impératifs de protection de la société et de réhabilitation de l'accusé. Le juge chargé de la détermination de la peine doit concevoir des conditions raisonnables en ce sens qu'elles doivent compléter ces objectifs et les conditions énoncées au par. 732.1(3). La clause résiduelle permet aux juges de formuler des conditions adaptées à la situation particulière de chaque accusé. Dans la mesure où une condition raisonnable peut être reliée aux catégories prévues par le *Code*, elle doit être considérée comme étant implicitement, mais indéniablement, autorisée par la loi. Bien qu'il prescrive des conditions relatives à la consommation d'alcool et de drogues, le *Code* est muet en ce qui concerne la surveillance de l'exécution de ces conditions. Notre nature of the obligations imposed on an accused in a probation order. To hold otherwise would cast doubt on a number of useful monitoring methods used to ensure that the goals of probation are met. However, any condition of a probation order requiring monitoring of an accused is open to review under s. 8 of the *Charter*. In this case, the monitoring condition does not meet the requirements of s. 8. Compelling blood tests absent a statutory framework governing such tests is not consistent with the *Charter* and random drug testing at a probation officer's discretion could become highly arbitrary. [30-37] [42-43]

The part of the order stating that a positive test will be a breach of probation is contrary to criminal law principles that require guilt to be proved in the usual manner. [41]

Cases Cited

By Charron J.

Referred to: *R. v. Proulx*, [2000] 1 S.C.R. 61, 2000 SCC 5; *R. v. Kootenay* (2000), 150 C.C.C. (3d) 311; *R. v. Traverse* (2006), 205 C.C.C. (3d) 33; *R. v. Ziatas* (1973), 13 C.C.C. (2d) 287; *R. v. Caja* (1977), 36 C.C.C. (2d) 401; *R. v. Lavender* (1981), 59 C.C.C. (2d) 551; *R. v. L.* (1986), 50 C.R. (3d) 398; *R. v. McLeod* (1993), 81 C.C.C. (3d) 83; *R. v. Borden*, [1994] 3 S.C.R. 145; *R. v. Stillman*, [1997] 1 S.C.R. 607; *R. v. Golden*, [2001] 3 S.C.R. 679, 2001 SCC 83; *Hunter v. Southam Inc.*, [1984] 2 S.C.R. 145.

By LeBel J.

Referred to: *R. v. M. (M.R.)*, [1998] 3 S.C.R. 393; *R. v. Carlson* (1996), 141 Sask. R. 168; *R. v. Curtis* (1996), 144 Sask. R. 156; *R. v. McLeod* (1992), 109 Sask. R. 8; *Little Sisters Book and Art Emporium v. Canada (Minister of Justice)*, [2000] 2 S.C.R. 1120, 2000 SCC 69.

Statutes and Regulations Cited

Canadian Charter of Rights and Freedoms, ss. 1, 8.
Correctional Institution Regulation, Alta. Reg. 205/2001, ss. 48.1, 48.2.
Correctional Institutions Regulation, Man. Reg. 227/92, ss. 28, 29, 29.1, 31(1).

Cour a reconnu l'existence de pouvoirs légaux implicites dans les cas où leur nécessité découle des dispositions substantielles d'une loi, et la nécessité d'un mécanisme de surveillance peut découler de la nature des obligations que l'ordonnance de probation impose à l'accusé. Conclure autrement jetterait le doute sur un certain nombre de modes de surveillance utiles pour assurer la réalisation des objectifs de la probation. Toutefois, toute condition d'une ordonnance de probation prescrivant la surveillance d'un accusé peut faire l'objet d'une révision fondée sur l'art. 8 de la *Charte*. En l'espèce, la condition en matière de surveillance ne respecte pas les exigences de l'art. 8. Obliger à se soumettre à des analyses sanguines en l'absence de cadre législatif régissant le prélèvement des échantillons de sang n'est pas conforme à la *Charte*, et les tests de dépistage de drogue faits au hasard, à la discrétion de l'agent de probation, risqueraient de devenir très arbitraires. [30-37] [42-43]

La partie de l'ordonnance prévoyant qu'un test positif constituera une violation de l'ordonnance de probation contrevient aux principes du droit criminel qui exigent que la culpabilité soit établie de la manière habituelle. [41]

Jurisprudence

Citée par la juge Charron

Arrêts mentionnés : *R. c. Proulx*, [2000] 1 R.C.S. 61, 2000 CSC 5; *R. c. Kootenay* (2000), 150 C.C.C. (3d) 311; *R. c. Traverse* (2006), 205 C.C.C. (3d) 33; *R. c. Ziatas* (1973), 13 C.C.C. (2d) 287; *R. c. Caja* (1977), 36 C.C.C. (2d) 401; *R. c. Lavender* (1981), 59 C.C.C. (2d) 551; *R. c. L.* (1986), 50 C.R. (3d) 398; *R. c. McLeod* (1993), 81 C.C.C. (3d) 83; *R. c. Borden*, [1994] 3 R.C.S. 145; *R. c. Stillman*, [1997] 1 R.C.S. 607; *R. c. Golden*, [2001] 3 R.C.S. 679, 2001 CSC 83; *Hunter c. Southam Inc.*, [1984] 2 R.C.S. 145.

Citée par le juge LeBel

Arrêts mentionnés : *R. c. M. (M.R.)*, [1998] 3 R.C.S. 393; *R. c. Carlson* (1996), 141 Sask. R. 168; *R. c. Curtis* (1996), 144 Sask. R. 156; *R. c. McLeod* (1992), 109 Sask. R. 8; *Little Sisters Book and Art Emporium c. Canada (Ministre de la Justice)*, [2000] 2 R.C.S. 1120, 2000 CSC 69.

Lois et règlements cités

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Correctional Services Act, R.S.P.E.I. 1988, c. C-26.1, s. 17(g).
Correctional Services Act, S.M. 1998, c. 47, C.C.S.M. c. C230, s. 16.
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Correctional Services Regulation, Man. Reg. 128/99, ss. 41 to 45.
Corrections Accountability Act, 2000, S.O. 2000, c. 40, s. 57.9(1) to (3).
Corrections Act, R.S.A. 2000, c. C-29, ss. 14.1, 14.2.
Corrections and Conditional Release Act, S.C. 1992, c. 20, ss. 54 to 57.
Corrections and Conditional Release Regulations, SOR/92-620, ss. 60 to 72.
Criminal Code, R.S.C. 1985, c. C-46, ss. 253 to 261, 487.04 to 487.091, 718 to 718.2, 731, 732.1(2), (3), 733.1, 742.3(2)(*f*).
P.E.I. Reg. EC616/92, ss. 10, 11.

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APPEAL from a judgment of the British Columbia Court of Appeal (Finch C.J.B.C. and Hall and Levine JJ.A.) (2004), 206 B.C.A.C. 266, 338 W.A.C. 266, 192 C.C.C. (3d) 176, 26 C.R. (6th) 97, 126 C.R.R. (2d) 149, [2004] B.C.J. No. 2626 (QL), 2004 BCCA 643, deleting part of a probation order. Appeal dismissed.

Wendy L. Rubin and *Susan J. Brown*, for the appellant.

Garth Barriere and *Dana Kripp*, for the respondent.

Correctional Institution Regulation, Alta. Reg. 205/2001, art. 48.1, 48.2.
Correctional Services Act, R.S.P.E.I. 1988, ch. C-26.1, art. 17g).
Correctional Services Act, S.S. 1993, ch. C-39.1, art. 56(1).
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Loi sur le système correctionnel et la mise en liberté sous condition, L.C. 1992, ch. 20, art. 54 à 57.
Loi sur les services correctionnels, L.M. 1998, ch. 47, C.P.L.M. ch. C230, art. 16.
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POURVOI contre un arrêt de la Cour d'appel de la Colombie-Britannique (le juge en chef Finch et les juges Hall et Levine) (2004), 206 B.C.A.C. 266, 338 W.A.C. 266, 192 C.C.C. (3d) 176, 26 C.R. (6th) 97, 126 C.R.R. (2d) 149, [2004] B.C.J. No. 2626 (QL), 2004 BCCA 643, qui a supprimé une partie d'une ordonnance de probation. Pourvoi rejeté.

Wendy L. Rubin et *Susan J. Brown*, pour l'appelante.

Garth Barriere et *Dana Kripp*, pour l'intimé.

Kenneth J. Yule, *Q.C.*, and *David Schermbrucker*, for the intervener the Attorney General of Canada.

James Stribopoulos and *Sarah Loosemore*, for the intervener the Criminal Lawyers' Association (Ontario).

The judgment of McLachlin C.J. and Binnie, Fish, Abella and Charron JJ. was delivered by

CHARRON J. —

1. Overview

1 This appeal raises the question whether a sentencing judge may require a probationer to provide, on demand by the probation officer, samples of breath, urine or blood for analysis to determine compliance with an abstention term of the probation order. In allowing the appeal against sentence, the British Columbia Court of Appeal held that the enforcement term violates s. 8 of the *Canadian Charter of Rights and Freedoms* due to the absence of legislative or regulatory standards or safeguards that would adequately protect the probationer's privacy interest. Levine J.A., in writing for the majority, deleted the enforcement term, holding that it was up to Parliament and not the courts to fill this "gap in . . . legislation" ((2004), 206 B.C.A.C. 266, 2004 BCCA 643, at para. 60). Hall J.A., in partial dissent, would have deleted the requirement to provide blood samples but would have read in adequate safeguards to ensure the constitutionality of the rest of the condition.

2 The Crown appeals to this Court and seeks to reinstate the enforcement condition. At issue is whether ss. 732.1(3)(*c*) and 732.1(3)(*h*) of the *Criminal Code*, R.S.C. 1985, c. C-46, authorize the enforcement condition and, if permissible, whether the condition must be predicated by reasonable and probable grounds to suspect a violation of an abstention condition.

Kenneth J. Yule, *c.r.*, et *David Schermbrucker*, pour l'intervenant le procureur général du Canada.

James Stribopoulos et *Sarah Loosemore*, pour l'intervenante Criminal Lawyers' Association (Ontario).

Version française du jugement de la juge en chef McLachlin et des juges Binnie, Fish, Abella et Charron rendu par

LA JUGE CHARRON —

1. Aperçu

Le présent pourvoi soulève la question de savoir si le juge chargé de la détermination de la peine peut exiger qu'un probationnaire fournisse, à la demande de l'agent de probation, des échantillons d'haleine, d'urine ou de sang qui seront analysés pour déterminer s'il respecte une condition de l'ordonnance de probation qui lui interdit de consommer certaines substances. En accueillant l'appel interjeté contre la peine, la Cour d'appel de la Colombie-Britannique a conclu que la modalité d'exécution en cause enfreint l'art. 8 de la *Charte canadienne des droits et libertés* en raison de l'absence de normes ou garanties législatives ou réglementaires qui protégeraient adéquatement le droit à la vie privée du probationnaire. S'exprimant au nom des juges majoritaires, la juge Levine a supprimé cette modalité d'exécution, concluant qu'il appartenait au législateur, et non aux tribunaux, de combler ce [TRADUCTION] « vide législatif » ((2004), 206 B.C.A.C. 266, 2004 BCCA 643, par. 60). Le juge Hall, dissident en partie, aurait supprimé l'obligation de fournir des échantillons de sang, mais il aurait ajouté des garanties suffisantes pour assurer la constitutionnalité des autres éléments de la condition.

Le ministère public se pourvoit devant notre Cour et sollicite le rétablissement de la modalité d'exécution. La question est de savoir si les al. 732.1(3)*c*) et *h*) du *Code criminel*, L.R.C. 1985, ch. C-46, permettent d'établir cette modalité d'exécution et, dans l'affirmative, si celle-ci doit être fondée sur des motifs raisonnables et probables de soupçonner qu'il y a eu violation d'une condition interdisant la consommation et la possession de certaines substances.

For the reasons that follow, I would dismiss the appeal. A sentencing judge has a broad jurisdiction in determining appropriate conditions of probation. However, there is no authority under the *Criminal Code* to authorize a search and seizure of bodily substances as part of a probation order. In light of the fact that the impugned condition must be quashed for lack of jurisdiction, it is neither necessary nor advisable for this Court to answer the constitutional question. It is Parliament's role to determine appropriate standards and safeguards governing the collection of bodily samples for enforcement purposes.

2. The Facts and Proceedings Below

Shortly after midnight on September 7, 2003, the complainant was awakened when a naked stranger was getting in her bed. The intruder, Harjit Singh Shoker, followed her when she fled to the kitchen to phone the police but he did not attempt to leave. On arrest, he told the police that he had been using a narcotic the previous day. Mr. Shoker did not testify at trial. He was convicted of breaking and entering a dwelling-house with intent to commit sexual assault.

A psychological assessment report prepared by Dr. Whittemore for sentencing revealed that Mr. Shoker blamed his drug use for his behaviour, stating that he had been on speed at the time of the offence. The report described a history of substance abuse, starting with alcohol as a teenager and later drugs including heroin, speed, cocaine and marijuana. The report also referred to a similar incident that had occurred a few months earlier in respect of which Mr. Shoker had been charged and awaiting trial at the time of this offence. Mr. Shoker told Dr. Whittemore that he was under the influence of alcohol at the time of this previous incident and thought he was at a friend's apartment. He was acquitted on that charge. Mr. Shoker did not feel that he needed treatment as he had not used drugs for the three months he had been in custody since his arrest. Describing Mr. Shoker's behaviour

3 Pour les motifs qui suivent, je suis d'avis de rejeter le pourvoi. Le juge chargé de la détermination de la peine est investi d'une vaste compétence pour imposer des conditions de probation appropriées. Cependant, le *Code criminel* ne confère aucun pouvoir d'autoriser le prélèvement de substances corporelles dans le cadre d'une ordonnance de probation. Comme la condition contestée doit être annulée pour cause d'absence de compétence, il n'est ni nécessaire ni souhaitable que notre Cour réponde à la question constitutionnelle. Il appartient au législateur d'établir les normes et garanties qui doivent régir le prélèvement d'échantillons de substances corporelles effectué aux fins d'exécution.

2. Les faits et les décisions des juridictions inférieures

4 Peu après minuit le 7 septembre 2003, la plaignante s'est réveillée au moment où un inconnu nu se glissait dans son lit. L'intrus, Harjit Singh Shoker, l'a suivie lorsqu'elle s'est enfuie vers la cuisine pour appeler la police, mais il n'a pas tenté de partir. Lors de son arrestation, il a dit à la police avoir consommé un narcotique la veille. M. Shoker n'a pas témoigné lors de son procès. Il a été déclaré coupable d'introduction par effraction dans une maison d'habitation avec l'intention d'y commettre une agression sexuelle.

5 Selon le rapport d'évaluation psychologique que le Dr Whittemore a rédigé aux fins de détermination de la peine, M. Shoker attribuait son comportement à sa consommation de drogue, affirmant avoir été sous l'effet de l'amphétamine au moment de l'infraction. Le rapport faisait état d'antécédents de consommation abusives de substances psychoactives, à commencer par l'alcool, durant son adolescence, jusqu'aux drogues telles l'héroïne, l'amphétamine, la cocaïne et la marijuana. Il mentionnait également un épisode similaire survenu quelques mois plus tôt, pour lequel M. Shoker avait été inculpé et attendait de subir son procès au moment où l'infraction reprochée en l'espèce a été commise. M. Shoker a déclaré au Dr Whittemore qu'il était en état d'ébriété lors de l'épisode antérieur et qu'il se croyait alors dans l'appartement d'une amie. Il a été acquitté relativement à cette accusation. Il estimait

as disturbing, Dr. Whittemore suggested that the court might consider imposing a condition requiring him to submit to random urinalysis to assist in managing his risk in the community.

qu'il n'avait pas à suivre un traitement étant donné qu'il n'avait consommé aucune drogue pendant les trois mois passés en détention depuis son arrestation. Qualifiant de troublant le comportement de M. Shoker, le D^{r} Whittemore a indiqué que la cour pourrait songer à lui imposer une condition qui l'obligerait à se soumettre à des analyses d'urine au hasard afin d'aider à gérer le risque qu'il présente pour la société.

6 The trial judge sentenced Mr. Shoker to 20 months' incarceration to be followed by a two-year period of probation subject to a number of conditions. The Crown did not ask that the order of probation include any condition for treatment or testing of bodily substances and the offender did not consent to those conditions. The following two conditions were later challenged by Mr. Shoker on his appeal before the British Columbia Court of Appeal:

Le juge du procès a condamné M. Shoker à une peine d'emprisonnement de 20 mois, suivie d'une période de probation de deux ans assortie d'un certain nombre de conditions. Le ministère public n'a pas demandé que l'ordonnance de probation comporte une condition prescrivant un traitement ou des analyses de substances corporelles et le délinquant n'a pas consenti à ces conditions. M. Shoker a, par la suite, contesté les deux conditions suivantes lors de son appel devant la Cour d'appel de la Colombie-Britannique :

> CONDITION 7: You shall attend for such treatment and counselling as directed by the Probation Officer and successfully complete any such programs to which you are referred.
>
> . . .
>
> CONDITION 9: Abstain absolutely from the consumption and possession of alcohol and non prescription narcotics and to submit to a urinalysis, blood test or breathalyzer test upon the demand/request of a Peace Officer or Probation Officer to determine compliance with this condition. Any positive reading will be a breach of this condition.

[TRADUCTION]

> CONDITION n^{o} 7 : Vous devrez suivre le traitement et participer aux séances de counseling prescrits par l'agent de probation et réussir tous les programmes qui vous seront recommandés.
>
> . . .
>
> CONDITION n^{o} 9 : Vous devrez vous abstenir totalement de consommer et de posséder de l'alcool et des narcotiques non vendus sur ordonnance et vous soumettre, à la demande d'un agent de la paix ou d'un agent de probation, à des analyses de sang, d'urine et d'haleine permettant de vérifier si la présente condition est respectée. Tout résultat positif constituera une violation de la présente condition.

7 The Court of Appeal deleted the reference to "treatment" in Condition 7 because a treatment condition can only be imposed under s. 732.1(3)(*g*) of the *Criminal Code* with the consent of the offender. In addition, as the majority of the court noted, there is no program in British Columbia for curative treatment in relation to the consumption of alcohol or drugs as described in para. (*g*.1). Condition 7 was amended accordingly and it is no longer in issue before this Court. The court also

La Cour d'appel a supprimé la mention de « traitement » dans la condition n^{o} 7 parce qu'une condition prescrivant un traitement ne peut être imposée qu'en vertu de l'al. 732.1(3)*g*) du *Code criminel* et avec le consentement du délinquant. De plus, comme les juges majoritaires l'ont souligné, il n'existe en Colombie-Britannique aucun programme de traitement curatif pour abus d'alcool ou de drogue, comme celui décrit à l'al. *g*.1). La condition n^{o} 7 a été modifiée en conséquence et n'est deleted the last sentence of Condition 9 for lack of jurisdiction — the sentencing judge could not predetermine that any positive reading would constitute a breach of probation as he had purported to do. The question of any breach would have to form the basis of a new charge against Mr. Shoker and be determined by a court in the usual way.

Fresh evidence admitted before the Court of Appeal revealed that funding for urinalysis testing had been discontinued as of March 31, 2003, and the service was no longer available in British Columbia. Hence the question of urinalysis testing for this offender was effectively moot. However, the court considered whether at law an offender can be required under the terms of a probation order to submit to a demand for a sample of bodily substances, including breath, urine and blood. Levine J.A., Finch C.J.B.C. concurring, was of the view that the authority for imposing such a condition could be found in s. 732.1(3)(*c*) of the *Criminal Code* with s. 732.1(3)(*h*) supporting this interpretation. Despite this finding, Levine J.A., in writing for the majority, held that the requirement to provide bodily samples, in the absence of a regulatory or statutory framework governing how the samples will be taken and tested, violates s. 8 of the *Charter* and that the defect cannot be cured by judicial fiat. Hence, that part of Condition 9 following the words "non prescription narcotics" was deleted. I read the majority's reasons as effectively holding that there is no statutory authority to require a probationer to provide bodily samples on demand.

Hall J.A., in partial dissent, was of the view that the authority to impose the condition could not be found under s. 732.1(3)(*h*) because "Parliament has spoken in a specific manner about alcohol and drugs in s. 732.1(3)(c)" (para. 70). In his view, the power flowed rather from s. 732.1(3)(*c*) itself as "a reasonable methodology to ensure that such an

plus en cause devant notre Cour. La cour a également supprimé la dernière phrase de la condition n^{o} 9 pour cause d'absence de compétence — le juge chargé de la détermination de la peine ne pouvait pas, comme il avait voulu le faire, décider d'avance que tout résultat d'analyse positif constituerait une violation de l'ordonnance de probation. La question de la violation devrait constituer le fondement d'une nouvelle accusation contre M. Shoker et être tranchée par un tribunal de la manière habituelle.

8 De nouveaux éléments de preuve admis en Cour d'appel ont révélé que le financement des analyses d'urine avait été interrompu dès le 31 mars 2003 et que ce service n'était plus offert en Colombie-Britannique. Partant, la question des analyses d'urine relativement au délinquant en cause était, en fait, théorique. La cour s'est toutefois demandé si, sur le plan juridique, une ordonnance de probation peut obliger un délinquant à se conformer à une demande d'échantillons de substances corporelles, notamment d'haleine, d'urine et de sang. La juge Levine, avec l'appui du juge en chef Finch, estimait que le pouvoir d'imposer une telle condition se dégageait de l'al. 732.1(3)*c*) du *Code criminel* et que l'al. 732.1(3)*h*) appuyait cette interprétation. Malgré cette conclusion, la juge Levine, s'exprimant au nom des juges majoritaires, a décidé que, en l'absence de cadre réglementaire ou législatif régissant la façon de prélever et d'analyser des échantillons de substances corporelles, l'obligation de fournir ces échantillons viole l'art. 8 de la *Charte* et qu'il ne peut être remédié à cette lacune au moyen d'une décision judiciaire. Ainsi, la partie de la condition n^{o} 9 qui suit les termes [TRADUCTION] « narcotiques non vendus sur ordonnance » a été supprimée. Je considère que les motifs majoritaires précisent, en fait, qu'il n'existe aucun pouvoir légal d'obliger un probationnaire à fournir des échantillons de substances corporelles sur demande.

9 Le juge Hall, dissident en partie, était d'avis que l'al. 732.1(3)*h*) ne pouvait pas conférer le pouvoir d'imposer la condition puisque [TRADUCTION] « le législateur a traité expressément de l'alcool et des drogues à l'al. 732.1(3)c) » (par. 70). À son avis, ce pouvoir découlait plutôt de l'al. 732.1(3)*c*) lui-même en tant que « moyen raisonnable d'assurer

order is effective" (para. 70). Hall J.A. departed from the majority on the question whether the condition could be amended to conform with the *Charter*. He would have deleted the requirement to provide blood samples and would have amended Condition 9 to require that urine or breath samples be provided upon demand based on reasonable and probable grounds to suspect a violation of the abstention condition.

l'efficacité d'une telle ordonnance » (par. 70). Le juge Hall ne partageait pas l'opinion des juges majoritaires quant à la possibilité de modifier la condition pour la rendre conforme à la *Charte*. Il aurait supprimé l'obligation de fournir des échantillons de sang et aurait modifié la condition nº 9 de manière à exiger que des échantillons d'urine ou d'haleine soient fournis sur demande, lorsqu'il y a des motifs raisonnables et probables de soupçonner qu'il y a eu violation de la condition interdisant la consommation et la possession de certaines substances.

3. Analysis

3.1 *Relevant Statutory Provisions*

10 Probation is a form of sentence that can be imposed only in circumstances described in s. 731 of the *Criminal Code*:

> **731.** (1) Where a person is convicted of an offence, a court may, having regard to the age and character of the offender, the nature of the offence and the circumstances surrounding its commission,
>
> (*a*) if no minimum punishment is prescribed by law, suspend the passing of sentence and direct that the offender be released on the conditions prescribed in a probation order; or
>
> (*b*) in addition to fining or sentencing the offender to imprisonment for a term not exceeding two years, direct that the offender comply with the conditions prescribed in a probation order.
>
> (2) A court may also make a probation order where it discharges an accused under subsection 730(1).

Probation has traditionally been viewed as a rehabilitative sentencing tool: *R. v. Proulx*, [2000] 1 S.C.R. 61, 2000 SCC 5, at paras. 31-33. The probationer remains free to live in the community but certain restraints on his freedom are imposed for the purpose of facilitating his rehabilitation and protecting society. An offender who is bound by a probation order and who, without reasonable excuse, fails or refuses to comply with that order is guilty of an offence under s. 733.1 punishable by up to two years' imprisonment.

3. Analyse

3.1 *Dispositions législatives pertinentes*

La probation est une forme de peine qui ne peut être infligée que dans les cas prévus à l'art. 731 du *Code criminel* :

> **731.** (1) Lorsqu'une personne est déclarée coupable d'une infraction, le tribunal peut, vu l'âge et la réputation du délinquant, la nature de l'infraction et les circonstances dans lesquelles elle a été commise :
>
> *a*) dans le cas d'une infraction autre qu'une infraction pour laquelle une peine minimale est prévue par la loi, surseoir au prononcé de la peine et ordonner que le délinquant soit libéré selon les conditions prévues dans une ordonnance de probation;
>
> *b*) en plus d'infliger une amende au délinquant ou de le condamner à un emprisonnement maximal de deux ans, ordonner que le délinquant se conforme aux conditions prévues dans une ordonnance de probation.
>
> (2) Le tribunal peut aussi rendre une ordonnance de probation qui s'applique à l'accusé absous aux termes du paragraphe 730(1).

La probation a traditionnellement été considérée comme une mesure de réinsertion sociale du délinquant : *R. c. Proulx*, [2000] 1 R.C.S. 61, 2000 CSC 5, par. 31-33. Le probationnaire reste libre de vivre au sein de la collectivité, mais sa liberté est assujettie à certaines restrictions destinées à faciliter sa réadaptation et à assurer la protection de la société. Le délinquant visé par une ordonnance de probation qui, sans excuse raisonnable, omet ou refuse de s'y conformer est, aux termes de l'art. 733.1, coupable d'une infraction punissable d'un emprisonnement maximal de deux ans.

All probation orders must contain at a minimum three conditions as prescribed under s. 732.1(2):

(*a*) keep the peace and be of good behaviour;

(*b*) appear before the court when required to do so by the court; and

(*c*) notify the court or the probation officer in advance of any change of name or address, and promptly notify the court or the probation officer of any change of employment or occupation.

Additional optional conditions may be imposed pursuant to s. 732.1(3). Only ss. 732.1(3)(*c*) and 732.1(3)(*h*) are at issue on this appeal. However, it is important that they be read in the context of the entire provision. Section 732.1(3) reads as follows:

732.1 . . .

(3) The court may prescribe, as additional conditions of a probation order, that the offender do one or more of the following:

(*a*) report to a probation officer

(i) within two working days, or such longer period as the court directs, after the making of the probation order, and

(ii) thereafter, when required by the probation officer and in the manner directed by the probation officer;

(*b*) remain within the jurisdiction of the court unless written permission to go outside that jurisdiction is obtained from the court or the probation officer;

(*c*) abstain from

(i) the consumption of alcohol or other intoxicating substances, or

(ii) the consumption of drugs except in accordance with a medical prescription;

(*d*) abstain from owning, possessing or carrying a weapon;

(*e*) provide for the support or care of dependants;

(*f*) perform up to 240 hours of community service over a period not exceeding eighteen months;

Toutes les ordonnances de probation doivent comporter au moins trois conditions prévues au 11
par. 732.1(2), soit celles intimant

a) de ne pas troubler l'ordre public et d'avoir une bonne conduite;

b) de répondre aux convocations du tribunal;

c) de prévenir le tribunal ou l'agent de probation de ses changements d'adresse ou de nom et de les aviser rapidement de ses changements d'emploi ou d'occupation.

Des conditions facultatives supplémentaires peuvent être imposées conformément au par. 732.1(3). 12
Seuls les al. 732.1(3)*c*) et *h*) sont en cause dans le présent pourvoi. Il importe toutefois de les interpréter en fonction de l'ensemble de la disposition. Le paragraphe 732.1(3) est ainsi libellé :

732.1 . . .

(3) Le tribunal peut assortir l'ordonnance de probation de l'une ou de plusieurs des conditions suivantes, intimant au délinquant :

a) de se présenter à l'agent de probation :

(i) dans les deux jours ouvrables suivant l'ordonnance, ou dans le délai plus long fixé par le tribunal,

(ii) par la suite, selon les modalités de temps et de forme fixées par l'agent de probation;

b) de rester dans le ressort du tribunal, sauf permission écrite d'en sortir donnée par le tribunal ou par l'agent de probation;

c) de s'abstenir de consommer :

(i) de l'alcool ou d'autres substances toxiques,

(ii) des drogues, sauf sur ordonnance médicale;

d) de s'abstenir d'être propriétaire, possesseur ou porteur d'une arme;

e) de prendre soin des personnes à sa charge et de subvenir à leurs besoins;

f) d'accomplir au plus deux cent quarante heures de service communautaire au cours d'une période maximale de dix-huit mois;

(*g*) if the offender agrees, and subject to the program director's acceptance of the offender, participate actively in a treatment program approved by the province;

(*g*.1) where the lieutenant governor in council of the province in which the probation order is made has established a program for curative treatment in relation to the consumption of alcohol or drugs, attend at a treatment facility, designated by the lieutenant governor in council of the province, for assessment and curative treatment in relation to the consumption by the offender of alcohol or drugs that is recommended pursuant to the program;

(*g*.2) where the lieutenant governor in council of the province in which the probation order is made has established a program governing the use of an alcohol ignition interlock device by an offender and if the offender agrees to participate in the program, comply with the program; and

(*h*) <u>comply with such other reasonable conditions as the court considers desirable</u>, subject to any regulations made under subsection 738(2) [s. 738(2) relates to restitution orders], <u>for protecting society and for facilitating the offender's successful reintegration into the community</u>.

g) si le délinquant y consent et le directeur du programme l'accepte, de participer activement à un programme de traitement approuvé par la province;

g.1) si le lieutenant-gouverneur en conseil de la province où doit être rendue l'ordonnance de probation a institué un programme de traitement curatif pour abus d'alcool ou de drogue, de subir, à l'établissement de traitement désigné par celui-ci, l'évaluation et la cure de désintoxication pour abus d'alcool ou de drogue qui sont recommandées dans le cadre de ce programme;

g.2) si le lieutenant-gouverneur en conseil de la province où est rendue l'ordonnance de probation a institué un programme visant l'utilisation par le délinquant d'un antidémarreur avec éthylomètre et s'il accepte de participer au programme, de se conformer aux modalités du programme;

h) <u>d'observer telles autres conditions raisonnables que le tribunal considère souhaitables</u>, sous réserve des règlements d'application du paragraphe 738(2), <u>pour assurer la protection de la société et faciliter la réinsertion sociale du délinquant</u>.

13 Before discussing the issue that arises in this case, I wish to make a few general comments about the power to impose optional conditions under s. 732.1(3). The residual power under s. 732.1(3)(*h*) speaks of "other reasonable conditions" imposed "for protecting society and for facilitating the offender's successful reintegration into the community". Such language is instructive, not only in respect of conditions crafted under this residual power, but in respect of the optional conditions listed under s. 732.1(3): before a condition can be imposed, it must be "reasonable" in the circumstances and must be ordered for the purpose of protecting society and facilitating the particular offender's successful reintegration into the community. Reasonable conditions will generally be linked to the particular offence but need not be. What is required is a nexus between the offender, the protection of the community and his reintegration into the community. See, for example, *R. v. Kootenay* (2000), 150 C.C.C. (3d) 311 (Alta. C.A.), and *R. v. Traverse* (2006), 205 C.C.C. (3d) 33 (Man. C.A.), where appellate courts have upheld conditions

Avant d'aborder la question qui se pose en l'espèce, je tiens à formuler quelques observations générales au sujet du pouvoir d'imposer des conditions facultatives en vertu du par. 732.1(3). Le pouvoir résiduel prévu à l'al. 732.1(3)*h*) fait état d'« autres conditions raisonnables » destinées à « assurer la protection de la société et [à] faciliter la réinsertion sociale du délinquant ». Un tel libellé est intéressant non seulement en ce qui concerne les conditions conçues en vertu de ce pouvoir résiduel, mais également en ce qui a trait aux conditions facultatives énumérées au par. 732.1(3) : la condition imposée doit être « raisonnable » dans les circonstances et viser à assurer la protection de la société et à faciliter la réinsertion sociale du délinquant en question. Les conditions raisonnables sont généralement, mais pas nécessairement, liées à l'infraction en cause. Il doit y avoir un lien entre le délinquant, la protection de la société et la réinsertion sociale de ce délinquant. Voir, par exemple, les arrêts *R. c. Kootenay* (2000), 150 C.C.C. (3d) 311 (C.A. Alb.), et *R. c. Traverse* (2006), 205 C.C.C. (3d) 33 (C.A. Man.), où des cours d'appel ont confirmé la validité requiring abstinence from alcohol or drugs even though these played no part in the commission of the offence for which the offender was sentenced. On the other hand, conditions of probation imposed to punish rather than rehabilitate the offender have been struck out: *R. v. Ziatas* (1973), 13 C.C.C. (2d) 287 (Ont. C.A.); *R. v. Caja* (1977), 36 C.C.C. (2d) 401 (Ont. C.A.); *R. v. Lavender* (1981), 59 C.C.C. (2d) 551 (B.C.C.A.); *R. v. L.* (1986), 50 C.R. (3d) 398 (Alta. C.A.). In contrast, punitive conditions may be imposed pursuant to s. 742.3(2)(*f*) as part of a conditional sentence: *Proulx*, at para. 34.

The residual power to craft individualized conditions of probation is very broad. It constitutes an important sentencing tool. The purpose and principles of sentencing set out in ss. 718 to 718.2 of the *Criminal Code* make it clear that sentencing is an individualized process that must take into account both the circumstances of the offence and of the offender. It would be impossible for Parliament to spell out every possible condition of probation that can meet these sentence objectives. The sentencing judge is well placed to craft conditions that are tailored to the particular offender to assist in his rehabilitation and protect society. However, the residual power to impose individualized conditions is not unlimited. The sentencing judge cannot impose conditions that would contravene federal or provincial legislation or the *Charter*. Further, inasmuch as the wording of the residual provision can inform the sentencing judge's exercise of discretion in imposing one of the listed optional conditions as I have described, the listed conditions in turn can assist in interpreting the scope of "other reasonable conditions" that can be crafted under s. 732.1(3)(*h*). As we shall see, none of the listed conditions is aimed at facilitating the investigation of suspected breaches of probation. I will come back to this point later.

de conditions prescrivant l'abstention de consommer de l'alcool ou des drogues, même si ces substances n'avaient joué aucun rôle dans la perpétration de l'infraction pour laquelle le délinquant avait été condamné. Par ailleurs, des conditions de probation imposées pour punir le délinquant, plutôt que pour le réadapter, ont été annulées : *R. c. Ziatas* (1973), 13 C.C.C. (2d) 287 (C.A. Ont.); *R. c. Caja* (1977), 36 C.C.C. (2d) 401 (C.A. Ont.); *R. c. Lavender* (1981), 59 C.C.C. (2d) 551 (C.A.C.-B.); *R. c. L.* (1986), 50 C.R. (3d) 398 (C.A. Alb.). Par contre, une ordonnance de sursis à l'emprisonnement peut être assortie de conditions à caractère punitif, selon l'al. 742.3(2)*f*) : *Proulx*, par. 34.

Le pouvoir résiduel de concevoir des conditions de probation individualisées est très large. Il constitue un important outil de détermination de la peine. L'objectif et les principes de la détermination de la peine, énoncés aux art. 718 à 718.2 du *Code criminel*, indiquent clairement qu'il s'agit d'un processus individualisé qui doit tenir compte à la fois des circonstances de l'infraction et de la situation du délinquant. Il serait impossible au législateur d'énoncer toutes les conditions de probation qui peuvent satisfaire à ces objectifs de la peine. Le juge chargé de la détermination de la peine est bien placé pour concevoir des conditions adaptées au délinquant particulier, qui l'aideront dans sa réadaptation et contribueront à protéger la société. Cependant, le pouvoir résiduel d'imposer des conditions individualisées n'est pas illimité. Le juge chargé de la détermination de la peine ne peut pas imposer des conditions qui contreviendraient à une loi provinciale ou fédérale ou encore à la *Charte*. En outre, dans la mesure où le libellé de la disposition résiduelle peut guider le juge chargé de la détermination de la peine dans l'exercice de son pouvoir discrétionnaire d'imposer l'une des conditions facultatives énumérées que j'ai décrites, les conditions énumérées peuvent à leur tour aider à interpréter la portée des « autres conditions raisonnables » qui peuvent être conçues en vertu de l'al. 732.1(3)*h*). Comme nous le verrons, aucune des conditions énumérées ne vise à faciliter les enquêtes sur de présumées violations d'une ordonnance de probation. Je reviendrai sur cette question plus loin. 14

15 The underlying purpose for imposing conditions of probation also serves to define the role of the probation officer. The intervener the Attorney General of Canada aptly describes the probation officer's functions in its factum (at para. 21):

> It is in the nature of a probation officer's duties to act as an officer of the court, to assist the probationer in his rehabilitation, and to monitor compliance with the conditions of probation imposed by the sentencing court. The supervising probation officer simultaneously performs two distinct functions, rehabilitation and enforcement. The twin goals of probation — rehabilitation of the offender and protection of society — require and justify supervision in order to ensure that the probationer in fact observes his conditions. This supervised control is a restraint on the probationer's freedom.

The supervisory function of the probation officer in ensuring compliance with the conditions and the manner in which this function must be performed becomes of central importance in this case when we consider the full implications of enforcing an abstention order by requiring bodily samples. The determinative question is whether the supervisory power to demand samples of bodily substances for enforcement purposes may be conferred upon the probation officer by the court as a discretionary exercise of discretion or whether it must be authorized by statute.

3.2 *The Impugned Condition*

16 For ease of reference, I repeat the terms of Condition 9:

> CONDITION 9: Abstain absolutely from the consumption and possession of alcohol and non prescription narcotics and to submit to a urinalysis, blood test or breathalyzer test upon the demand/request of a Peace Officer or Probation Officer to determine compliance with this condition. Any positive reading will be a breach of this condition. [Emphasis added.]

17 As indicated earlier, the sentencing judge did not have the jurisdiction to predetermine that any positive reading would constitute a breach of

L'objectif fondamental de l'imposition de conditions de probation sert aussi à définir le rôle de l'agent de probation. L'intervenant le procureur général du Canada a décrit avec justesse les fonctions de l'agent de probation dans son mémoire (par. 21) :

> [TRADUCTION] Il est du ressort de l'agent de probation d'agir à titre d'auxiliaire de justice, d'aider le probationnaire dans sa réadaptation et de veiller à ce que les conditions de probation imposées par le tribunal qui a déterminé la peine soient respectées. L'agent de probation qui agit comme superviseur cumule deux fonctions distinctes, celles de réadaptation et d'exécution. Le double objectif de la probation — la réadaptation du délinquant et la protection de la société — commande et justifie une supervision destinée à assurer que le probationnaire respecte effectivement les conditions qui lui ont été imposées. Ce contrôle supervisé restreint la liberté du probationnaire.

En l'espèce, la fonction de supervision que l'agent de probation exerce pour assurer le respect des conditions et la façon dont il doit exercer cette fonction revêtent une importance cruciale lorsqu'on examine toutes les répercussions de l'exécution d'une ordonnance d'abstention au moyen d'une demande d'échantillons de substances corporelles. La question déterminante est celle de savoir si la cour peut, à sa discrétion, investir l'agent de probation d'un pouvoir de supervision lui permettant de demander des échantillons de substances corporelles aux fins d'exécution, ou si cela doit être autorisé par la loi.

3.2 *La condition contestée*

Pour en faciliter la consultation, je reproduis de nouveau la condition n^{o} 9 :

> [TRADUCTION]
>
> CONDITION n^{o} 9 : Vous devrez vous abstenir totalement de consommer et de posséder de l'alcool et des narcotiques non vendus sur ordonnance et vous soumettre, à la demande d'un agent de la paix ou d'un agent de probation, à des analyses de sang, d'urine et d'haleine permettant de vérifier si la présente condition est respectée. Tout résultat positif constituera une violation de la présente condition. [Je souligne.]

Comme nous l'avons vu, le juge chargé de la détermination de la peine n'avait pas compétence pour décider d'avance que tout résultat d'analyse probation. Therefore, the last sentence of Condition 9 was properly deleted by the Court of Appeal. The first part of the condition is also not in issue. The abstention condition is expressly authorized under s. 732.1(3)(*c*) and, given Mr. Shoker's particular circumstances, it is entirely reasonable to impose this condition to facilitate his rehabilitation and to protect society. The prohibition against the possession of alcohol and non-prescription drugs, imposed pursuant to the s. 732.1(3)(*h*) residual power, is also not in dispute. What remains at issue is the requirement that bodily samples be provided on demand.

positif constituerait une violation de l'ordonnance de probation. Par conséquent, la dernière phrase de la condition n° 9 a été supprimée à juste titre par la Cour d'appel. La première partie de la condition n'est pas non plus en cause. La condition interdisant la consommation de certaines substances est expressément autorisée par l'al. 732.1(3)*c*) et, compte tenu de la situation particulière de M. Shoker, il est parfaitement raisonnable d'imposer cette condition pour faciliter sa réadaptation et protéger la société. L'interdiction de la possession d'alcool et de drogues non vendues sur ordonnance, imposée conformément au pouvoir résiduel prévu à l'al. 732.1(3)*h*), n'est pas contestée non plus. Ce qui reste en cause est la question de l'obligation de fournir des échantillons de substances corporelles sur demande.

18

The impugned condition is challenged essentially on *Charter* grounds. In reviewing a sentencing judge's exercise of discretion on *Charter* grounds, an appellate court should first consider whether the sentencing judge acted within his statutory jurisdiction. If a sentence is illegal on the basis that it is unauthorized under the governing legislation, it must be struck down and the constitutional issue does not arise. I will therefore consider whether the requirement to provide bodily samples as a condition of probation falls within the scope of s. 732.1.

La contestation de la condition litigieuse repose essentiellement sur la *Charte*. En examinant, pour des motifs liés à la *Charte*, l'exercice d'un pouvoir discrétionnaire du juge chargé de la détermination de la peine, une cour d'appel doit d'abord se demander si le juge a agi conformément à la compétence que lui confère la loi. Si une peine est illégale du fait qu'elle n'est pas autorisée par la loi applicable, elle doit être annulée et la question constitutionnelle ne se pose pas. Je vais donc examiner la question de savoir si l'obligation de fournir des échantillons de substances corporelles, comme condition de probation, est visée par l'art. 732.1.

3.3 *Requiring Bodily Samples and Section 732.1 of the Criminal Code*

3.3 *La demande d'échantillons de substances corporelles et l'art. 732.1 du Code criminel*

19

The Crown submits that s. 732.1(3)(*c*) abstention conditions are highly desirable for the rehabilitation of the offender and the protection of the public and that the sentencing objectives of such abstention terms can only be achieved if there is also an effective mechanism to enforce them. Therefore, the Crown argues that ss. 732.1(3)(*c*) and 732.1(3)(*h*), read together, authorize the imposition of random sampling of an offender's bodily substances to ensure compliance with the

Le ministère public soutient que les conditions interdisant de consommer certaines substances, prévues à l'al. 732.1(3)*c*), sont très souhaitables aux fins de réadaptation du délinquant et de protection du public. Il ajoute que seule l'existence d'un moyen efficace d'assurer le respect de ces conditions peut permettre d'atteindre les objectifs qu'elles visent en matière de détermination de la peine. Par conséquent, le ministère public fait valoir que les al. 732.1(3)*c*) et *h*), abstention condition. Mr. Shoker argues that the power to impose enforcement terms to the abstention condition neither flows implicitly from s. 732.1(3)(*c*) nor does it fall within the scope of s. 732.1(3)(*h*) "reasonable conditions". If Parliament had intended to authorize the seizure of bodily samples, he argues, it would have expressly so stated as it has done in other existing legislative schemes.

interprétés conjointement, permettent d'imposer le prélèvement au hasard d'échantillons de substances corporelles d'un délinquant afin d'assurer le respect de la condition lui interdisant de consommer certaines substances. M. Shoker prétend que le pouvoir d'assortir cette condition de modalités d'exécution ne découle pas implicitement de l'al. 732.1(3)*c*) et n'est pas visé non plus par les « conditions raisonnables » mentionnées à l'al. 732.1(3)*h*). Si, affirme-t-il, le législateur avait voulu autoriser le prélèvement de substances corporelles, il l'aurait précisé, comme il l'a fait dans d'autres régimes législatifs existants.

20 I will deal firstly with s. 732.1(3)(*c*). With respect to Hall J.A.'s opinion to the contrary, the jurisdiction to impose enforcement terms cannot simply flow from the power to impose an abstention condition. The effect of including a s. 732.1(3)(*c*) abstention condition in a probation order is to define a criminal offence, the commission of which is punishable under s. 733.1. Enforcement powers are not implicit from the simple creation of an offence. For example, it cannot reasonably be contended that the prohibition against impaired driving under s. 253 implicitly includes the enforcement scheme for demanding bodily samples contained in ss. 254 to 258. Yet, in essence, that is the argument here. The Crown submits that the enforcement scheme should be implied as necessary to give effect to a s. 732.1(3)(*c*) abstention condition. I do not accept this argument. Breach of probation is a criminal offence under the *Criminal Code* and, as such, it is subject to the usual investigatory techniques and manner of proof as any other offence. Hence, the probationer who is found consuming alcohol with his friends in a drinking establishment can be prosecuted based on the evidence of witnesses to the event. Likewise, the probationer who exhibits signs of alcohol or drug impairment can be prosecuted and the offence can be proven by testimonial evidence much in the same way as an offence for impaired driving. The power to demand bodily samples and the resulting analyses would undoubtedly assist in the enforcement

Je vais commencer par examiner l'al. 732.1(3)*c*). Avec respect pour l'opinion contraire exprimée par le juge Hall, la compétence pour imposer des modalités d'exécution ne peut pas simplement découler du pouvoir d'imposer une condition interdisant la consommation de certaines substances. L'inclusion, dans une ordonnance de probation, d'une condition interdisant la consommation de certaines substances, prévue à l'al. 732.1(3)*c*), a pour effet de définir une infraction criminelle punissable en vertu de l'art. 733.1. Les pouvoirs d'exécution ne découlent pas de la simple création d'une infraction. Par exemple, on ne peut pas raisonnablement prétendre que l'interdiction de la conduite avec facultés affaiblies prévue à l'art. 253 inclut implicitement le régime d'exécution consistant à demander des échantillons de substances corporelles prévu aux art. 254 à 258. Pourtant, tel est essentiellement l'argument avancé en l'espèce. Le ministère public fait valoir que le régime d'exécution devrait être implicite dans la mesure où il est nécessaire pour donner effet à une condition interdisant la consommation de certaines substances, prévue à l'al. 732.1(3)*c*). Je ne retiens pas cet argument. La violation d'une ordonnance de probation est une infraction criminelle prévue par le *Code criminel* et, à ce titre, elle est sujette aux techniques d'enquête et au mode de preuve qui sont habituellement utilisés pour n'importe quelle autre infraction. Partant, le probationnaire surpris en train de consommer de l'alcool avec ses amis dans un débit de boissons peut être poursuivi sur la foi du témoignage de ceux qui l'ont vu faire. De of a s. 732.1(3)(*c*) condition, but it cannot on that basis simply be implied.

même, le probationnaire qui montre des signes de facultés affaiblies en raison de la consommation d'alcool ou de drogue peut être poursuivi et l'infraction peut être prouvée au moyen d'une preuve testimoniale à peu près de la même façon qu'une infraction de conduite avec facultés affaiblies. Il ne fait aucun doute que le pouvoir de demander des échantillons de substances corporelles et les analyses qui en découleraient aideraient à exécuter une condition imposée en vertu de l'al. 732.1(3)*c*), mais cela n'est pas suffisant pour tout simplement conclure que ce pouvoir existe implicitement.

The authority to impose enforcement terms, if any, must be found rather in the residual clause. As indicated earlier, s. 732.1(3)(*h*) gives the sentencing judge a broad power to craft other reasonable conditions designed to protect society and facilitate the offender's successful reintegration into the community. Hall J.A. was of the view that the authority could not be found under s. 732.1(3)(*h*) because Parliament has specifically addressed alcohol and drugs in s. 732.1(3)(*c*). The fact that Parliament has specifically addressed alcohol and drugs under s. 732.1(3)(*c*) — and also in ss. 732.1(3)(*g*.1) and 732.1(3)(*g*.2) — is certainly a relevant factor but, in my respectful view, it does not preclude the imposition of "other" alcohol and drug-related "reasonable conditions" under the residual clause. Any number of additional conditions aimed at ensuring that the probationer comply with the abstention condition can be imposed. Indeed, the prescription against the possession of alcohol and drug found in Condition 9 is one example. Similarly, a sentencing judge could prescribe that the offender not enter any premises where alcohol is sold or served; that he not associate with his favourite drinking buddies; or that he obey a curfew. All these conditions could be imposed to ensure better compliance with the abstention condition and thereby facilitate the offender's rehabilitation and protect society. Absent peculiar circumstances, it could not seriously be contended that any such condition would be unreasonable. LeBel J., in his concurring reasons, expressed concerns that a narrow interpretation of the residual clause would cast doubt on a number of useful monitoring methods,

Le pouvoir d'imposer des modalités d'exécution, s'il existe, doit plutôt se dégager de la clause résiduelle. Comme nous l'avons vu, l'al. 732.1(3)*h*) attribue au juge chargé de la détermination de la peine un vaste pouvoir de concevoir d'autres conditions raisonnables destinées à protéger la société et à faciliter la réinsertion sociale du délinquant. Le juge Hall estimait que ce pouvoir ne pouvait pas se dégager de l'al. 732.1(3)*h*) étant donné que le législateur a abordé expressément la question de l'alcool et des drogues à l'al. 732.1(3)*c*). Le fait que le législateur a traité expressément de ces substances à l'al. 732.1(3)*c*) — ainsi qu'aux al. 732.1(3)(*g*.1) et (*g*.2) — est certainement pertinent, mais j'estime, en toute déférence, que cela n'empêche pas d'imposer, en application de la clause résiduelle, d'« autres conditions raisonnables » liées à l'alcool et aux drogues. Il est possible d'imposer toute une série de conditions supplémentaires destinées à assurer le respect, par le probationnaire, de la condition interdisant la consommation et la possession de certaines substances. En fait, l'interdiction d'être en possession d'alcool et de drogues énoncée à la condition n^{o} 9 en est un exemple. De même, un juge chargé de la détermination de la peine pourrait interdire au délinquant de fréquenter les copains avec qui il aime prendre un verre ou tout endroit où de l'alcool est vendu ou servi, ou encore lui imposer un couvre-feu. Toutes ces conditions pourraient être imposées pour assurer un meilleur respect de la condition interdisant la consommation et la possession d'alcool et ainsi faciliter la réadaptation du délinquant et protéger la société. En l'absence de circonstances particulières, on ne saurait sérieusement prétendre 21 more particularly the use of electronic monitoring. The legality of electronic monitoring under s. 732.1(3)(*h*) is not before us and, hence, this Court is not deciding this issue. We are concerned here only with the compelled seizure of bodily samples as an enforcement mechanism. It is also noteworthy that in each case referred to by LeBel J., the probationer's consent was required for participation in the Saskatchewan electronic monitoring program. Further, the Saskatchewan Court of Appeal in *R. v. McLeod* (1993), 81 C.C.C. (3d) 83, at p. 99, also made it clear that "the constitutionality of this form of sanction was not argued or considered during argument".

qu'une telle condition serait déraisonnable. Dans ses motifs concordants, le juge LeBel, a dit craindre qu'une interprétation restrictive de la clause résiduelle jette le doute sur un certain nombre de modes de surveillance utiles, plus particulièrement la surveillance électronique. Nous ne sommes pas saisis de la question de la légalité de la surveillance électronique au regard de l'al. 732.1(3)*h*) et, partant, notre Cour ne se prononce pas sur ce point. En l'espèce, nous nous intéressons uniquement au prélèvement forcé d'échantillons de substances corporelles en tant que mécanisme d'exécution. Il vaut également la peine de noter que, dans chacun des cas mentionnés par le juge LeBel, il fallait que le probationnaire consente à participer au programme de surveillance électronique de la Saskatchewan. De plus, dans l'arrêt *R. c. McLeod* (1993), 81 C.C.C. (3d) 83, p. 99, la Cour d'appel de la Saskatchewan a aussi indiqué clairement que [TRADUCTION] « la constitutionnalité de cette forme de sanction n'a pas été débattue ou examinée au cours des plaidoiries ».

22 On the face of it, s. 732.1(3)(*h*) therefore appears wide enough to permit enforcement terms such as the one imposed in this case since, it is argued, submitting to testing would also ensure better compliance with the abstention condition. However, the residual provision must be read in context. Since it provides for "other" reasonable conditions, the listed conditions under ss. 732.1(3)(*a*) to 732.1(3)(*g*.2) can assist in delineating the scope of the residual provision. It is noteworthy that the fulfilment of any of the listed conditions can have no incriminating consequence for the probationer. In addition, when the condition may pose a risk, such as participating in a treatment program, the consent of the offender is required before the condition can be imposed. Section 732.1(3)(*h*) speaks of "other reasonable conditions". It is reasonable to infer that additional conditions imposed under the residual power would be of the same kind as the listed conditions. However, conditions intended to facilitate the gathering of evidence for enforcement purposes do not simply monitor the probationer's behaviour and, as such, are of a different kind and, because of their potential effect, absent the probationer's consent to such conditions, raise

À première vue, l'al. 732.1(3)*h*) semble donc avoir une portée assez large pour permettre des conditions d'exécution comme celle imposée en l'espèce étant donné, soutient-on, que les tests de dépistage assureraient également un meilleur respect de la condition interdisant la consommation de certaines substances. Toutefois, la disposition résiduelle doit être interprétée dans son contexte. Comme cette disposition prévoit la possibilité d'imposer d'« autres » conditions raisonnables, les conditions énumérées aux al. 732.1(3)*a*) à *g*.2) peuvent aider à en circonscrire la portée. Il vaut la peine de noter que le respect de l'une ou l'autre des conditions énumérées ne peut avoir aucune conséquence incriminante pour le probationnaire. En outre, une condition susceptible de présenter un risque, comme celle intimant de participer à un programme de traitement, ne peut être imposée qu'avec le consentement du délinquant. L'alinéa 732.1(3)*h*) parle d'« autres conditions raisonnables ». On peut raisonnablement inférer que des conditions supplémentaires imposées en vertu du pouvoir résiduel seraient du même genre que celles qui sont énumérées. Toutefois, du fait qu'elles ne permettent pas simplement de surveiller le comportement du probationnaire, les conditions constitutional concerns. For example, could Mr. Shoker be compelled, as a condition of his probation, to make his home available for inspection on demand to better monitor the prescription against the possession of alcohol or drugs? Such a condition in effect would subject him to a different standard than that provided by Parliament for the issuance of a search warrant. In my view, it could not reasonably be argued that the sentencing judge would have the jurisdiction to override this scheme under the authority of the open-ended language of s. 732.1(3)(*h*). It would be up to Parliament, if it saw fit, to enact any such scheme.

destinées à faciliter l'obtention d'éléments de preuve aux fins d'exécution sont différentes et soulèvent, à cause de leur effet potentiel, des questions d'ordre constitutionnel dans le cas où le probationnaire n'y a pas consenti. Par exemple, M. Shoker pourrait-il se voir imposer, comme condition de sa probation, l'obligation de donner accès sur demande à sa résidence pour qu'on puisse y effectuer des inspections permettant de mieux veiller à ce que l'interdiction d'être en possession d'alcool ou de drogues soit respectée? Une telle condition aurait pour effet de l'assujettir à une norme différente de celle que le législateur prescrit pour la délivrance d'un mandat de perquisition. À mon avis, on ne saurait raisonnablement soutenir que le libellé non limitatif de l'al. 732.1(3)*h*) habiliterait le juge chargé de la détermination de la peine à passer outre à ce régime. Il appartiendrait au législateur d'édicter un tel régime s'il jugeait à propos de le faire.

23

The sentencing judge's jurisdiction can be no greater in respect of the seizure of bodily samples. The seizure of bodily samples is highly intrusive and, as this Court has often reaffirmed, it is subject to stringent standards and safeguards to meet constitutional requirements. Significantly, in *R. v. Borden*, [1994] 3 S.C.R. 145, this Court held that where there is no statutory authorization for the seizure of bodily samples, consent must be obtained if the seizure is to be lawful. In *R. v. Stillman*, [1997] 1 S.C.R. 607, Cory J., speaking for the majority, held that the seizure of bodily samples such as hair, buccal swabs and dental impressions, was not authorized by the common law power to search incident to arrest. The principle was again reaffirmed in *R. v. Golden*, [2001] 3 S.C.R. 679, 2001 SCC 83. Again here, it is my view that such statutory authorization cannot be read in the general language of s. 732.1(3)(*h*). In the various circumstances where Parliament has chosen to authorize the collection of bodily samples, it has not only used clear language; it has also included in the legislation, or through regulations, a number of standards and safeguards: see for example, the collection of DNA samples for investigative purposes or, on conviction, for inclusion in the DNA databank (ss. 487.04 to 487.091 of the *Criminal Code*); the collection of breath and blood samples during the

La compétence du juge chargé de la détermination de la peine ne peut pas être plus grande en matière de prélèvement d'échantillons de substances corporelles. Le prélèvement d'échantillons de substances corporelles est une mesure très envahissante et, comme notre Cour l'a souvent confirmé, il est assujetti à des normes et à des garanties rigoureuses qui permettent de satisfaire aux exigences de la Constitution. Fait révélateur, dans l'arrêt *R. c. Borden*, [1994] 3 R.C.S. 145, la Cour a conclu que, en l'absence d'autorisation légale de prélever des échantillons de substances corporelles, la légalité du prélèvement est subordonnée au consentement de la personne visée. Dans l'arrêt *R. c. Stillman*, [1997] 1 R.C.S. 607, le juge Cory a conclu, au nom des juges majoritaires, que le pouvoir de common law de procéder à une fouille accessoire à une arrestation ne permettait pas de prélever des échantillons de substances corporelles, comme des cheveux et des poils, d'effectuer des prélèvements dans la bouche et de prendre des empreintes dentaires. Ce principe a été confirmé de nouveau dans l'arrêt *R. c. Golden*, [2001] 3 R.C.S. 679, 2001 CSC 83. Là encore, j'estime qu'on ne peut pas considérer que le libellé général de l'al. 732.1(3)*h*) accorde une telle autorisation. Dans les différents cas où le législateur a choisi d'autoriser le prélèvement d'échantillons de investigation of impaired driving offences (ss. 253 to 261 of the *Criminal Code*); and the collection of urine samples from federal inmates and parolees (ss. 54 to 57 of the *Corrections and Conditional Release Act*, S.C. 1992, c. 20, and ss. 60 to 72 of the *Corrections and Conditional Release Regulations*, SOR/92-620).

substances corporelles, il ne l'a pas seulement dit clairement, mais il a également établi, dans la loi ou par voie de règlement, un certain nombre de normes et de garanties : voir, par exemple, le prélèvement d'échantillons d'ADN pour les besoins d'une enquête ou, à la suite d'une déclaration de culpabilité, aux fins d'inclusion dans la banque de données génétiques (art. 487.04 à 487.091 du *Code criminel*), le prélèvement d'échantillons d'haleine et de sang au cours d'une enquête relative à une infraction de conduite avec facultés affaiblies (art. 253 à 261 du *Code criminel*), ainsi que le prélèvement d'échantillons d'urine d'un détenu qui se trouve dans un pénitencier fédéral ou à l'extérieur d'un tel pénitencier à la suite d'une libération conditionnelle (art. 54 à 57 de la *Loi sur le système correctionnel et la mise en liberté sous condition*, L.C. 1992, ch. 20, et art. 60 à 72 du *Règlement sur le système correctionnel et la mise en liberté sous condition*, DORS/92-620).

24 A number of provincial legislatures have also enacted legislation and regulations governing the seizure of bodily samples from inmates of provincial institutions: see, for example, Alberta, *Corrections Act*, R.S.A. 2000, c. C-29, ss. 14.1 and 14.2, and *Correctional Institution Regulation*, Alta. Reg. 205/2001, ss. 48.1 and 48.2; Saskatchewan, *The Correctional Services Act*, S.S. 1993, c. C-39.1, s. 56(1), and *The Correctional Services Administration, Discipline and Security Regulations, 2003*, R.R.S., c. C-39.1, Reg. 3, s. 40(1); Manitoba, *Correctional Services Act*, S.M. 1998, c. 47, C.C.S.M. c. C230, s. 16, *Correctional Institutions Regulation*, Man. Reg. 227/92, ss. 28, 29, 29.1 and 31(1), and *Correctional Services Regulation*, Man. Reg. 128/99, ss. 41 to 45; Prince Edward Island, *Correctional Services Act*, R.S.P.E.I. 1988, c. C-26.1, s. 17(g), and P.E.I. Reg. EC616/92, ss. 10 and 11; Ontario, *Corrections Accountability Act, 2000*, S.O. 2000, c. 40, s. 57.9(1) to (3). The Ontario legislation, unlike other provinces, applies to probationers as well as to provincial inmates.

Un certain nombre de législatures provinciales ont également édicté des lois et des règlements régissant le prélèvement d'échantillons de substances corporelles de détenus incarcérés dans un établissement provincial : voir, par exemple, Alberta, *Corrections Act*, R.S.A. 2000, ch. C-29, art. 14.1 et 14.2, et *Correctional Institution Regulation*, Alta. Reg. 205/2001, art. 48.1 et 48.2; Saskatchewan, *The Correctional Services Act*, S.S. 1993, ch. C-39.1, par. 56(1), et *The Correctional Services Administration, Discipline and Security Regulations, 2003*, R.R.S., ch. C-39.1, Reg. 3, par. 40(1); Manitoba, *Loi sur les services correctionnels*, L.M. 1998, ch. 47, C.P.L.M. ch. C230, art. 16, *Règlement sur les établissements de correction*, Règl. du Man. 227/92, art. 28, 29, 29.1 et par. 31(1), et *Règlement sur les services correctionnels*, Règl. du Man. 128/99, art. 41 à 45; Île-du-Prince-Édouard, *Correctional Services Act*, R.S.P.E.I. 1988, ch. C-26.1, al. 17g), et P.E.I. Reg. EC616/92, art. 10 et 11; Ontario, *Loi de 2000 sur la responsabilisation en matière de services correctionnels*, L.O. 2000, ch. 40, par. 57.9(1) à (3). La loi ontarienne, contrairement à celles des autres provinces, s'applique tant aux probationnaires qu'aux détenus incarcérés dans un établissement provincial.

25 The establishment of these standards and safeguards cannot be left to the discretion of the sentencing judge in individual cases. There is no question that a probationer has a lowered expectation of privacy. However, it is up to Parliament, not the courts, to balance the probationers' *Charter* rights as against society's interest in effectively monitoring their conduct. Since the purpose of s. 8 is preventative, the following principle in *Hunter v. Southam Inc.*, [1984] 2 S.C.R. 145, at p. 169, is particularly apposite here:

> While the courts are guardians of the Constitution and of individuals' rights under it, it is the legislature's responsibility to enact legislation that embodies appropriate safeguards to comply with the Constitution's requirements. It should not fall to the courts to fill in the details that will render legislative lacunae constitutional.

In this case, the Crown argues that reasonable and probable grounds are not required for the search and seizure of bodily substances from probationers and that the seizure of blood samples is also reasonable. Hall J.A. disagreed. He would have deleted the requirement to provide blood samples as too intrusive and conditioned the requirement to provide urine and breath samples upon the establishment of reasonable and probable grounds. Those are precisely the kinds of policy decisions for Parliament to make having regard to the limitations contained in the *Charter*. Parliament has specifically addressed the issue of alcohol and intoxicating substances in ss. 732.1(3)(*c*), 732.1(3)(*g*.1) and 732.1(3)(*g*.2) but it has not provided for a scheme for the collection of bodily samples as it has done in respect of parolees. Such a scheme cannot be judicially enacted on the ground that the court may find it desirable in an individual case. In addition to the constitutional concerns raised by the collection of bodily samples, the establishment of such a scheme requires the expenditure of resources and usually the cooperation of the provinces. This reality is exemplified in this case where the funding for urinalysis has been discontinued in British Columbia rendering the

L'établissement de ces normes et garanties ne saurait être laissé, dans chaque cas, au choix du juge chargé de la détermination de la peine. Il est indubitable qu'un probationnaire a des attentes moins grandes en matière de vie privée. Cependant, il appartient au législateur, et non aux tribunaux, d'établir un équilibre entre les droits que la *Charte* garantit aux probationnaires et l'intérêt qu'a la société à assurer une surveillance efficace de leur conduite. Comme l'art. 8 remplit une fonction préventive, le principe suivant énoncé dans l'arrêt *Hunter c. Southam Inc.*, [1984] 2 R.C.S. 145, p. 169, est particulièrement pertinent en l'espèce :

> Même si les tribunaux sont les gardiens de la Constitution et des droits qu'elle confère aux particuliers, il incombe à la législature d'adopter des lois qui contiennent les garanties appropriées permettant de satisfaire aux exigences de la Constitution. Il n'appartient pas aux tribunaux d'ajouter les détails qui rendent constitutionnelles les lacunes législatives.

Dans la présente affaire, le ministère public fait valoir que l'existence de motifs raisonnables et probables n'est pas requise pour prélever des échantillons de substances corporelles de probationnaires et que le prélèvement d'échantillons de sang est également raisonnable. Le juge Hall de la Cour d'appel n'était pas de cet avis. Il aurait supprimé l'exigence de fournir des échantillons de sang pour le motif qu'elle constitue une mesure trop envahissante et il aurait assujetti l'exigence de fournir des échantillons d'urine et d'haleine à la preuve de l'existence de motifs raisonnables et probables. C'est précisément le genre de décision de politique générale que le législateur doit prendre compte tenu des restrictions prévues dans la *Charte*. Le législateur a abordé expressément la question de l'alcool et des substances toxiques aux al. 732.1(3)*c*), *g*.1) et *g*.2), mais il n'a prescrit aucun régime de prélèvement d'échantillons de substances corporelles comme il l'a fait pour les personnes en liberté conditionnelle. Il n'appartient pas à un tribunal d'édicter un tel régime parce qu'il peut juger souhaitable de le faire dans un cas particulier. Outre les questions d'ordre constitutionnel soulevées par le prélèvement d'échantillons de substances corporelles, l'établissement d'un tel régime commande l'utilisation de ressources et habituellement, la collaboration des probation condition moot. This is yet another reason why the matter is one for Parliament.

provinces. Cela se reflète dans la présente affaire où la Colombie-Britannique a cessé de financer les analyses d'urine, de sorte que la condition de probation est désormais théorique. Voilà une raison de plus pour laquelle cette question doit relever du législateur.

26 For these reasons, I would conclude that there is no statutory authority for requiring Mr. Shoker to submit bodily samples. In the absence of a legislative scheme authorizing the seizure of bodily samples, the enforcement of abstention conditions must be done in accordance with existing investigatory tools. The majority of the Court of Appeal was therefore correct in deleting that part of Condition 9 following the words "non prescription narcotics". I would dismiss the appeal.

Pour ces motifs, je suis d'avis de conclure qu'il n'existe aucun pouvoir légal de contraindre M. Shoker à fournir des échantillons de substances corporelles. En l'absence d'un régime législatif autorisant le prélèvement d'échantillons de substances corporelles, l'exécution des conditions interdisant la consommation de certaines substances doit se faire d'une manière conforme aux outils d'enquête existants. Par conséquent, les juges majoritaires de la Cour d'appel ont eu raison de supprimer la partie de la condition n^{o} 9 qui suivait les termes « narcotiques non vendus sur ordonnance ». Je suis d'avis de rejeter le pourvoi.

The reasons of Bastarache and LeBel JJ. were delivered by

Version française des motifs des juges Bastarache et LeBel rendus par

LeBel J. —

Le juge LeBel —

I. Introduction

I. Introduction

27 I have read the reasons of my colleague Charron J. Although I agree with her that the appeal should be dismissed, I reach this result on a different basis. In my opinion, there is statutory authority for the kind of order made by the sentencing judge. But the terms of the order were open to review under s. 8 of the *Canadian Charter of Rights and Freedoms*. As they did not meet the requirements of s. 8, the appeal should fail.

J'ai pris connaissance des motifs de ma collègue la juge Charron. Je partage son opinion selon laquelle il y a lieu de rejeter le pourvoi, mais à l'issue d'un raisonnement différent. Selon moi, la loi permet de prononcer une ordonnance comme celle rendue par le juge chargé de la détermination de la peine. Cependant, les conditions de l'ordonnance pouvaient faire l'objet d'une révision fondée sur l'art. 8 de la *Charte canadienne des droits et libertés*. Puisqu'elles ne respectaient pas les exigences de l'art. 8, le pourvoi doit être rejeté.

28 I need not return to the facts of this appeal, which were fully reviewed by Charron J. I will focus on the two legal issues raised by the case at bar. I will begin by considering whether statutory authority for the order can be found in the *Criminal Code*, R.S.C. 1985, c. C-46. Then, I will turn to the issue of whether the discretion delegated to the sentencing judge was exercised in conformity with the *Charter*.

Je n'entends pas revenir sur les faits, que la juge Charron a examinés en détail. Je me concentrerai sur les deux questions de droit que soulève la présente affaire. J'examinerai d'abord si le *Code criminel*, L.R.C. 1985, ch. C-46, permet de rendre l'ordonnance en cause. Ensuite, je verrai si le pouvoir discrétionnaire délégué au juge chargé de la détermination de la peine a été exercé d'une manière conforme à la *Charte*.

II. Statutory Basis for the Order

This case is, first and foremost, one raising a problem of statutory interpretation. Once more, the courts are trying to ascertain the intention of Parliament using, I assume, the modern approach of purposive interpretation (see S. Beaulac and P.-A. Côté, "Driedger's 'Modern Principle' at the Supreme Court of Canada: Interpretation, Justification, Legitimization" (2006), 40 *R.J.T.* 131). In this context, I readily concede that a purely textual reading of the relevant provisions of the *Criminal Code* (ss. 732.1(3)(*c*) and 732.1(3)(*h*)) would not resolve the issue. Nowhere do these provisions grant the sentencing judge, in so many words, the discretion to impose on the accused, in a probation order, an obligation to give samples of bodily substances. The *Criminal Code* expressly lists a number of mandatory and optional conditions, which are reviewed by my colleague in her reasons. Section 732.1(3)(*c*) authorizes the prohibition of the consumption of drugs or alcohol, but says nothing about monitoring the interdiction. Then, s. 732.1(3)(*h*), which plays the role of a basket or residual clause, refers merely to "such other reasonable conditions as the court considers desirable . . . for protecting society and for facilitating the offender's successful reintegration into the community". These words do not by themselves clearly grant a discretion. Read in context, however, they do.

To determine whether statutory authority for the order exists, the court must consider the context, namely probation and sentencing. A probation order is framed in a situation in which the court must address, in an individualized manner, the imperatives of the protection of society and rehabilitation of the accused. The sentencing judge is required to address the circumstances of the case and to devise terms that are reasonable in their context. The focus of the analysis remains the reasonableness of the conditions themselves. They are reasonable, and thus authorized by the statute, if they complement terms provided for in the *Code*

II. Fondement législatif de l'ordonnance

29 La présente affaire soulève d'abord et avant tout un problème d'interprétation législative. Une fois de plus, les tribunaux essaient de déterminer l'intention du législateur à l'aide, je suppose, de la méthode moderne d'interprétation téléologique (voir S. Beaulac et P.-A. Côté, « Driedger's "Modern Principle" at the Supreme Court of Canada : Interpretation, Justification, Legitimization » (2006), 40 *R.J.T.* 131). Dans ce contexte, je reconnais volontiers qu'une interprétation purement textuelle des dispositions pertinentes du *Code criminel* (al. 732.1(3)*c*) et 732.1(3)*h*)) ne permettrait pas de régler la question en litige. Nulle part ces dispositions ne confèrent-elles explicitement au juge chargé de la détermination de la peine le pouvoir discrétionnaire d'imposer à l'accusé, dans une ordonnance de probation, l'obligation de fournir des échantillons de substances corporelles. Le *Code criminel* énumère expressément un certain nombre de conditions obligatoires et facultatives que ma collègue examine dans ses motifs. L'alinéa 732.1(3)*c*) permet d'interdire la consommation de drogues ou d'alcool, mais il demeure silencieux au sujet de la surveillance de l'interdiction. Ensuite, l'al. 732.1(3)*h*), qui sert de clause « fourre-tout » ou résiduelle, mentionne simplement « telles autres conditions raisonnables que le tribunal considère souhaitables [. . .] pour assurer la protection de la société et faciliter la réinsertion sociale du délinquant ». Pris isolément, ces mots ne confèrent pas clairement un pouvoir discrétionnaire. Cependant, ils le font si on les interprète dans leur contexte.

30 Pour déterminer si la loi permet de rendre l'ordonnance en cause, le tribunal doit examiner le contexte, qui est celui de la probation et de la détermination de la peine. Une ordonnance de probation est rédigée dans des circonstances où le tribunal doit donner suite, d'une manière individualisée, aux impératifs de protection de la société et de réhabilitation de l'accusé. Le juge chargé de la détermination de la peine doit examiner les circonstances de l'affaire et concevoir des conditions raisonnables dans leur contexte. L'analyse doit être axée sur le caractère raisonnable des conditions elles-mêmes. Des conditions sont raisonnables, et donc autorisées

and address the objectives of the protection of society and the reintegration of the accused into the community.

par la loi, si elles complètent celles prévues dans le *Code* et répondent aux objectifs de protection de la société et de réinsertion sociale de l'accusé.

31 In a legal and factual environment such as this, the *Code* cannot provide for everything. Parliament has wisely delegated to sentencing judges a reasonable discretion to frame terms that will allow them to address the particular situation of each accused. A reasonable condition that can be connected with the categories of terms contemplated by the *Code* is grounded in an implied, but solid, statutory authority. The condition may then face a second level of scrutiny under the *Charter*, but it would not lie outside the jurisdiction of the sentencing judge.

Dans un contexte juridique et factuel comme celui qui nous occupe, le *Code* ne saurait tout prévoir. Le législateur a eu la sagesse de déléguer aux juges chargés de la détermination de la peine un pouvoir discrétionnaire raisonnable de concevoir des conditions adaptées à la situation particulière de chaque accusé. Une condition raisonnable qui peut être reliée aux catégories prévues par le *Code* doit être considérée comme étant implicitement, mais indéniablement, autorisée par la loi. Cette condition peut ensuite faire l'objet d'un deuxième examen cette fois fondé sur la *Charte*, mais elle n'excéderait pas la compétence du juge chargé de la détermination de la peine.

32 The *Criminal Code* provides for conditions concerning alcohol and drug use. Prohibitions or restrictions on their use appear to have become almost standard terms of many probation orders. Nevertheless, the *Code* remains vague, even silent, about the monitoring of these conditions, although, according to well-known textbooks on sentencing, probation orders often incorporate monitoring procedures (C. C. Ruby, *Sentencing* (6th ed. 2004), at para. 10.57; A. Manson, P. Healy and G. Trotter, *Sentencing and Penal Policy in Canada* (2000), at p. 280).

Le *Code criminel* prescrit des conditions relatives à la consommation d'alcool et de drogues. Les interdictions ou les restrictions concernant la consommation de ces substances semblent presque devenues la norme dans maintes ordonnances de probation. Néanmoins, le *Code* reste vague, voire muet, à l'égard de la surveillance de l'exécution de ces conditions, quoique, selon des ouvrages de doctrine bien connus en matière de détermination de la peine, les ordonnances de probation sont souvent assorties de modes de surveillance (C. C. Ruby, *Sentencing* (6e éd. 2004), par. 10.57; A. Manson, P. Healy et G. Trotter, *Sentencing and Penal Policy in Canada* (2000), p. 280).

33 The residual clause in s. 732.1(3)(*h*) appears to have been designed to address the difficulties faced by trial judges in framing orders that fit the distinct situations of individual accused and that must be made effective. It is there to fill in gaps, allowing the sentencing judge to flesh out the terms of the probation order by adding reasonable conditions. Conditions will be reasonable if they address the situation of the accused and meet the standards of s. 8 of the *Charter*.

La clause résiduelle qui figure à l'al. 732.1(3)*h*) semble avoir pour objet d'aplanir les difficultés auxquelles se heurtent les juges du procès lorsqu'ils sont appelés à formuler des ordonnances à la fois efficaces et adaptées à la situation particulière de chaque accusé. Elle vise à combler des lacunes en permettant au juge chargé de la détermination de la peine d'étoffer l'ordonnance de probation par l'ajout de conditions raisonnables. Des conditions seront alors raisonnables si elles tiennent compte de la situation de l'accusé et si elles respectent les normes de l'art. 8 de la *Charte*.

34 The residual clause was not adopted for the purpose of collecting evidence for future prosecution.

La clause résiduelle ne vise pas à permettre l'obtention d'éléments de preuve destinés à être utilisés

It exists to make sure that the terms of probation orders are effective and can be implemented in a practical way. The fact that the *Criminal Code* contains no specific monitoring provisions simply reflects the generally individualized nature of the sentencing process and of probation orders.

dans des poursuites ultérieures. Elle a pour objet d'assurer que les conditions des ordonnances de probation soient efficaces et puissent être exécutées concrètement. L'absence dans le *Code criminel* de dispositions précises en matière de surveillance reflète simplement la nature généralement individualisée du processus de détermination de la peine et des ordonnances de probation.

35

The need for a monitoring mechanism may result from the nature of the obligations imposed on the accused by the probation order. Absent a monitoring procedure in such circumstances, it might rightly be said that Parliament spoke for nothing. To deny the existence of implied statutory powers in the present case does not comport with the approach of this Court, which has not hesitated to acknowledge the existence of such powers when the need for them flows from the nature of the substantive provisions of a law. For example, in one *Charter* case, which concerned public schools and their students, the Court found implied authority for conducting reasonable searches of students in the statutory obligations of schools and teachers to maintain order and discipline (*R. v. M. (M.R.)*, [1998] 3 S.C.R. 393, at para. 51, *per* Cory J.):

> If it is to be reasonable the search must be conducted reasonably and must be authorized by a statutory provision which is itself reasonable. There is no specific authorization to search provided in the *Education Act*, R.S.N.S. 1989, [c. 136,] or its regulations. Nonetheless, the responsibility placed upon teachers, and principals to maintain proper order and discipline in the school and to attend to the health and comfort of students by necessary implication authorizes searches of students. See s. 54(b) and Regulation 3(7) and (9). Teachers must be able to search students if they are to fulfil the statutory duties imposed upon them. It is reasonable, if not essential to provide teachers and principals with this authorization to search. It is now necessary to consider the circumstances in which the search itself may be considered to be reasonable.

La nécessité d'un mécanisme de surveillance peut découler de la nature des obligations que l'ordonnance de probation impose à l'accusé. Si aucun mode de surveillance n'était prévu dans ces cas, on pourrait affirmer à juste titre que le législateur a parlé pour ne rien dire. Nier l'existence de pouvoirs légaux implicites ne respecte pas l'opinion de notre Cour, qui n'a pas hésité à reconnaître l'existence de tels pouvoirs dans les cas où leur nécessité tient à la nature des dispositions substantielles d'une loi. Par exemple, dans une affaire liée à la *Charte*, à propos des rapports entre les écoles publiques et leurs élèves, la Cour a conclu que les obligations légales des écoles et des enseignants de maintenir l'ordre et la discipline permettaient implicitement de soumettre les élèves à des fouilles raisonnables (*R. c. M. (M.R.)*, [1998] 3 R.C.S. 393, par. 51, le juge Cory) :

> Pour être raisonnable, la fouille doit être effectuée de manière raisonnable et être autorisée par une disposition législative qui est elle-même raisonnable. On ne trouve aucune autorisation particulière de procéder à des fouilles dans l'*Education Act*, R.S.N.S. 1989, [ch. 136,] ou dans son règlement d'application. Cependant, la responsabilité qui incombe aux enseignants et aux directeurs de maintenir l'ordre et la discipline dans l'école et de veiller à la santé et au bien-être des élèves autorise, par déduction nécessaire, les fouilles d'élèves. Voir l'al. 54b) de la Loi et les par. 3(7) et (9) du Règlement. Les enseignants doivent pouvoir fouiller les élèves pour être en mesure de s'acquitter des responsabilités que leur impose la loi. Il est raisonnable, voire essentiel, de donner cette autorisation de fouiller aux enseignants et aux directeurs. Il faut maintenant examiner les circonstances dans lesquelles la fouille elle-même peut être jugée raisonnable.

36

With respect for those who hold other views, under very well-established rules of statutory interpretation, the *Criminal Code* grants the sentencing

En toute déférence pour les tenants d'autres points de vue, des règles d'interprétation législative très bien établies veulent que le *Code criminel* judge the authority to include monitoring procedures in probation orders. To hold otherwise might well cause unforeseen and undesirable effects, as the inflexibility of such an interpretative approach would likely require Parliament to attempt to foresee a wide range of individual situations and to address them in minute detail. A drafting technique such as this would hardly be consistent with the canons of sound legal drafting, even if it were feasible.

habilite le juge chargé de la détermination de la peine à inclure des modes de surveillance dans une ordonnance de probation. Conclure différemment pourrait bien entraîner des effets inattendus et peu souhaitables, parce que la rigidité d'une telle méthode d'interprétation forcerait vraisemblablement le législateur à tenter de prévoir une vaste gamme de situations particulières et à en traiter de manière très détaillée. Même s'il était possible de l'utiliser, cette technique de rédaction ne serait guère compatible avec les règles fondamentales d'une bonne rédaction législative.

37 Moreover, a narrow interpretation of the residual clause would cast doubt on a number of useful monitoring methods, which sentencing judges appear to be resorting to with increasing frequency. For example, it might prevent the use of electronic monitoring, which allows probation officers or public authorities to make sure that conditions relating to house arrest or curfews are complied with. I note that a number of judges have found such conditions to be valid:

The conclusion is that section 732.1(3)(h) allows orders which restrict a defendant's lifestyle, such as curfews, orders that he or she not frequent specified places, or associate with specified persons, <u>or orders that a defendant be confined on electronic monitoring</u>.

. . .

The terms of probation can control the defendant's lifestyle. For example, <u>a defendant might be . . . ordered to wear an electronic monitoring device</u> . . . .

. . .

Thus, <u>curfews, house arrest (with or without electronic monitoring), bed checks . . . *etc.*, can all be appropriate "other conditions". It does not matter whether one sees them as rehabilitative measures, control measures, or punishment.</u> What counts is not the label but an intent that the condition should further public protection or the acceptance of the defendant in the community, and some reasonable grounds for belief that it will

De plus, une interprétation restrictive de la clause résiduelle jetterait le doute sur un certain nombre de modes de surveillance utiles auxquels semblent recourir de plus en plus les juges chargés de la détermination de la peine. Elle pourrait notamment empêcher le recours à la surveillance électronique qui permet aux agents de probation ou aux autorités publiques de s'assurer que les conditions prescrivant la détention à domicile ou un couvre-feu sont respectées. D'ailleurs, je constate qu'un certain nombre de juges ont conclu à la validité de ces conditions :

[TRADUCTION] Il faut conclure que l'al. 732.1(3)h) permet de rendre des ordonnances qui restreignent le mode de vie d'un défendeur par l'imposition d'un couvre-feu notamment, qui lui intiment de ne pas fréquenter certains endroits ou certaines personnes <u>ou qui le placent sous surveillance électronique</u>.

. . .

Les conditions de probation peuvent régir le mode de vie du défendeur. Par exemple, <u>un défendeur pourrait se voir [. . .] ordonner de porter un dispositif de surveillance électronique</u> . . .

. . .

Ainsi, <u>les couvre-feux, les détentions à domicile (avec ou sans surveillance électronique), les contrôles de présence à domicile [. . .] *etc.*, peuvent tous constituer « d'autres conditions » appropriées. Il importe peu que ces conditions soient perçues comme des mesures de réadaptation, des modes de contrôle ou des sanctions.</u> Ce qui compte est non pas la façon de désigner une condition mais plutôt l'intention que cette condition have a tendency to effect those purposes. [Emphasis added.]

(T. W. Ferris, *Sentencing: Practical Approaches* (2005), at pp. 79, 116 and 216-17)

Ferris reports that the courts in the following cases held that electronic monitoring is lawful under s. 732.1(3)(*h*) : *R. v. Carlson* (1996), 141 Sask. R. 168 (C.A.); *R. v. Curtis* (1996), 144 Sask. R. 156 (C.A.); *R. v. McLeod* (1992), 109 Sask. R. 8 (C.A.).

38 The range of possible conditions is broad. The purpose of such conditions is often to control aspects of the lifestyle of an accused to ensure that the goals of probation — protection of society and reintegration into the community — are achieved.

39 We should not assume that such a discretion would be abused by sentencing judges or exercised in an unconstitutional manner in the absence of a detailed statutory framework. In another context — a case concerning an exercise of discretion by an administrative authority — this Court asserted that it should not rely on assumptions of prospective breaches of the *Charter*:

I do not think there is any constitutional rule that requires Parliament to deal with Customs' treatment of constitutionally protected expressive material by legislation (as the appellants contend) rather than by way of regulation (as Parliament contemplated in s. 164(1)(*j*)) or even by ministerial directive or departmental practice. Parliament is entitled to proceed on the basis that its enactments "will be applied constitutionally" by the public service.

. . .

[I]t is in the nature of government work that the power of the state is exercised and the *Charter* rights of the citizen may therefore be engaged. While there is evidence of actual abuse here, there is the *potential* for

contribue à protéger le public ou à faciliter la réinsertion sociale du défendeur, ainsi que l'existence de motifs raisonnables de croire qu'elle contribuera à l'atteinte de ces objectifs. [Je souligne.]

(T. W. Ferris, *Sentencing : Practical Approaches* (2005), p. 79, 116 et 216-217)

Ferris indique que, dans les affaires suivantes, les tribunaux ont statué que l'al. 732.1(3)*h*) autorise la surveillance électronique : *R. c. Carlson* (1996), 141 Sask. R. 168 (C.A.); *R. c. Curtis* (1996), 144 Sask. R. 156 (C.A.); *R. c. McLeod* (1992), 109 Sask. R. 8 (C.A.).

Il existe un large éventail de conditions possibles. Ces conditions visent souvent à régir certains aspects du mode de vie d'un accusé de manière à assurer la réalisation des objectifs de la probation, à savoir la protection de la société et la réinsertion sociale de l'accusé.

Nous ne devrions pas supposer qu'en l'absence d'un cadre législatif détaillé les juges chargés de la détermination de la peine abuseraient d'un tel pouvoir discrétionnaire ou qu'ils l'exerceraient d'une manière non conforme à la Constitution. Dans un autre contexte où il était question de l'exercice d'un pouvoir discrétionnaire par une autorité administrative, notre Cour a souligné qu'elle ne devrait pas s'appuyer sur des présomptions de violation éventuelle de la *Charte* :

Je ne crois pas qu'il y ait quelque règle constitutionnelle obligeant le Parlement à prescrire au moyen d'une loi (comme le prétendent les appelants) plutôt que d'un règlement (comme l'a prévu le Parlement à l'al. 164(1)*j*)) ou même d'une directive ministérielle ou d'une pratique institutionnelle, la façon dont les Douanes doivent traiter le matériel expressif protégé par la Constitution. Le Parlement a le droit d'agir en tenant pour acquis que les textes de loi qu'il adopte « s[eront] appliqué[s] [. . .] d'une manière conforme à la Constitution » par les fonctionnaires.

. . .

[I]l est normal, de par la nature des activités de l'État, que celui-ci soit appelé à exercer son pouvoir et que les droits garantis au citoyen par la *Charte* puissent en conséquence être touchés. Quoiqu'il y ait preuve d'abus abuse in many areas, and a rule requiring Parliament to enact in each case special procedures for the protection of *Charter* rights would be unnecessarily rigid. [Underlining added.]

(*Little Sisters Book and Art Emporium v. Canada (Minister of Justice)*, [2000] 2 S.C.R. 1120, 2000 SCC 69, at paras. 71 and 137)

40 Any challenge in the instant case should have related to the reasonableness of the order under s. 8 of the *Charter*. The authority to impose the monitoring conditions exists. It remains to be seen whether the conditions meet the standards of the *Charter* (see Ruby, at para. 10.63).

41 Before I move on to some brief comments on the application of s. 8 in the context of the case at bar, I must add that I agree with Charron J. that the part of the order that would, in essence, turn a positive test into a breach of the conditions set out in the order is contrary to the principles of criminal law. Guilt must be proved in the usual manner, that is, beyond a reasonable doubt, and the accused is entitled to the protection of the law of criminal evidence and criminal procedure.

III. Application of Section 8

42 Section 8 raises difficulties in respect of parts of the order. I agree that the part compelling the accused to undergo blood tests would be far too intrusive and would breach s. 8 absent a statutory framework consistent with the standards of the *Charter*.

43 Although it may very well be a more efficient way to monitor compliance, random drug testing at the probation officer's discretion could become highly arbitrary. Courts would have difficulty defining a proper framework to supplement the silence of the *Code*. This is a situation where Parliament would be in a better position to address the issue. Its solution would then be open to review by the courts under s. 8 and s. 1 of the *Charter*.

réel en l'espèce, il y a *risque* d'abus dans de nombreux domaines, et une règle qui obligerait le Parlement à édicter dans chaque cas des procédures spéciales pour protéger les droits garantis par la *Charte* serait inutilement rigide. [Je souligne.]

(*Little Sisters Book and Art Emporium c. Canada (Ministre de la Justice)*, [2000] 2 R.C.S. 1120, 2000 CSC 69, par. 71 et 137)

En l'espèce, toute contestation aurait dû porter sur le caractère raisonnable de l'ordonnance au regard de l'art. 8 de la *Charte*. L'imposition des conditions en matière de surveillance est permise. Il reste à voir si ces conditions respectent les normes de la *Charte* (voir Ruby, par. 10.63).

Avant de commenter brièvement l'application de l'art. 8 dans le cadre du présent pourvoi, je dois ajouter que je conviens avec la juge Charron que la partie de l'ordonnance qui, pour l'essentiel, ferait d'un test positif une violation des conditions énoncées dans cette ordonnance, contrevient aux principes du droit criminel. La culpabilité doit être établie de la manière habituelle, c'est-à-dire hors de tout doute raisonnable, et l'accusé a droit à la protection des règles de preuve et de procédure en matière criminelle.

III. Application de l'art. 8

Certaines parties de l'ordonnance présentent des difficultés au regard de l'art. 8. Je suis d'accord pour dire que, en l'absence d'un cadre législatif conforme aux normes de la *Charte*, la partie qui oblige l'accusé à se soumettre à des analyses sanguines serait beaucoup trop envahissante et contreviendrait à l'art. 8.

Bien qu'ils puissent très bien représenter un moyen plus efficace de veiller au respect des conditions imposées, les tests de dépistage de drogue faits au hasard, à la discrétion de l'agent de probation, risqueraient de devenir très arbitraires. Les tribunaux auraient de la difficulté à définir un cadre approprié pour suppléer au silence du *Code*. Il s'agit d'un cas où le législateur serait mieux placé pour régler la question. La solution qu'il retiendrait pourrait ensuite faire l'objet d'un examen judiciaire fondé sur l'art. 8 et l'article premier de la *Charte*.

For these reasons, I agree with my colleague that the appeal should be dismissed. 44

Pour ces motifs, je partage l'opinion de ma collègue selon laquelle il y a lieu de rejeter le pourvoi.

Appeal dismissed.

Pourvoi rejeté.

Solicitor for the appellant: Attorney General of British Columbia, Vancouver.

Procureur de l'appelante : Procureur général de la Colombie-Britannique, Vancouver.

Solicitor for the respondent: Garth Barriere, Vancouver.

Procureurs de l'intimé : Garth Barriere, Vancouver.

Solicitor for the intervener the Attorney General of Canada: Attorney General of Canada, Vancouver.

Procureur de l'intervenant le procureur général du Canada : Procureur général du Canada, Vancouver.

Solicitors for the intervener the Criminal Lawyers' Association (Ontario): Kapoor & Stribopoulos, Toronto.

Procureurs de l'intervenante Criminal Lawyers' Association (Ontario) : Kapoor & Stribopoulos, Toronto.

1991 CarswellAlta 192
Supreme Court of Canada

R. v. Stinchcombe

Please see in particular paras. 11-12 and 29

1991 CarswellAlta 559, 1991 CarswellAlta 192, [1991] 3 S.C.R. 326, [1991] A.W.L.D. 882, [1991] S.C.J. No. 83, [1992] 1 W.W.R. 97, 120 A.R. 161, 130 N.R. 277, 14 W.C.B. (2d) 266, 18 C.R.R. (2d) 210, 68 C.C.C. (3d) 1, 83 Alta. L.R. (2d) 193, 8 C.R. (4th) 277, 8 W.A.C. 161, J.E. 91-1713, EYB 1991-66887

WILLIAM B. STINCHCOMBE v. R.

La Forest, L'Heureux-Dubé, Sopinka, Gonthier, Cory, McLachlin and Iacobucci JJ.

Heard: May 2, 1991
Judgment: November 7, 1991
Docket: Doc. 21904

Counsel: *William E. Code, Q.C.*, and *John Kingman Phillips*, for appellant
Daniel M. McDonald, Q.C., and *Bruce R. Fraser, Q.C.*, for respondent

Subject: Criminal; Evidence

Headnote

Criminal Law --- Evidence — Crown evidence — Disclosure — Duty to disclose

Criminal Law --- Evidence — Evidence at trial — Witnesses — Duties of prosecutor — General

Criminal law — Evidence — Disclosure by Crown — Evidence favourable to defence — Police recording prospective witness's statement before trial and taking further written statement during trial — Crown not calling witness and refusing to produce statements on ground that witness not worthy of credit — Crown having duty to disclose all material evidence to defence — Absence of evidence possibly affecting outcome of trial — Supreme Court of Canada ordering new trial with statements produced.

Criminal law — Trial — Full answer and defence — Police recording prospective witness's statement before trial and taking further written statement during trial — Crown not calling witness and refusing to produce statements on ground that witness not worthy of credit — Crown having duty to disclose all material evidence to defence — Absence of evidence possibly affecting outcome of trial — Supreme Court of Canada ordering new trial with statements produced.

A lawyer was charged with theft, breach of trust and fraud by appropriating certain financial instruments which he held in trust for his client. The defence contended that despite the lawyer's formal status as trustee of the property, the client had in fact made the lawyer his business partner. Under this theory, the lawyer had acted as he was legally entitled to act. After the lawyer's former secretary testified at the preliminary inquiry, but prior to the trial, the R.C.M.P. took a tape-recorded statement from the secretary. During the trial, the police took a further written statement from the secretary. Defence counsel's request for disclosure of both statements was refused. When defence counsel learned that the Crown would not be calling the secretary, he moved before the trial judge that the Crown disclose the contents of both statements to the defence. The Crown did not provide any basis for resisting production other than saying that the secretary was not worthy of credit. The trial judge dismissed the application on the ground that the Crown had no obligation to disclose the contents of the statements. The lawyer was found guilty and the Alberta Court of Appeal dismissed his appeal from conviction without issuing reasons. Leave to appeal to the Supreme Court of Canada was granted on the disclosure issue.

Held:

Appeal allowed; new trial ordered with statements to be produced.

The Crown is under a duty in indictable offences to disclose to the defence all material evidence whether favourable to the accused or not. Failure to disclose impedes the ability of the accused to make full answer and defence. However, this obligation to disclose is subject to the discretion of Crown counsel both as to the withholding of information and as to the timing of disclosure. For example, the Crown's duty to protect the identity of informers gives it a discretion as to the timing and manner of disclosure. A discretion must also be exercised respecting the relevance of information, although the Crown must err on the side of disclosure. There may also be situations in which early disclosure may impede completion of an investigation. This Crown discretion is reviewable by the trial judge, who should be guided by the general principle that information ought not to be withheld if there is a reasonable possibility that the withholding of information will impair the right of the accused to make full answer and defence. The absolute withholding of relevant information can be justified only by the existence of legal privilege which excludes the information from disclosure. The trial judge might also, in certain circumstances, conclude that an existing privilege is not a reasonable limit on the right to make full answer and defence. Here the Crown's explanation for refusal of production, that the witness was not worthy of credit, was completely inadequate to support its exercise of discretion on the ground of irrelevance. Whether the witness was credible was for the trial judge to determine after hearing the evidence, and he ought to have examined the statements.

Initial disclosure should occur before the accused is called upon to elect the mode of trial or to plead. These are crucial steps which the accused must take which affect his or her rights in a fundamental way. The obligation to disclose is a continuing one and disclosure must be completed when additional information is received. Defence counsel must bring to the attention of the trial judge at the earliest opportunity any Crown failure to comply with its duty to disclose. This may enable the trial judge to remedy any prejudice to the accused, and will be an important factor in determining on appeal whether a new trial should be ordered.

Material produced must include not only that which the Crown intends to introduce into evidence but also that which it does not. No distinction should be made between inculpatory and exculpatory evidence. Statements from proposed witnesses should be produced, including those simply taken in an investigator's notes. If notes do not exist then a summary of the witness's anticipated evidence should be produced. Relevant statements from persons not proposed as Crown witnesses should also be produced, and if there are no statements, then notes, or all available information respecting any relevant evidence that the person could give. Here the court must assume that non-production of the secretary's statements was an important factor in the defence decision not to call that witness. The absence of this evidence might have affected the outcome.

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R. v. Rothman, [1981] 1 S.C.R. 640, 20 C.R. (3d) 97, 59 C.C.C. (2d) 30, 121 D.L.R. (3d) 578, 35 N.R. 485 — *referred to*

R. v. Scott, [1990] 3 S.C.R. 979, 116 N.R. 361, 2 C.R. (4th) 153, 61 C.C.C. (3d) 300, 43 O.A.C. 277, 1 C.R.R. (2d) 82 — *referred to*

Savion v. R. (1980), 13 C.R. (3d) 259, 52 C.C.C. (2d) 276 (Ont. C.A.) — *referred to*

Statutes considered:

Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B of the Canada Act 1982 (U.K.), 1982, c. 11

s. 7*considered*

Criminal Code, R.S.C. 1970, c. C-34 [now R.S.C. 1985, c. C-46]

s. 294(a) [now s. 334(a)]*pursuant to*

s. 296 [now s. 336]*pursuant to*

s. 338(1)(a) [now s. 380(1)(a)]*pursuant to*

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

s. 482*considered*

s. 603*referred to*

Criminal Justice Act 1967 (U.K.), 1967, c. 80 — *referred to*

Appeal by accused from judgment of Alberta Court of Appeal which affirmed judgment of Brennan J. convicting accused of breach of trust and fraud.

The judgment of the court was delivered by *Sopinka J.*:

1 This appeal raises the issue of the Crown's obligation to make disclosure to the defence. A witness who gave evidence at the preliminary inquiry favourable to the accused was subsequently interviewed by agents for the Crown. Crown counsel decided not to call the witness and would not produce the statements obtained at the interview. The trial judge refused an application by the defence for disclosure on the ground that there was no obligation on the Crown to disclose the statements. The Court of Appeal affirmed the judgment at trial and the case is here with leave of this court.

I. Facts

2 The appellant was a Calgary lawyer charged with appropriating certain financial instruments from a client, one Jack Abrams. The indictment charged thirteen counts of criminal breach of trust contrary to s. 296 of the *Criminal Code*, R.S.C. 1970, c. C-34 (now s. 336 of R.S.C. 1985, c. C-46), thirteen counts of theft contrary to s. 294(*a*) (now s. 334(*a*) of R.S.C. 1985, c. C-46) of the *Criminal Code*, and one count of fraud contrary to s. 338(1)(*a*) (now s. 380(1)(*a*) of R.S.C. 1985, c. C-46) of the *Criminal Code*. The trial in the Alberta Court of Queen's Bench was before Brennan J. without a jury.

3 The Crown alleged that the appellant had wrongfully appropriated property which he held in trust for Abrams. The defence did not contest the receipt of funds by the appellant. The defence did contend, however, that despite Stinchcombe's formal status as trustee of the property, Abrams had in fact made Stinchcombe his business partner. Under this theory, Stinchcombe had acted as he was legally entitled to act. At issue therefore was the actual, as opposed to the formal, nature of the relationship between the two men.

4 Patricia Lineham is a former secretary of Mr. Stinchcombe. She was a Crown witness at the preliminary inquiry. There, she gave evidence which was apparently very favourable to the defence regarding the conduct of Abrams. The precise content of this testimony was not before the trial judge and is not in the record. Lineham was not listed on the indictment, but was subpoenaed by the Crown.

5 After the preliminary inquiry but prior to the trial, Lineham was interviewed by an R.C.M.P. officer. A tape-recorded statement was taken. Crown counsel informed defence counsel of the existence but not the content of this statement. A request for disclosure was refused. Later, during the course of the trial, Lineham was again interviewed by a police officer and a written statement was taken. Again, though defence counsel was advised of the existence of the statement, a request for disclosure was refused. Crown counsel also indicated that he would not be calling Lineham as she was not worthy of credit.

6 It was not until the third day of the trial that defence counsel learned conclusively that Lineham would not be called by the Crown. At this time, he moved before the trial judge for an order that (i) the Crown call the witness, or (ii) the court call the witness, or (iii) the Crown disclose the contents of the statements to the defence. A review of the record makes it clear that defence counsel was pressing for access to, or production of, both the tape-recorded and written statements and was not pressing the alternative requests. In support of this motion, counsel for the defendant indicated that Lineham refused to speak to him or his staff when they attempted to interview her about the contents of the statements. Crown counsel did not provide any basis for resisting production other than to say that in his view the potential witness was not worthy of credit.

7 The trial judge dismissed the application. Brennan J. ruled that under the circumstances there was no obligation on the Crown to call the witness and that there was no obligation on the Crown to disclose the contents of the statements. The trial proceeded, and the accused was found guilty of all twenty-seven counts charged. A conditional stay was entered with respect to the thirteen theft counts. The Alberta Court of Appeal dismissed the appeal from conviction without issuing reasons. Leave to appeal to this court was granted on the disclosure issue.

8 During argument before this court, an application was made by the Crown to adduce the statements and the tape as fresh evidence. This application was rejected. The principal basis for the

rejection was that at this stage it would be impossible to determine whether the statements would have been material to the defence if produced at trial.

II. Crown's Obligation to Disclose

9 The circumstances which give rise to this case are testimony to the fact that the law with respect to the duty of the Crown to disclose is not settled. A number of cases have addressed some aspects of the subject: see, for example, *Cunliffe v. Law Society of British Columbia*, [1984] 4 W.W.R. 451, 11 D.L.R. (4th) 280, 13 C.C.C. (3d) 560, 40 C.R. (3d) 67 (B.C.C.A.); *Savion v. R.* (1980), 13 C.R. (3d) 259, 52 C.C.C. (2d) 276 (Ont. C.A.); *R. v. Bourget* (1987), 56 C.R. (3d) 97, 46 M.V.R. 246, 54 Sask. R. 178, 35 C.C.C. (3d) 371, 41 D.L.R. (4th) 756, 29 C.R.R. 25 (C.A.). No case in this court has made a comprehensive examination of the subject. The Law Reform Commission of Canada, in a 1974 working paper titled *Criminal Procedure: Discovery* (the "1974 working paper"), and a 1984 report titled *Disclosure by the Prosecution* (the "1984 report"), recommended comprehensive schemes regulating disclosure by the Crown but no legislative action has been taken implementing the proposals. Apart from the limited legislative response contained in s. 603 of the *Criminal Code*, R.S.C. 1985, c. C-46, enacted in the 1953-54 overhaul of the *Criminal Code* (which itself condensed pre-existing provisions), legislators have been content to leave the development of the law in this area to the courts.

10 Production and discovery were foreign to the adversary process of adjudication in its earlier history when the element of surprise was one of the accepted weapons in the arsenal of the adversaries. This applied to both criminal and civil proceedings. Significantly, in civil proceedings this aspect of the adversary process has long since disappeared, and full discovery of documents and oral examination of parties and even witnesses are familiar features of the practice. This change resulted from acceptance of the principle that justice was better served when the element of surprise was eliminated from the trial and the parties were prepared to address issues on the basis of complete information of the case to be met. Surprisingly, in criminal cases in which the liberty of the subject is usually at stake, this aspect of the adversary system has lingered on. While the prosecution bar has generally co-operated in making disclosure on a voluntary basis, there has been considerable resistance to the enactment of comprehensive rules which would make the practice mandatory. This may be attributed to the fact that proposals for reform in this regard do not provide for reciprocal disclosure by the defence (see 1974 working paper at pp. 29-31; 1984 report at pp. 13-15; Marshall Commission Report, infra, vol. 2, at pp. 242-44).

11 It is difficult to justify the position which clings to the notion that the Crown has no legal duty to disclose all relevant information. The arguments against the existence of such a duty are groundless while those in favour are, in my view, overwhelming. The suggestion that the duty should be reciprocal may deserve consideration by this court in the future but is not a valid reason for absolving the Crown of its duty. The contrary contention fails to take account of the

fundamental difference in the respective roles of the prosecution and the defence. In *Boucher v. R.*, [1955] S.C.R. 16, 20 C.R. 1, 110 C.C.C. 263, Rand J. states (at pp. 23-24) [S.C.R.]:

> It cannot be over-emphasized that the purpose of a criminal prosecution is not to obtain a conviction, it is to lay before a jury what the Crown considers to be credible evidence relevant to what is alleged to be a crime. Counsel have a duty to see that all available legal proof of the facts is presented: it should be done firmly and pressed to its legitimate strength but it must also be done fairly. The role of prosecutor excludes any notion of winning or losing; his function is a matter of public duty than which in civil life there can be none charged with greater personal responsibility. It is to be efficiently performed with an ingrained sense of the dignity, the seriousness and the justness of judicial proceedings.

12 I would add that the fruits of the investigation which are in the possession of counsel for the Crown are not the property of the Crown for use in securing a conviction but the property of the public to be used to ensure that justice is done. In contrast, the defence has no obligation to assist the prosecution and is entitled to assume a purely adversarial role toward the prosecution. The absence of a duty to disclose can, therefore, be justified as being consistent with this role.

13 Other grounds advanced by advocates of the absence of a general duty to disclose all relevant information are that it would impose onerous new obligations on the Crown prosecutors resulting in increased delays in bringing accused persons to trial. This ground is not supported by the material in the record. As I have already observed, disclosure is presently being made on a voluntary basis. The extent of disclosure varies from province to province, from jurisdiction to jurisdiction and from prosecutor to prosecutor. The adoption of uniform, comprehensive rules for disclosure by the Crown would add to the workload of some Crown counsel but this would be offset by the time saved which is now spent resolving disputes such as this one surrounding the extent of the Crown's obligation and dealing with matters that take the defence by surprise. In the latter case an adjournment is frequently the result of non-disclosure or more time is taken by a defence counsel who is not prepared. There is also compelling evidence that much time would be saved and therefore delays reduced by reason of the increase in guilty pleas, withdrawal of charges and shortening or waiver of preliminary hearings. The 1984 report (at pp. 6-9) refers to several experimental projects which were established after the publication of the 1974 working paper in order to test the viability of pre-trial disclosure. The result of these experiments, and in particular the Montreal experiment, which was the most exhaustively evaluated, was that there was a significant increase in the number of cases settled and pleas of guilty entered or charges withdrawn.

14 In England, under the provisions of the *Criminal Justice Act 1967* (U.K.), 1967, c. 80, a "packet" of material is furnished to defence counsel. The provision of such material has led to a reduction in the length and number of preliminary hearings in that jurisdiction: *Report of the*

Special Committee on Preliminary Hearings, Bench and Bar Council of Ontario (1982), at pp. 12-15.

15 Refusal to disclose is also justified on the ground that the material will be used to enable the defence to tailor its evidence to conform with information in the Crown's possession. For example, a witness may change his or her testimony to conform with a previous statement given to the police or counsel for the Crown. I am not impressed with this submission. All forms of discovery are subject to this criticism. There is surely nothing wrong in a witness refreshing his or her memory from a previous statement or document. The witness may even change his or her evidence as a result. This may rob the cross-examiner of a substantial advantage but fairness to the witness may require that a trap not be laid by allowing the witness to testify without the benefit of seeing contradic tory writings which the prosecutor holds close to the vest. The principle has been accepted that the search for truth is advanced rather than retarded by disclosure of all relevant material.

16 Finally, it is suggested that disclosure may put at risk the security and safety of persons who have provided the prosecution with information. No doubt measures must occasionally be taken to protect the identity of witnesses and informers. Protection of the identity of informers is covered by the rules relating to informer privilege and exceptions thereto (see *Marks v. Beyfus* (1890), 25 Q.B.D. 494 (C.A.); *R. v. Scott*, [1990] 3 S.C.R. 979, 116 N.R. 361, 2 C.R. (4th) 153, 61 C.C.C. (3d) 300, 43 O.A.C. 277, 1 C.R.R. (2d) 82), and any rules with respect to disclosure would be subject to this and other rules of privilege. With respect to witnesses, persons who have information that may be evidence favourable to the accused will have to have their identity disclosed sooner or later. Even the identity of an informer is subject to this fact of life by virtue of the "innocence exception" to the informer privilege rule (*Marks v. Beyfus*, supra, at pp. 489-99; *R. v. Scott*, supra, at p. 996; *Bisaillon v. Keable*, [1983] 2 S.C.R. 60 at 93, 4 Admin. L.R. 205, 37 C.R. (3d) 289, 2 D.L.R. (4th) 193, 51 N.R. 81, 7 C.C.C. (3d) 385; *Canada (Solicitor General) v. Ontario (Royal Commission of Inquiry into Confidentiality of Health Records)*, [1981] 2 S.C.R. 494, 23 C.R. (3d) 338, 23 C.P.C. 99, 128 D.L.R. (3d) 193, 38 N.R. 588, 62 C.C.C. (2d) 193). It will, therefore, be a matter of the timing of the disclosure rather than whether disclosure should be made at all. The prosecutor must retain a degree of discretion in respect of these matters. The discretion, which will be subject to review, should extend to such matters as excluding what is clearly irrelevant, withholding the identity of persons to protect them from harassment or injury, or to enforce the privilege relating to informers. The discretion would also extend to the timing of disclosure in order to complete an investigation. I shall return to this subject later in these reasons.

17 This review of the pros and cons with respect to disclosure by the Crown shows that there is no valid practical reason to support the position of the opponents of a broad duty of disclosure. Apart from the practical advantages to which I have referred, there is the overriding concern that failure to disclose impedes the ability of the accused to make full answer and defence. This common law right has acquired new vigour by virtue of its inclusion in s. 7 of the *Canadian*

Charter of Rights and Freedoms as one of the principles of fundamental justice. (See *Dersch v. Canada (Attorney General)*, [1990] 2 S.C.R. 1505 at 1514, [1991] 1 W.W.R. 231, 80 C.R. (3d) 299, 60 C.C.C. (3d) 132, 51 B.C.L.R. (2d) 145, 50 C.R.R. 272, 77 D.L.R. (4th) 473, 36 Q.A.C. 258, 116 N.R. 340, 43 O.A.C. 256 .) The right to make full answer and defence is one of the pillars of criminal justice on which we heavily depend to ensure that the innocent are not convicted. Recent events have demonstrated that the erosion of this right due to non-disclosure was an important factor in the conviction and incarceration of an innocent person. In the *Royal Commission on the Donald Marshall, Jr., Prosecution*, vol. 1: Findings and Recommendations (1989) (the "Marshall Commission Report"), the commissioners found that prior inconsistent statements were not disclosed to the defence. This was an important contributing factor in the miscarriage of justice which occurred and led the commission to state that "anything less than complete disclosure by the Crown falls short of decency and fair play" (vol. 1 at p. 238). The commission recommended an extensive regime of disclosure of which the key provisions are as follows (vol. 1 at p. 243):

> 2(1) Without request, the accused is entitled, before being called upon to elect the mode of trial or to plead to the charge of an indictable offence, whichever comes first, and thereafter:
>
> (*a*) to receive a copy of his criminal record;
>
> (*b*) to receive a copy of any statement made by him to a person in authority and recorded in writing or to inspect such a statement if it has been recorded by electronic means; and to be informed of the nature and content of any verbal statement alleged to have been made by the accused to a person in authority and to be supplied with any memoranda in existence pertaining thereto;
>
> (*c*) to inspect anything that the prosecutor proposes to introduce as an exhibit and, where practicable, receive copies thereof;
>
> (*d*) to receive a copy of any statement made by a person whom the prosecutor proposes to call as a witness or anyone who may be called as a witness, and recorded in writing or, in the absence of a statement, a written summary of the anticipated testimony of the proposed witness, or anyone who may be called as a witness;
>
> (*e*) to receive any other material or information known to the Crown and which tends to mitigate or negate the defendant's guilt as to the offence charged, or which would tend to reduce his punishment therefor, notwithstanding that the Crown does not intend to introduce such material or information as evidence;
>
> (*f*) to inspect the electronic recording of any statement made by a person whom the prosecutor proposes to call as a witness;
>
> (*g*) to receive a copy of the criminal record of any proposed witness; and

> (*h*) to receive, where not protected from disclosure by the law, the name and address of any other person who may have information useful to the accused, or other details enabling that person to be identified.
>
> 2(2) The disclosure contemplated in subsection (1), paragraphs (*d*), (*e*) and (*h*) shall be provided by the Crown and may be limited only where, upon an inter partes application by the prosecutor, supported by evidence showing a likelihood that such disclosure will endanger the life or safety of such person or interfere with the administration of justice, a justice having jurisdiction in the matter deems it just and proper.

18 In my opinion there is a wholly natural evolution of the law in favour of disclosure by the Crown of all relevant material. As long ago as 1951, Cartwright J. stated in *Lemay v. R.*, [1952] 1 S.C.R. 232 at 257, 14 C.R. 89, 102 C.C.C. 1:

> I wish to make it perfectly clear that I do not intend to say anything which might be regarded as lessening *the duty which rests upon counsel for the Crown to bring forward evidence of every material fact known to the prosecution whether favourable to the accused or otherwise* ... [emphasis added]

This statement may have been in reference to the obligation resting on counsel for the Crown to call evidence rather than to disclose the material to the defence, but I see no reason why this obligation should not be discharged by disclosing the material to the defence rather than obliging the Crown to make it part of the Crown's case. Indeed, some of the information will be in a form that cannot be put in evidence by the Crown but can be used by the defence in cross-examination or otherwise. Production to the defence is then the only way in which the injunction of Cartwright J. can be obeyed.

19 In *R. v. C. (M.H.)* (1988), 46 C.C.C. (3d) 142 at 155 (B.C.C.A.), McEachern C.J.B.C. after a review of the authorities stated what I respectfully accept as a correct statement of the law. He said that "there is a general duty on the part of the Crown to disclose all material it proposes to use at trial and especially all evidence which may assist the accused even if the Crown does not propose to adduce it." This passage was cited with approval by McLachlin J. in her reasons on behalf of the court (*R. v. C. (M.H.)* (1991), 4 C.R. (4th) 1, 63 C.C.C. (3d) 385, 123 N.R. 63 (S.C.C.)). She went on to add: "This court has previously stated that the Crown is under a duty at common law to disclose to the defence all material evidence whether favourable to the accused or not" (p. 73) [N.R.].

20 As indicated earlier, however, this obligation to disclose is not absolute. It is subject to the discretion of counsel for the Crown. This discretion extends both to the withholding of information and to the timing of disclosure. For example, counsel for the Crown has a duty to respect the rules of privilege. In the case of informers the Crown has a duty to protect their

identity. In some cases serious prejudice or even harm may result to a person who has supplied evidence or information to the investigation. While it is a harsh reality of justice that ultimately any person with relevant evidence must appear to testify, the discretion extends to the timing and manner of disclosure in such circumstances. A discretion must also be exercised with respect to the relevance of information. While the Crown must err on the side of inclusion, it need not produce what is clearly irrelevant. The experience to be gained from the civil side of the practice is that counsel, as officers of the court and acting responsibly, can be relied upon not to withhold pertinent information. Transgressions with respect to this duty constitute a very serious breach of legal ethics. The initial obligation to separate "the wheat from the chaff" must therefore rest with Crown counsel. There may also be situations in which early disclosure may impede completion of an investigation. Delayed disclosure on this account is not to be encouraged and should be rare. Completion of the investigation before proceeding with the prosecution of a charge or charges is very much within the control of the Crown. Nevertheless, it is not always possible to predict events which may require an investigation to be reopened and the Crown must have some discretion to delay disclosure in these circumstances.

21 The discretion of Crown counsel is, however, reviewable by the trial judge. Counsel for the defence can initiate a review when an issue arises with respect to the exercise of the Crown's discretion. On a review the Crown must justify its refusal to disclose. Inasmuch as disclosure of all relevant information is the general rule, the Crown must bring itself within an exception to that rule.

22 The trial judge on a review should be guided by the general principle that information ought not to be withheld if there is a reasonable possibility that the withholding of information will impair the right of the accused to make full answer and defence, unless the non-disclosure is justified by the law of privilege. The trial judge might also, in certain circumstances, conclude that the recognition of an existing privilege does not constitute a reasonable limit on the constitutional right to make full answer and defence and thus require disclosure in spite of the law of privilege. The trial judge may also review the decision of the Crown to withhold or delay production of information by reason of concern for the security or safety of witnesses or persons who have supplied information to the investigation. In such circumstances, while much leeway must be accorded to the exercise of the discretion of the counsel for the Crown with respect to the manner and timing of the disclosure, the absolute withholding of information which is relevant to the defence can only be justified on the basis of the existence of a legal privilege which excludes the information from disclosure.

23 The trial judge may also review the Crown's exercise of discretion as to relevance and interference with the investigation to ensure that the right to make full answer and defence is not violated. I am confident that disputes over disclosure will arise infrequently when it is made clear that counsel for the Crown is under a general duty to disclose *all* relevant information. The tradition of Crown counsel in this country in carrying out their role as "ministers of justice" and not as adversaries has generally been very high. Given this fact, and the obligation on defence counsel as officers of the court to act responsibly, these matters will usually be resolved without

the intervention of the trial judge. When they do arise, the trial judge must resolve them. This may require not only submissions but the inspection of statements and other documents and indeed, in some cases, viva voce evidence. A voir dire will frequently be the appropriate procedure in which to deal with these matters.

24 Counsel for the accused must bring to the attention of the trial judge at the earliest opportunity any failure of the Crown to comply with its duty to disclose of which counsel becomes aware. Observance of this rule will enable the trial judge to remedy any prejudice to the accused if possible and thus avoid a new trial: see *R. v. Caccamo*, [1976] 1 S.C.R. 786, 29 C.R.N.S. 78, 4 N.R. 133, 21 C.C.C. (2d) 257, 54 D.L.R. (3d) 685. Failure to do so by counsel for the defence will be an important factor in determining on appeal whether a new trial should be ordered.

25 These are the general principles that govern the duty of the Crown to make disclosure to the defence. There are many details with respect to their application that remain to be worked out in the context of concrete situations. It would be neither possible nor appropriate to attempt to lay down precise rules here. Although the basic principles of disclosure will apply across the country, the details may vary from province to province and even within a province by reason of special local conditions and practices. It would, therefore, be useful if the under-utilized power conferred by s. 482 of the *Criminal Code*, R.S.C. 1985, c. C-46, which empowers superior courts and courts of criminal jurisdiction to enact rules were employed to provide further details with respect to the procedural aspects of disclosure.

26 The general principles referred to herein arise in the context of indictable offences. While it may be argued that the duty of disclosure extends to all offences, many of the factors which I have canvassed may not apply at all or may apply with less impact in summary conviction offences. Moreover, the content of the right to make full answer and defence entrenched in s. 7 of the *Charter* may be of a more limited nature. A decision as to the extent to which the general principles of disclosure extend to summary conviction offences should be left to a case in which the issue arises in such proceedings. In view of the number and variety of statutes which create such offences, consideration would have to be given as to where to draw the line. Pending a decision on that issue, the voluntary disclosure which has been taking place through the co-operation of Crown counsel will no doubt continue. Continuation and extension of this practice may eliminate the necessity for a decision on the issue by this court.

27 There are, however, two additional matters which require further elaboration of the general principles of disclosure outlined above. They are: (1) the timing of disclosure, and (2) what should be disclosed. Some detail with respect to these issues is essential if the duty to disclose is to be meaningful. Moreover, with respect to the second matter, resolution of the dispute over disclosure in this case requires a closer examination of the issue.

28 With respect to timing, I agree with the recommendation of the Law Reform Commission of Canada in both of its reports that initial disclosure should occur before the accused is called upon to elect the mode of trial or to plead. These are crucial steps which the accused must take which affect his or her rights in a fundamental way. It will be of great assistance to the accused to know what are the strengths and weaknesses of the Crown's case before committing on these issues. As I have pointed out above, the system will also profit from early disclosure as it will foster the resolution of many charges without trial, through increased numbers of withdrawals and pleas of guilty. The obligation to disclose will be triggered by a request by or on behalf of the accused. Such a request may be made at any time after the charge. Provided the request for disclosure has been timely, it should be complied with so as to enable the accused sufficient time before election or plea to consider the information. In the rare cases in which the accused is unrepresented, Crown counsel should advise the accused of the right to disclosure and a plea should not be taken unless the trial judge is satisfied that this has been done. At this stage, the Crown's brief will often not be complete and disclosure will be limited by this fact. Nevertheless, the obligation to disclose is a continuing one and disclosure must be completed when additional information is received.

29 With respect to what should be disclosed, the general principle to which I have referred is that all relevant information must be disclosed subject to the reviewable discretion of the Crown. The material must include not only that which the Crown intends to introduce into evidence but also that which it does not. No distinction should be made between inculpatory and exculpatory evidence. The attempt to make this distinction in connection with the confession rule proved to be unworkable and was eventually discarded by this court: see *R. v. Piché*, [1971] S.C.R. 23 at 36, 74 W.W.R. 674, 12 C.R.N.S. 222, 11 D.L.R. (3d) 700, [1970] 4 C.C.C. 27; *R. v. Rothman*, [1981] 1 S.C.R. 640 at 645, 20 C.R. (3d) 97, 59 C.C.C. (2d) 30, 121 D.L.R. (3d) 578, 35 N.R. 485. To reintroduce the distinction here would lead to interminable controversy at trial that should be avoided. The Crown must, therefore, disclose relevant material whether it is inculpatory or exculpatory.

30 A special problem arises in respect to witness statements and is specifically raised in this case. There is virtually no disagreement that statements in the possession of the Crown obtained from witnesses it proposes to call should be produced. In some cases the statement will simply be recorded in notes taken by an investigator, usually a police officer. The notes or copies should be produced. If notes do not exist then a "will say" statement, summarizing the anticipated evidence of the witness, should be produced based on the information in the Crown's possession. A more difficult issue is posed with respect to witnesses and other persons whom the Crown does not propose to call. In its 1974 working paper, the Law Reform Commission of Canada recommended disclosure of not only the names, addresses and occupations of all "persons who have provided information to investigation or prosecution authorities" (p. 41), but the statements obtained or, if these did not exist, "a summary of the information provided by those persons not intended to be called at trial, along with a statement of the manner in which the information in each summary has

been obtained ..." (p. 41). In its 1984 report, the commission seemed to have changed its mind. It stated (at pp. 27-28):

> With respect to potential witnesses we do not recommend, on a mandatory basis, the type of thorough disclosure that we recommend with respect to proposed witnesses. Complete disclosure would entail not only the identification of such persons, but the disclosure of any statement they made and in some cases their criminal records. In our view a recommendation to this effect would be excessive and disproportionate to the needs of the defence. In many instances these people are of no use, or of marginal use, to the case for either side. Their statements are not evidence, although they may be effectively used by the prosecution for purposes of impeachment in cross-examination in the event the witness is called by the accused. Prosecutors are understandably reluctant to disclose these statements because to do so would imperil their principal utility. It is our view that the interests of the defence are adequately served by the mandatory disclosure of the identity of such persons, although we would not wish our comments to discourage prosecutors from disclosing statements and other relevant information on a voluntary basis.

31 The Marshall Commission Report recommended disclosure of "any statement made by a person whom the prosecutor proposes to call as a witness or anyone who may be called as a witness." Although not entirely clear, this recommendation appears to extend to anyone who has relevant information and who is either compellable or prepared to testify whether proposed to be called by the Crown or not.

32 This court, in *R. v. C. (M.H.)*, supra, dealt with the failure to disclose either the identity or statement of a person who provided relevant information to the police but who was not called as a witness. McLachlin J., speaking for the court, indicated that failure to disclose in such cases could impair the fairness of the trial.

33 I am of the opinion that, subject to the discretion to which I have referred above, all statements obtained from persons who have provided relevant information to the authorities should be produced notwithstanding that they are not proposed as Crown witnesses. Where statements are not in existence, other information such as notes should be produced, and, if there are no notes, then in addition to the name, address and occupation of the witness, all information in the possession of the prosecution relating to any relevant evidence that the person could give should be supplied. I do not find the comments of the commission in its 1984 report persuasive. If the information is of no use then presumably it is irrelevant and will be excluded in the exercise of the discretion of the Crown. If the information is of some use then it is relevant and the determination as to whether it is sufficiently useful to put into evidence should be made by the defence and not the prosecutor. Moreover, I do not understand the commission's statement that "their statements are not evidence." That is true of all witness statements. They themselves are not evidence but are produced not because they will be put in evidence in that form but will enable the evidence to

be called viva voce. That prosecutors are reluctant to disclose statements because use of them in cross-examination is thereby rendered less effective is understandable. That is an objection to all forms of discovery and disclosure. Tactical advantage must be sacrificed in the interests of fairness and the ascertainment of the true facts of the case.

III. Application to this Case

34 No request was made in this case for disclosure prior to pleading or electing the mode of trial and this issue does not, therefore, arise. A request for disclosure was made during the trial for the disclosure of two statements taken subsequent to the preliminary hearing. An application for disclosure was dismissed by the trial judge on the ground that there was no obligation on the Crown to disclose the statements.

35 Applying the above principles, I conclude that the following errors were committed:

36 (1) Counsel for the Crown misconceived his obligation to disclose the statements;

37 (2) The explanation for refusal that the witness was not worthy of credit was completely inadequate to support the exercise of this discretion on the ground of irrelevance. Whether the witness is credible is for the trial judge to determine after hearing the evidence;

38 (3) The trial judge ought to have examined the statements. The suggestion that this would have prejudiced the trial judge is without merit. Trial judges are frequently apprised of evidence which is ruled inadmissible. One example is a confession that fails to meet the test of voluntariness. No one would suggest that knowledge of such evidence prejudices the trial judge. We operate on the principle that a judge trained to screen out inadmissible evidence will disabuse himself or herself of such evidence;

39 (4) The trial judge erred in his statement of the duty to disclose on the part of the Crown.

40 It was submitted that the appellant was not deprived of the opportunity to make full answer and defence because he could have:

41 (a) interviewed the witness and obtained his own statement;

42 (b) called the witness, and if her evidence proved adverse, cross-examined on the basis of the preliminary hearing transcript.

43 With respect to (a), counsel for the appellant pointed out that the witness refused to be interviewed. In any event, even if such an interview took place, what the witness said on two prior occasions could be very material to the defence.

44 As for (b), counsel for the defence is entitled to know whether the witness he or she is calling will give evidence that will assist the defence or whether the witness will be adverse and necessitate an application to cross-examine on the basis of a prior inconsistent statement. The latter usually creates an undesirable atmosphere at the trial and the most that can be achieved is to impeach or destroy the credibility of the witness: see *McInroy v. R.*, [1979] 1 S.C.R. 588, [1978] 6 W.W.R. 585, 5 C.R. (3d) 125, 89 D.L.R. (3d) 609, 42 C.C.C. (2d) 481, 23 N.R. 589, and *R. v. Mannion*, [1986] 2 S.C.R. 272 at 277-78, [1986] 6 W.W.R. 525, 47 Alta. L.R. (2d) 177, 53 C.R. (3d) 193, 69 N.R. 189, 28 C.C.C. (3d) 544, 31 D.L.R. (4th) 712, 75 A.R. 16, 25 C.R.R. 182. Most counsel faced with this prospect would likely opt not to call the witness, a matter which bears on the right to make full answer and defence.

45 What are the legal consequences flowing from the failure to disclose? In my opinion, when a court of appeal is called upon to review a failure to disclose, it must consider whether such failure impaired the right to make full answer and defence. This in turn depends on the nature of the information withheld and whether it might have affected the outcome. As McLachlin J. put it in *R. v. C. (M.H.)*, supra (at p. 76):

> Had counsel for the appellant been aware of this statement, he might well have decided to use it in support of the defence that the evidence of the complainant was a fabrication. In my view, that evidence could conceivably have affected the jury's conclusions on the only real issue, the respective credibility of the complainant and the appellant.

46 In this case, we are told that the witness gave evidence at the preliminary hearing favourable to the defence. The subsequent statements were not produced and therefore we have no indication from the trial judge as to whether they were favourable or unfavourable. Examination of the statements, which were tendered as fresh evidence in this court, should be carried out at trial so that counsel for the defence, in the context of the issues in the case and the other evidence, can explain what use might be made of them by the defence. In the circumstances, we must assume that non-production of the statements was an important factor in the decision not to call the witness. The absence of this evidence might very well have affected the outcome.

47 Accordingly, I would allow the appeal and direct a new trial at which the statements should be produced.

Appeal allowed; new trial ordered with statements to be produced.

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1994 CarswellOnt 102
Supreme Court of Canada

R. v. Swietlinski

Please see in particular paras. 14 and 24

1994 CarswellOnt 102, 1994 CarswellOnt 1166, [1994] 3 S.C.R. 481, [1994] S.C.J. No. 81, 119 D.L.R. (4th) 309, 172 N.R. 321, 24 C.R.R. (2d) 71, 24 W.C.B. (2d) 589, 33 C.R. (4th) 295, 75 O.A.C. 161, 92 C.C.C. (3d) 449, J.E. 94-1584, EYB 1994-67666

ROMAN SWIETLINSKI v. ATTORNEY GENERAL FOR ONTARIO

Lamer C.J.C., La Forest, L'Heureux-Dubé, Sopinka, Gonthier, Cory, McLachlin, Iacobucci and Major JJ.

Heard: May 27, 1994
Judgment: September 30, 1994
Docket: Doc. 23100

Counsel: *Mark J. Sandler* and *Sandra G. Leonard*, for appellant.
Gary T. Trotter, for respondent.

Subject: Criminal
Headnote
Criminal Law --- Sentencing — Sentencing hearing — Victim impact statement
Criminal Law --- Prisons and prisoners — Release — Parole — Eligibility
Sentencing — Procedure — Murder — First degree murder — Judicial review of 25-year period of parole ineligibility pursuant to s. 745 — New hearing ordered because of prejudicial and inflammatory remarks and questions by Crown counsel — Remarks based on suggestions that process unfair or unduly favourable to prisoner, that Parliament ought not to have provided for leniency, that replacement of death penalty with 25 years was sufficient bargain — References to isolated cases of murder by released persons improper.
Sentencing — Procedure — Murder — First degree murder — Judicial review of 25-year period of parole ineligibility pursuant to s. 745 — Admissibility of evidence of impact on victims within discretion of presiding judge — Judge should be cautious before admitting — Focusing on victims 15 years after event may distract jury from matters properly encompassed by s. 745.
Parole — Eligibility for parole — First degree murder — Judicial review of 25-year period of parole ineligibility pursuant to s. 745 — New hearing ordered because of prejudicial and inflammatory remarks and questions by Crown counsel — Admissibility of victim impact testimony within discretion of presiding judge.
Trial — Address of counsel — Judicial review of 25-year period of parole ineligibility pursuant to s. 745 — Inflammatory remarks of Crown counsel — New hearing ordered.

After serving 15 years of a life sentence for first degree murder, the accused applied pursuant to s. 745 of the *Criminal Code* to have the applicable period of parole ineligibility reduced from 25 years. He had been convicted of the brutal stabbing of a woman he met in a bar. Although he experienced difficulties in the first two years of his sentence, he later became a "model prisoner", participating in work programs, and working with various charitable and religious groups. He had been on several escorted temporary absence passes. At the preliminary hearing held to canvass evidentiary issues, the presiding judge ruled that statements from the victim's family would not be admissible. A jury was empanelled and the hearing was conducted. The jury refused to reduce the period of parole ineligibility and set the date for the next review at November6, 2001. This effectively prohibited the accused from bringing another s. 745 application. The accused was granted leave to appeal on various grounds relating to the judge's charge, and the prejudicial nature of questions asked by Crown counsel and his address to the jury.

Held:

The appeal was allowed and a new hearing was ordered.

Per Lamer C.J.C. (Gonthier and Cory JJ. concurring)

Given the discretionary nature of the jury's decision, and the absence of any right of appeal to the Court of Appeal, the Supreme Court's role is to determine whether the appellant was given a fair hearing at trial. The purpose behind the procedure for a jury review of the period of parole ineligibility after 15 years is to re-examine the initial decision in light of new information or factors. At the hearing, the jury's attention should be drawn to any changes which might justify imposing a less harsh penalty. The jury determines the minimum length of the sentence which the prisoner must serve. The statutory framework lists various factors which must be taken into consideration. Accordingly, the concepts of burden of proof, proof on a balance of probabilities or proof beyond a reasonable doubt have limited value.

The remarks and questions of Crown counsel compromised the fairness of the hearing. Counsel suggested that the process was unfair because the victim had no opportunity to reduce her suffering and that 25 years' imprisonment was a bargain compared with the death penalty. In questioning certain witnesses, he drew attention to the fact that the victim could not get a second chance and that no assistance was available to the victim's family while the penitentiary system offered programs to the accused. Counsel also discredited the parole process and suggested that the institution where the accused had been confined for the previous two years was too comfortable to be called a prison. The combined effect of these remarks was to suggest that the hearing was unduly favourable to the prisoner and represented a subversion of Parliament's intent to impose a 25-year term for first degree murder. The possible reduction of parole ineligibility after 15 years is a choice which Parliament made and it could not be called into question by Crown counsel, suggesting that it was abnormal, excessively indulgent or contrary to Parliament's intent. Moreover, it was improper to refer to isolated cases where prisoners committed murder after parole. The jury should have considered the accused and not other cases. The accused should not be punished for any weakness in the system. The jury cannot be faced with in terrorem arguments about the problems of violence in society and urged to solve those problems through their response to the case before them. The jury should be free from undue influence by the media; it was wrong for counsel to refer to media accounts of violence. The judge's failure to reprimand counsel or tell the jury that the impugned remarks should be ignored aggravated the lack of fairness. Although the absence of an objection by the accused's counsel was a factor to consider, the hearing was unfair and the court must intervene. With respect to the factors referred to in s. 745, the judge's charge was excessively compartmentalized. The judge's charge on the accused's character should not have been limited to matters prior to, or contemporaneous with, the murder. In light of the purpose of a s. 745 hearing, present character and how his situation has evolved should have been mentioned. Also, when the judge expressed an opinion on the accused's conduct while serving his sentence, but not on the other factors, the jury may have been led to believe that each criterion was separate. The jury may have thought that to find in the prisoner's favour, they had to arrive at a favourable decision on each of the three criteria.

The judge's lengthy review of the psychiatric evidence was unnecessary, given that the evidence was fresh and the jury had all the reports. The judge emphasized the psychiatrist who was unfavourable to the accused. When a judge considers it necessary to review such evidence, it is wrong to pay greater attention to evidence which favours one party over the other.

The errors with respect to compartmentalizing the burden of proof and the review of the psychiatric evidence were not sufficiently serious to justify a rehearing by themselves.

The judge erred in refusing to admit statements by members of the victim's family. Since the purpose of a s. 745 hearing is to determine the length of sentence, similar evidentiary rules should apply to those which apply at sentencing hearings. Victims' testimony is admissible at a hearing on sentence. Since the nature of the offence is one of the relevant criteria, victims' testimony should be relevant and admissible, even if by means of a written statement. However, it cannot be used to introduce prejudicial or inflammatory remarks.

Per Sopinka J. (concurring)

The reasons of Lamer C.J.C. were agreed with except on the issue of the victim impact statement. The presiding judge should have the right to consider whether statements from victims should be admitted. At the new hearing the matter should be determined afresh.

Per McLachlin J. (concurring)

The reasons of Lamer C.J.C. were agreed with except with respect to the issue of victim impact statements. At the new hearing, the presiding judge should consider this matter afresh.

Per Major J. (dissenting) (La Forest, L'Heureux-Dubé and IacobucciJJ. concurring)

In a s. 745 hearing, 12 jurors are empowered to reduce the applicant's parole ineligibility if the applicant shows on a balance of probabilities that he deserves to be treated with clemency or leniency. Since a successful applicant is only entitled to apply for parole, it is wrong to think that the s. 745 jury determines the length of the sentence. The jury must consider the applicant's character, the applicant's conduct while serving the sentence, the nature of the offence, and such other matters which the judge deems relevant. Parliament has not seen fit to incorporate traditional sentencing principles in s. 745 and it would be wrong to read such principles into the section. Because the jury has been given broad discretion, there is little scope to interfere with the jury's determination on appeal. The Supreme Court's role is to determine whether the applicant had a fair hearing.

Reference to the relative comfort of Beaver Creek Institution was relevant to the assessment of whether the accused's conduct varied with his institutional setting, similar to questions asked by his counsel to show the violent setting at Millhaven and Collins Bay. The questions about prisoners in half-way houses who have committed murder was relevant to the jury's assessment of the accuracy of the evidence tendered by members of the correctional community and of the Parole Board's decision-making processes. The jury should be entitled to consider the likelihood of an error by the board. Therefore, it could not be said that it was the judge's duty to exclude these comments or questions, nor could it be said that his failure to do so had any effect on the fairness of the hearing. The references to the death penalty were irrelevant, but any prejudicial effect was eradicated by the judge's charge. Other comments about the plight of the victim's family and the victim receiving no second chance were of minimal relevance or probative value. However, one must consider the whole of the proceedings to determine whether the hearing was fair, not individual aspects of evidence or incidents. There was little risk that the statements relating to the victim, her family or the secrecy of the parole process would have any significant effect on the jury. No objection was raised by counsel at the hearing, which suggested that the remarks were not considered prejudicial. The jurors were made aware of their responsibility and understood the nature of what they were doing.

The presiding judge erred in ruling that victim impact statements are at all times inadmissible at s. 745 hearings. It was permissible to receive victim impact statements under the discretion to hear evidence of "such other matters as the judge deems relevant in the circumstances". Since these statements would not be relevant with respect to the statutory criteria in s. 745(2), a judge should be cautious in admitting such statements. To focus the jury on the victim, some 15 years after the crime was committed, is to invite the jury to assess to appropriateness of the applicant's sentence in terms of its retribution, denunciation and punishment, which is not the proper focus of a s. 745 hearing. A judge presiding at a s. 745 hearing has the discretion to determine when a victim impact statement is relevant to the jury's deliberations; in this case, the exclusion was an appropriate exercise of that discretion. The appeal should be dismissed.

Table of Authorities

Cases considered:

Per Lamer C.J.C. (Gonthier and Cory JJ. concurring)

Boucher v. R., [1955] S.C.R. 16, 20 C.R. 1, 110 C.C.C. 263 — *considered*

R. v. Finta, [1994] 1 S.C.R. 701, 28 C.R. (4th) 265, 165 N.R. 1, 20 C.R.R. (2d) 1, 70 O.A.C. 241, 88 C.C.C. (3d) 417, 112 D.L.R. (4th) 513 — *referred to*

R. v. Gardiner, [1982] 2 S.C.R. 368, 30 C.R. (3d) 289, 140 D.L.R. (3d) 612, 68 C.C.C. (2d) 477, 43 N.R. 361 — *considered*

R. v. L. (D.O.), [1993] 4 S.C.R. 419, 25 C.R. (4th) 285, 161 N.R. 1, 85 C.C.C. (3d) 289, 88 Man. R. (2d) 241, 51 W.A.C. 241, 18 C.R.R. (2d) 257 — *referred to*

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R. v. M. (S.H.), [1989] 2 S.C.R. 446, 71 C.R. (3d) 257, 69 Alta. L.R. (2d) 209, [1989] 6 W.W.R. 385, 100 A.R. 321, 50 C.C.C. (3d) 503, 100 N.R. 1 — *referred to*

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R. c. Potvin, [1989] 1 S.C.R. 525, 68 C.R. (3d) 193, 93 N.R. 42, 47 C.C.C. (3d) 289, 21 Q.A.C.258, 42 C.R. R. 44 — *referred to*

R. v. Swietlinski (1978), 5 C.R. (3d) 324, 22 O. R. (2d) 604, 44 C.C.C. (2d) 267, 94 D.L.R. (3d) 218 (C. A.), affirmed [1980] 2 S.C.R. 956, 18 C.R. (3d) 231, 34 N.R. 569, 55 C.C.C. (2d) 481, 117 D.L.R. (3d) 285 — *referred to*

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R. v. Vaillancourt (1989), 71 C.R. (3d) 43, 33 O.A.C. 234, 49 C.C.C. (3d) 544, 43 C.R. R. 60 [leave to appeal to S.C.C. refused (1990), 72 C.R. (3d) xxvi (note), 37 O.A.C. 397 (note)] — *referred to*

R. v. Vaillancourt (1990), 9 C.R.R. (2d) 384, 76 C.C.C. (3d) 384 (S.C.C.) — *referred to*

R. v. Vallières (1969), 9 C.R.N.S. 24 (C.A. Qué.) — *referred to*

Per Major J. (dissenting) (La Forest, L'Heureux-Dubé and Iacobucci JJ. concurring)

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Statutes considered:

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s. 11

Corrections and Conditional Release Act, S. C. 1992, c. 20.

Criminal Code, R.S.C. 1985, c. C-46 —

s. 735(1. 1) [en. R.S.C. 1985, c. 23 (4th Supp.), s. 7(1)]

s. 735(1. 2) [en. R.S.C. 1985, c. 23 (4th Supp.), s. 7(1)]

s. 735(1. 3) [en. R.S.C. 1985, c. 23 (4th Supp.), s. 7(1)]

s. 735(1. 4) [en. R.S.C. 1985, c. 23 (4th Supp.), s. 7(1)]

s. 744

s. 745

s. 745(2)

s. 745(4)

Supreme Court Act, R.S.C. 1985, c. S-26 —

s. 40

Regulations considered:

Criminal Code, R.S.C. 1985, c. C-46 —

Ontario Rules of Practice Respecting Reduction in the Number of Years of Imprisonment without Eligibility for Parole,

SOR/88-582

s. 10

Appeal from judgment reported at (1992), 13 C.R. (4th) 116, 73 C.C.C. (3d) 376 (Ont. Gen. Div.) dismissing application for judicial review of parole eligibility.

Lamer C.J.C. **(*Gonthier* and *Cory JJ.* concurring):**

1 This case provides an opportunity for this court to consider for the first time the interpretation of s. 745 of the *Criminal Code*, R.S.C. 1985, c. C-46, which authorizes a reduction of the period during which persons convicted of murder are ineligible for parole.

I. Facts

2 The appellant Roman Swietlinski was convicted of first degree murder. His conviction was upheld by the Ontario Court of Appeal [*R. v. Swietlinski*] (1978), 44 C.C.C. (2d) 267 [5 C.R. (3d)

324], and by this court, [1980] 2 S.C.R. 956. Since the earlier judgment of this court sets out the facts in detail, I will only give a brief description of the murder. On the night of September 18 to 19, 1976 the appellant met the victim, Mary Frances McKenna, in a bar in Toronto. Apparently the pair left the bar about midnight on their way to the victim's apartment. The attack which followed was one of unspeakable brutality. The appellant stabbed the victim 132 times using five different knives. The force used was such that some of the knives were broken at the time the police located them.

3 In the course of the first two years of his sentence the appellant committed various disciplinary offences connected with smuggling and an attempted escape. Apparently when he was placed in punitive segregation for the latter offence he underwent a complete change of heart and became a "model prisoner". In 1983 he was transferred to a medium security institution and then in 1990 to a minimum security institution. During his confinement in these various penal institutions the appellant became involved in various charitable or religious groups. He participated in work programs in the institutions. Since 1988 he has received several permits for escorted temporary absences. At various times he took part in Alcoholics Anonymous activities. He also participated in some training sessions and requested the assistance of a psychologist.

II. Applicable Legislation

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

4

745. (1) Where a person has served at least fifteen years of his sentence

(*a*) in the case of a person who has been convicted of high treason or first degree murder, or

(*b*) in the case of a person convicted of second degree murder who has been sentenced to imprisonment for life without eligibility for parole until he has served more than fifteen years of his sentence,

he may apply to the appropriate Chief Justice in the province in which the conviction took place for a reduction in his number of years of imprisonment without eligibility for parole.

(2) On receipt of an application under subsection (1), the appropriate Chief Justice shall designate a judge of the superior court of criminal jurisdiction to empanel a jury to hear the application and determine whether the applicant's number of years of imprisonment without eligibility for parole ought to be reduced having regard to the character of the applicant, his conduct while serving his sentence, the nature of the offence for which he was convicted and such other matters as the judge deems relevant in the circumstances and the determination shall be made by not less than two-thirds of the jury.

(3) Where the jury hearing an application under subsection (1) determines that the applicant's number of years of imprisonment without eligibility for parole ought not to be reduced, the jury shall set another time at or after which an application may again be made by the applicant to the appropriate Chief Justice for a reduction in his number of years of imprisonment without eligibility for parole.

(4) Where the jury hearing an application under subsection (1) determines that the applicant's number of years of imprisonment without eligibility for parole ought to be reduced, the jury may, by order,

(*a*) substitute a lesser number of years of imprisonment without eligibility for parole than that then applicable; or

(*b*) terminate the ineligibility for parole.

III. Judgment of Ontario Court of Justice (General Division) (1992), 73 C.C.C. (3d) 376 [13 C.R. (4th) 116]

5 O'Driscoll J. of the Ontario Court (General Division) was designated for empanelling a jury and hearing the case.

6 At the preliminary hearing provided for in s. 10 of the *Ontario Rules of Practice Respecting Reduction in the Number of Years of Imprisonment without Eligibility for Parole*, SOR/88-582, in effect at that time, O'Driscoll J. held that statements by members of the victim's family were not admissible as evidence. He based his decision on *R. v. Vaillancourt* (1989), 49 C.C.C. (3d) 544 [71 C.R. (3d) 43], in which the Ontario Court of Appeal held that a s. 745 hearing did not form part of the sentencing process. Since s. 735(1. 1) of the Code made such statements admissible in order only to facilitate the determination of the sentence, they should be excluded from a s. 745 hearing. Further, O'Driscoll J. considered that the statements disclosed no information relevant to the assessment of the factors listed in s. 745(2).

7 The hearing itself was subsequently held and the jury refused to reduce the period of the appellant's ineligibility for parole. Further, it set November 6, 2001 as the date on which the appellant could again make a similar application. Since that date corresponds to the time when the appellant will have served 25 years of his sentence, the jury's decision amounts to prohibiting the appellant from filing another application under s. 745.

8 The appellant sought and obtained leave to appeal directly to this court. Section 40 of the *Supreme Court Act*, R.S.C. 1985, c. S-26, authorizes a direct appeal since the Code makes no provision for any other avenue of appeal: *R. v. Vaillancourt*, [1990] 1 S.C.R. xii, 76 C.C.C. (3d) 384.

IV. Issues

9 The appellant raised the following grounds of appeal, most of which relate to the judge's charge to the jury:

1. the judge should not have limited consideration of the appellant's character to his character at the time of the murder: he should also have mentioned the appellant's present character;

2. the judge should not have referred to the three factors mentioned in s. 745(2) as three independent factors, each to be proved on a balance of probabilities;

3. the judge should have reread all of the agreed statement of facts: he should not have omitted the second part, relating to "extenuating circumstances";

4. the judge did not make a fair summation of the psychiatric evidence;

5. in questioning certain witnesses and in his address to the jury, counsel for the Crown introduced inflammatory and highly prejudicial matters.

10 I feel that the fifth ground provides a sufficient basis for allowing this appeal. Furthermore, the first, second and fourth grounds raise legitimate concerns which only aggravate the inequity resulting from the Crown counsel's inflammatory remarks.

11 Additionally, since I believe that a new hearing should be ordered, I will deal with the question of the admissibility of statements by the victim's family.

V. Analysis

12

A. General Observations on Section 745

13 Section 745 of the Code was adopted in 1976 in connection with the abolition of the death penalty. The compromise arrived at between the supporters and opponents of the death penalty was its replacement by long-term imprisonment without parole. Accordingly, in the case of first degree murder the penalty is life imprisonment with no eligibility for parole for 25 years. In the case of second degree murder, this time period is 10 years, but it may be extended to 25 years by the trial judge on the jury's recommendation. In both cases, however, Parliament provided that after 15 years a jury could be empanelled to reassess the period of ineligibility.

14 Section 745 put in place a procedure that is original in several respects. However, we need not consider all its aspects in order to deal with the case at bar. What is important is to understand that the procedure is one for reassessing long-term imprisonment imposed by law (in

the case of first degree murder) or by a judge (in the case of second degree murder). The purpose of a reassessment procedure, especially when it takes place 15 years after the initial decision, is necessarily to re-examine a decision in light of new information or factors which could not have been known initially. It follows that the primary purpose of a s. 745 hearing is to *call attention to changes* which have occurred in the applicant's situation and which might justify imposing a less harsh penalty upon the applicant. Accordingly, the jury's decision is not essentially different from the ordinary decision regarding length of a sentence. It is similar to that taken by a judge pursuant to s. 744 of the Code as to the period of ineligibility in cases of second degree murder.

15 It should also be noted, in the context of an appeal to this court, that s. 745 gives the jury a broad discretionary power. This is quite different from a trial, at which the jury must choose between two options, guilt or innocence, based on very specific rules of law. Moreover, the discretionary nature of the jury's decision is made quite clear by the fact that Parliament did not see fit to grant any right of appeal to the Court of Appeal, although as I mentioned earlier that does not prevent an appeal to this court with leave. Consequently, there is no need to analyze the judge's charge to the jury in the detail that would be appropriate in the case of a trial. This court's function is essentially to determine whether the appellant was given a fair hearing at trial.

16 The discretionary nature of the decision also compels the jury to adopt a different analytical approach from that used in a trial. At a trial the jury must decide whether it has been proven beyond all reasonable doubt that the accused committed the crime with which he or she is charged. In such a proceeding the offence is generally defined by a number of elements which must all be proven for the accused to be convicted. Each element of the offence is thus a necessary condition for a conviction. At a s. 745 hearing, on the other hand, the jury does not determine whether the applicant is guilty: another jury (or, in some cases, a judge) has already performed that task. Its duty rather is to make a discretionary decision as to the minimum length of the sentence that the applicant must serve. The conceptof an element of an offence cannot be transposed onto a discretionary decision. When a person makes such a decision he or she does not apply rigid logic, requiring for example that if conditions A, B and C are met, then decision X must be the result. When legislation lists various factors that a decision-maker must take into consideration a finding reached upon one or all of the factors does not necessarily mandate a conclusion leading to a specific decision. They are instead factors some of which may work in favour of the applicant and some against him, and which must be assessed and weighed as a whole in arriving at a conclusion. This is quite different from a trial where very strong evidence of one aspect of an offence cannot offset the weakness of evidence of another aspect.

17 Accordingly, the concepts of burden of proof, proof on a balance of probabilities, or proof beyond a reasonable doubt are of very limited value in a hearing pursuant to s. 745, where the decision lies exclusively in the discretion of the jury. The jury must instead make what it, in its discretion, deems to be the best decision on the evidence. (On this point see also *R. v. M. (S. H.)*, [1989] 2 S.C.R. 446, at p. 464.)

B. Grounds of Appeal

1. Inappropriate Language by Counsel for the Crown

18 The appellant objected to certain irrelevant and prejudicial languageused by counsel for the Crown. Before considering the disputed remarks in detail, it should be recalled that the function of counsel for the Crown in a s. 745 hearing is no different from the function in a criminal trial. Taschereau J. described his function as follows in *Boucher v. R.*, [1955] S.C.R. 16, at p. 21:

> [TRANSLATION]
>
> The position held by counsel for the Crown is not that of a lawyer in civil litigation. His functions are quasi-judicial. His duty is not so much to obtain a conviction as to assist the judge and the jury in ensuring that the fullest possible justice is done. His conduct before the Court must always be characterized by moderation and impartiality. He will have properly performed his duty and will be beyond all reproach if, eschewing any appeal to passion, and employing a dignified manner suited to his function, he presents the evidence to the jury without going beyond what it discloses.

The first category of unacceptable language had the effect of discrediting the process of reviewing ineligibility established by s. 745. Counsel for the Crown sought, in some measure, to present the procedure as fundamentally inequitable, first, because the victim had no opportunity, as the applicant did, to have her suffering reduced, and second, because the 25 years ineligibility period was a bargain comparedwith the death penalty imposed prior to 1976 and further reducing this period of time would be an additional concession to the accused.

19 For example, counsel began his opening statement with the following passage:

> Ladies and gentlemen of the jury, in 1976 this country, our government abolished capital punishment. Mr. Swietlinski was convicted of the worst crime known to our criminal justice system. You will hear shortly about the facts of this offence. In 1976, the same year, Mary Frances McKenna, someone that you won't hear very much about in this proceeding — this is an application brought by Mr. Swietlinski — but you won't hear much about a person by the name of Mary Frances McKenna, who was 37 years of age at the time.

He went on to add:

> ... please don't forget the victim in this case, Mary Frances McKenna. She doesn't have a chance to come before a group of people to ask for a second chance.

He concluded his opening statement by reminding the jurors that

> ... Mr. Swietlinski, a few years earlier, would have been sentenced to death for this offence ...

In his final submission to the jury he returned to the same themes:

> Mary Frances McKenna doesn't get a chance to come before a jury and ask to have her parole eligibility reduced. Mary Frances McKenna is gone.
>
> . . . . .
>
> If we wanted revenge, we would have capital punishment. As I say, we don't. We have a compromise. It's a mandatory sentence, life with no eligibility for parole for 25 years, and that's the sentence that our society imposes for the taking of a human life in the manner that Mr. Swietlinski took it. To do otherwise, as Mr. Swietlinski suggested to you about the rules at Millhaven, would be anarchy.

20 Counsel also sought, in questioning certain witnesses, to draw attention to the fact that the victim could not obtain the second chance the appellant was seeking and to the fact that no assistance programs were available to the victim's family whereas the penitentiary system offered the appellant a vast range of services.

21 Counsel further sought to discredit the parole process in the following language:

> Normally, issues of parole, parole hearings, are held by, basically, a faceless group of people. They're held in secret, in private, and really all that the Parole Board hears from is the applicant and perhaps his counsel and the kind of people that you're about to hear from, the various corrections people.

22 Finally, in questioning certain witnesses counsel insinuated that the Beaver Creek Institution, where the appellant had spent the last two years, was too comfortable to be called a prison and that in fact some visitors confused the institution with a neighbouring campground. In his final submission he suggested that the transfer to this institution was sufficient reward for the appellant's good conduct during his sentence.

23 The combined effect of these remarks was to imply that the s. 745 hearing was a proceeding unduly favourable to the applicant, even a subversion of Parliament's intent to impose a definite 25-year penalty on first degree murderers. The conclusion that emerged from these observations, and it was not a difficult one to draw, was that the jury should deal more severely with the appellant.

24 Nevertheless, s. 745 is as much a part of the Code as the provisions providing for no parole for 25 years in cases of first degree murder. The possible reduction of the ineligibility period after 15 years is a choice made by Parliament which the jury must accept. Clearly, the prosecution may not call this choice into question by suggesting to the jury that it is an abnormal procedure, excessively indulgent and contrary to what it argues was Parliament's intent. That amounts to

urging the jurors not to make a decision in accordance with the law if they feel that it is bad law. It is clearly unacceptable for a lawyer to make such an observation to the jury: *R. v. Morgentaler*, [1988] 1 S.C.R. 30, at pp. 76-79; *R. v. Finta*, [1994] 1 S.C.R. 701.

25 In the same way, counsel may not constantly repeat that imprisonment for 25 years is a substitute for the death penalty. That is an invitation to offset the alleged excessive clemency of Parliament by a severity not justified by the wording of s. 745. The jury does not have to decide whether the penalties imposed by Parliament are too severe or not severe enough. It must simply apply the Code. The Code no longer contains the death penalty: on the contrary, s. 745 gives the appellant the right to seek a reduction in his ineligibility period. No one can be permitted to undermine the fairness of the proceeding in which the appellant may obtain such a reduction by constant references to the death penalty.

26 Additionally, counsel for the Crown sought to draw the jury's attention to other cases of murderers who had used their parole to commit other murders. Thus, in questioning Antonio Jean, a psychologist employed by Correctional Service Canada, counsel put the following questions:

> Q. You also mentioned, during the course of your evidence this morning, you made mention of the Rygrock Inquest. That was an inquest in Ottawa?
>
> A. Yes, ma'am.
>
> Q. And that, in fact, was an inquest involving an inmate who had been released to a half-way house and had subsequently murdered an employee of that half-way house?
>
> A. Yes, ma'am.
>
> Q. Okay. And, presumably, out of that inquest, Corrections Canada had reasons to look at some of its procedures, correct, in terms of the releasing of people? I'm not asking the details, but obviously they would review the procedures.
>
> A. Very definitely.
>
> Q. Okay. And, in fact, after the inquest and after the review was done, another inmate was released to a half-way house here in Toronto, Melvin Stanton. You're aware of him, aren't you?
>
> A. Yes, ma'am.
>
> Q. Okay. And, in fact, what followed from that was the murder, within a few hours of his release, of Tema Conter, correct?
>
> A. Correct.
>
> Q. So it seems that Corrections Canada does make mistakes, fair enough?

> A. Your conclusion, ma'am.
>
> Q. Could you agree with me, given those two inquests?
>
> A. Do I have to?
>
> Q. I'm just asking you to answer the question.
>
> A. I suppose, like any other organization — I'm afraid to say what I have to say because it might be taken wrongly. Maybe the judicial system makes some mistakes too at times. It's human error.

Counsel broached the same subject in the examination of Allan Partington, a Correctional Service officer.

27 Similarly, in his opening statement he invited the jury to take into consideration cases of violence other than those of the appellant:

> We read the papers. We open the headlines today and we see concerns about violence in our society, and, in particular, we hear concerns about violence against women. I want you, when you listen to that evidence, to bear in mind that you are here representing the best interests of this community as it pertains not only to Mr. Swietlinski but the broader issues that an application, such as this, brings to bear.

In his final submission he added the following:

> Violence is, unfortunately, increasing in our community. Every time you turn on the news, read the headlines you hear either reports of or people worried about the issue of violence and, in particular, violence against women.
>
> A lot of times people come into contact or read in the paper and hear, read or see on T.V. something that shocks them, and the facts of this case no doubt shocked you. Well, they have concerns about things going on in our society, and they think to themselves, "Someone should do something about that," and always the someone is someone off in the distance. For the purpose of this case ... you are the they. Consider that when you retire to reach your determination.

28 It is completely improper to invite the jury to consider isolated cases in which prisoners committed murder after being paroled. Even though the rules applicable in the s. 745 hearing are not as strict as in a criminal trial, the fact remains that the jury must consider only the applicant's case. Although the temptation may sometimes be very strong, the jury must not try the cases of other inmates or determine whether the existing system of parole is doing its job. The appellant should not be punished for the weaknesses of the system.

29 Furthermore, the other observations I have just referred to may have suggested to the jury that its function was in some way to solve the problem of violence in society. It is true that deterrence is one of the functions of the penalty and that it is therefore legitimate for the jury to take this factor into account when hearing an application under s. 745. However, the approach taken by counsel for the Crown was unacceptable. The jury cannot simply be referred to headlines in newspapers, which generally concern themselves with the worst crimes. Such a course could produce a disproportionate reaction in the jury by making it believe it could solve the problem of crime at one stroke and by giving the appellant's case the odour of a general threat. Such a tactic smacks of the in terrorem arguments disapproved by the Quebec Court of Appeal in *R. v. Vallières* (1969), 9 C.R.N.S. 24. In my view, it is possible to invite the jury to take the deterrent aspect of the penalty into account, but this should be done in the context of a general submission on the various functions performed by the penalty.

30 In a trial by jury it is usual for the judge to indicate to the jurors that they must base their decision solely on the evidence and that they should not read the newspapers while the trial is in progress. Sometimes drastic methods such as sequestering the jury or banning publication may be used to keep the jury free from undue influence by the media. That being the case, it is astonishing that counsel for the Crown could have invited the jury to do precisely what any good judge would tell it not to do. It is still more surprising that the trial judge did not react and rectify these remarks.

31 To sum up, I consider that the remarks of counsel for the Crown seriously compromised the fairness of the hearing. The judge's failure to reprimand him and to tell the jury that such remarks should not be taken into account only aggravates the lack of fairness. However, the respondent argued that this court should dismiss the appeal because counsel for the appellant did not object to these remarks at trial. I cannot accept that argument. It is true that the absence of an objection is a factor which an appellate court may take into account in deciding whether to dismiss an appeal. In the case at bar, however, the hearing was unfair. The trial judge had a duty to ensure that the hearing was fair: *R. c. Potvin*, [1989] 1 S.C.R. 525, at p. 532 (per La Forest J.); *R. v. L. (D.O.)*, [1993] 4 S.C.R. 419, at p. 461 (per L'Heureux-Dubé J.). Since he did not do so, this court must intervene, whether counsel for the appellant objected or not.

32 I would allow the appeal for this reason alone. This conclusion is made all the more necessary when we take into account the court's errors in compartmentalizing the burden of proof and in the review of the evidence, although those errors by themselves are not sufficiently serious to justify a re-hearing.

2. Distinction Between Present and Past Character: Burden of Proof

33 The common error disclosed by the first two grounds of appeal is an excessive compartmentalization of the various factors listed in s. 745(2) that the jury must take into account in arriving at its decision.

34 The judge's first error was to limit his discussion of the appellant's character to matters prior to or contemporaneous with the murder. He made no reference to the changes in the appellant's character since his imprisonment. As I mentioned, however, the purpose of the s. 745 proceeding is to reassess the penalty imposed on the offender by reference to the way his or her situation has evolved in 15 years. The judge should therefore have mentioned both the appellant's past and present character.

35 The second error results from the following observation by the judge, made at the start of the part of his charge dealing with conduct while serving sentence:

> Ladies and gentlemen, it is for you to say, but it would seem that the evidence establishes for you, on the balance of probabilities, that Roman Swietlinski was a model prisoner after he emerged from the 25 days in "the hole" at Millhaven penitentiary back in 1979 or 1980.

36 The judge expressed no similar opinion as to the other two factors mentioned in s. 745(2).

37 It is true that a judge may always give his or her opinion on the facts, so long as he or she makes it clear to the jurors that the final decision is theirs. However, this comment could have led the jury to think that the three factors mentioned in s. 745(2) were separate and that each had to be "establishe[d] ... on the balance of probabilities". As I have shown, this is not a very suitable approach in the case of a discretionary decision. The jury could have thought, in reliance on this comment, that it had to arrive at a decision favourable to the appellant on each of the three criteria.

3. Summary of Psychiatric Evidence

38 The appellant's psychiatric condition was one of the major questions raised in the court below. The points especially in dispute were the possibility that the appellant suffers from sexual sadism and the possibility of successful psychiatric treatment. Simplifying somewhat, it can be said that Dr. Dickey's testimony was very unfavourable to the appellant while the testimony of Mr. Jean, Drs. Wood-Hill and Quirt was favourable.

39 The trial judge undertook a lengthy review of the psychiatric evidence. It was probably not necessary to do this in so much detail. The issues were relatively straightforward. The expert testimony was fresh in the minds of the jurors. Moreover, each juror had a copy of the written reports available to him or her. However, when the trial judge considers it necessary or desirable to make such a review, he or she should not unduly devote greater attention to the aspects of the evidence that favour one party, yet this is what the trial judge did here. The judge placed his emphasis on Dr. Dickey's testimony, noting his professional qualifications and repeating certain parts of his testimony word for word. On the other hand, the judge made no mention at all of the testimony of Mr. Jean or Drs. Wood-Hill and Quirt. He simply mentioned short extracts from the written reports of Drs. Wood-Hill and Quirt. Though I am sure it was not intentional, the judge

did nevertheless favour the respondent in his summation of the evidence. As an illustration, it can be pointed out that the review of Dr. Dickey's testimony took up 15 pages of the transcript of the charge to the jury while the passage from Dr. Wood-Hill's report extended only for a page and a half.

C. Admissibility of Victim's Statements

40 As I feel that a rehearing should be ordered, I think it is worth dealing with the question of the admissibility of statements by members of the victim's family. The respondent will undoubtedly seek to introduce such statements at that hearing. Additionally, since there is no right of appeal to the Court of Appeal, the appeal to this court is the only opportunity to introduce uniformity into the rulings of the superior courts on this point.

41 In *R. v. Gardiner*, [1982] 2 S.C.R. 368, this court set out the general rules governing evidence at a sentencing hearing. DicksonJ. (as he then was) noted that the rules which applied to evidence at trial had been made more flexible: now, for example, hearsay evidence can be admitted if it is credible and reliable.

42 A s. 745 hearing differs from an initial hearing in many respects. However, the purpose of both is to determine the length of sentence. Consequently, evidence should be governed by similar rules. It is well known that the victim's testimony is admissible at a hearing on sentencing: see, e. g., *R. v. Landry* (1981), 61 C.C.C. (2d) 317 (N.S. C.A.). Since s. 745(2) states that the nature of the offence is one of the criteria the jury must take into account, it is clear that the victim's testimony is relevant and admissible at such a hearing. Since the ordinary rules of evidence have been loosened, this testimony can be presented by means of a written statement. Of course, such a statement should only contain relevant information. Counsel for the Crown clearly cannot use it in an attempt to introduce the type of remarks which I earlier condemned.

43 I therefore consider that the trial judge made an error in refusing to admit statements by members of the victim's family.

VI. Judgment

44 The appellant did not get the fair hearing to which he was entitled. The appeal is therefore allowed and a rehearing ordered in accordance with these reasons.

***Major J.* (dissenting) (*La Forest, L'Heureux-Dubé* and *Iacobucci JJ.* concurring):**

45 I have read the reasons of the Chief Justice and agree with him except with respect to the effect of the statements made by Crown counsel and his conclusion that victim impact statements are always admissible at s. 745 hearings. As a result I would dismiss the appeal.

46 A s. 745 parole eligibility review hearing is neither a criminal trial nor a sentencing review hearing. The applicant's guilt has already been determined and his sentence fixed according to the mandatory penalties in the *Criminal Code* (first degree murder) or by a judge (second degree murder). Section 745 empowers 12 jurors, who represent the community and its conscience (*R. v. Nichols* (1992), 71 C.C.C. (3d) 385 (Alta. Q.B.)), to determine whether the applicant deserves clemency or leniency in the form of a reduction in his or her parole ineligibility.

47 Section 745 is unique because it authorizes the modification of a provision of the law otherwise than by royal prerogative or legislative action: *R. v. Nichols*, supra, at p. 386. Under its provisions the jury is empowered to *order* a reduction in parole eligibility (s. 745(4)); only two-thirds of the jury need be convinced of the verdict (s. 745(2)); and the burden of proof lies with the applicant to establish that he deserves to be treated with clemency on the balance of probabilities: *Vaillancourt v. Canada (Attorney General)* (1988), (sub nom. *R. v. Vaillancourt)* 43 C.C.C. (3d) 238 [66 C.R. (3d) 66] (Ont. H.C.) [hereinafter "*R. v. Vaillancourt*"].

48 Section 745 only entitles a successful applicant to *apply* to the Parole Board for early parole; there is no guarantee that parole will be granted. Thus, the s. 745 jury is not empowered in any respect "to determine the length of sentence" contrary to the view expressed by the Chief Justice.

49 A jury seized of a parole eligibility review application must consider (1) the applicant's character; (2) the applicant's conduct while serving his or her sentence; (3) the nature of the offence for which the applicant was convicted; and (4) such other matters as the presiding judge deems relevant: Code, s. 745(2). While some sentencingprinciples, relating to rehabilitation and public protection will inevitably enter into the jurors' minds as they consider character, conduct and the nature of the offence, sentencing principles, e.g., rehabilitation, deterrence, denunciation — should not play any significant role at the hearing. Parliament has not seen fit to incorporate traditional principles of sentencing into s. 745, and it would be wrong for this court to read any such principles into the section.

50 Given the broad nature of the discretionary powers conferred upon the jury, there is little scope for this court to interfere with the jury's determination on an appeal. It may, however, review the con duct of the presiding judge in directing the proceedings and in charging the jury. I agree with the Chief Justice that the court's role in undertaking such a review must be to determine whether the applicant had a fair hearing. In view of the nature of the proceedings, and in particular the fact that the ultimate determination is made by the jury based on a range of open-ended factors, deficiencies that might lead to unfairness in a criminal trial will not necessarily have the same effect in a s. 745 hearing. For example, it has been held that placing the persuasive onus on an applicant under s. 745 does not violate the presumption of innocence protected in s. 11 of the *Canadian Charter of Rights and Freedoms*: *R. v. Vaillancourt*, supra.

51 It is in light of these considerations that an analysis of the appellant's grounds of appeal should be made. I agree with the Chief Justice that standing alone the deficiencies, in the presiding judge's instructions on the burden of proof and his review of the psychiatric evidence were not sufficiently serious to justify a rehearing, and I cannot add anything to that conclusion.

52 However, I disagree with the conclusion that the inappropriate comments made by Crown counsel were sufficient in their cumulative effect to require a new hearing. I also disagree that the presiding judge erred in refusing to admit victim impact statements in this case.

A. Inappropriate Language by Counsel for the Crown

53 Evidence is admissible only if it is (1) relevant and (2) not subject to exclusion under any other clear rule of law or policy: Sopinka, Lederman and Bryant, *The Law of Evidence in Canada*, at p. 21. However, the trier of law retains a discretion to exclude relevant and admissible evidence if its prejudicial effect exceeds its probative value, such that its admission would impact on the fairness of the trial: ibid., at pp. 28-33; *R. v. Corbett*, [1988] 1 S.C.R. 670, at pp. 729-36; *R. c. Potvin*, [1989] 1 S.C.R. 525, at p. 532; and *R. v. L. (D.O.)*, [1993] 4 S.C.R. 419, at p. 461.

54 In this case, several of the comments made by Crown counsel which are now attacked as inflammatory were relevant and substantially probative to the issues in the case. References to the relative comforts of the Beaver Creek Institution were relevant to the jury's assessment of whether the appellant's conduct varied with his institutional setting. Defence counsel took a similar tactic when she cross-examined the appellant's parole officer on the issue of the violent setting at the Millhaven and Collins Bay institutions. Additionally, the cross-examination about cases where inmates of half-way houses have killed was relevant to the jury's assessment of the accuracy of the evidence tendered by members of the correctional community and of the Parole Board's decision-making processes. While such a line of questioning might be inappropriate in a criminal trial, the jury at a s. 745 hearing should, in the circumstances of this case, be entitled to consider the likelihood of an error by the National Parole Board. Therefore, it cannot be said that the presiding judge had a duty to exclude Crown counsel's comments or questioning regarding the Beaver Creek Institution or infamous cases of recidivism by paroled offenders nor can it be said that his failure to exclude these statements had any effect on the fairness of the hearing.

55 Other comments made by Crown counsel had little relevance to issues at the review hearing. In particular, Crown counsel's repeated references to the death penalty and his comments about violence in society were irrelevant to the jury's deliberations. However, the prejudicial effect of these comments was eradicated by the following statements made by the presiding judge in his charge to the jury:

> As you know, public debate on the subject of capital punishment still comes to the fore from time to time. There are those who think it should be brought back. By the same token, there are

> those who argue that the 25 year non-eligibility period in the *Criminal Code* is much too harsh as it destroys all hope for the convicted person. Again, there are those who argue that the 15-year judicial review is that ray of hope held out to persons convicted of first degree murder.
>
> At a different time and different place, you are entitled to hold any one or more of those views. However, in the jury room, you are to cast aside any preconceived ideas, notions and philosophies and deal with this case as you are required to do so by law under the dictates of s. 745 of the *Criminal Code*.
>
> In other words, in the jury room, there is no room for "soap boxes" and no one should be riding any favourite "hobby horse." The jury room is not the place for a philosophizer. You are here as judges of the facts. You are not here as law reformers.

56 Other comments made by Crown counsel relating to the plight of the victim's family, the fact that the victim received no second chances and the secrecy of the parole process also had minimal relevance or probative value in the proceedings. Had this been a criminal trial, these statements would have required close scrutiny as there the burden lies with the Crown to prove every element of the offence. The admission of any prejudicial evidence might render the proceedings unfair to the accused. However, in parole eligibility review proceedings, where the burden lies with the applicant to prove that he or she deserves clemency on the balance of probabilities, and where a number of factors are weighed together by the jurors in their discretion, the same danger does not exist. A discretionary decision may still provide a fair hearing even though some of the evidence relied upon was arguably unfair.

57 In determining whether the accused had a fair hearing in a parole eligibility application, the whole of the proceedings rather than individual aspects of evidence or incidents must be reviewed. This court's role in reviewing a s. 745 decision is to consider the cumulative effect of the impugned evidence on the fairness of the proceedings.

58 In the present case, the judge advised the jurors repeatedly that they were to assess only the three factors enumerated in s. 745(2) of the Code, i.e., the appellant's character, his conduct while serving his sentence, and the nature of the offence. These same factors were set out on the jury information sheet distributed to the jurors, which read:

> **Part I**
>
> (a) Are you satisfied by a preponderance of credible evidence, having regard to:
>
> (i) the character of the Applicant
>
> and
>
> (ii) his conduct while serving his sentence and

(iii) the nature of the offence for which he was convicted,

that the Applicant's number of years of imprisonment without eligibility for parole should be reduced?

Please answer: "YES" or "NO"

As outlined above, the impugned comments of Crown counsel had only a limited relevance to these three enumerated factors. There was little risk that the statements relating to the victim, her family or the secrecy of the parole process, would have any significant effect on the jury's deliberations. It is clear to me that the judge's directions put the jury's obligations squarely before them. As a result, in spite of the Crown's language there was no threat to the fairness of the hearing.

59 The appellant submitted before this court that the inflammatory language used by Crown counsel rendered the proceedings fundamentally unfair. Ironically, however, defence counsel did not take that position at the hearing as no objection was raised to the language of the Crown. The only objection occurred when Crown counsel began to examine plans for renovating the Beaver Creek Institution, a matter that clearly had no relevance. In fact, the appellant did not even raise the "inflammatory language" issue in his application for leave to appeal. The failure to object indicates that the statements made by the Crown in the context of the hearing were not regarded as prejudicial. These isolated comments, scattered throughout the 600-page transcript, were seen at the time as not sufficient to warrant even an objection.

60 While a failure to object is not determinative, it is a circumstance which may be considered by an appellate court in dismissing an appeal: *R. v. Imrich* (1977), [1978] 1 S.C.R. 622; *R. v. Lewis*, [1979] 2 S.C.R. 821; *R. v. Lomage* (1991), 2 O.R. (3d) 621 (C.A.). In the present case, the failure to object demonstrates that the language used by Crown counsel did not have the cumulative prejudicial effect discussed by the Chief Justice.

61 I am satisfied that in spite of the language complained of, the jurors were made aware of their responsibility and understood the nature of what they were doing. It is difficult to conclude that the irregularities complained of had any effect on the jury's assessment of whether the accused had satisfied the jury that he was in the circumstances entitled to a reduction in his parole eligibility.

62 I would therefore reject the appellant's fifth ground of appeal.

B. Victim Impact Statements

63 The presiding judge at the appellant's s. 745 hearing held that victim impact statements were not admissible ((1992), 73 C.C.C. (3d) 376 [13 C.R. (4th) 116] (Ont. Gen. Div.) at p. 380 [C.C.C., pp. 121-22 C.R.]), for two reasons. First, he ruled that the victim impact statements *tendered in this*

case did not constitute "relevant matters" within the meaning of s. 745(2) of the *Criminal Code*. He wrote at p. 380 [C.C.C., p. 121 C.R.]:

> As I read s. 745(2), evidence by way of *the* proposed victim impact statements does not form part of the relevant matters enunciated by s. 745(2). [Emphasis added.]

As well he held that victim impact statements are *in all cases* inadmissible in a s. 745 hearing, stating as follows at p. 380 [C.C.C., p. 121 C.R.]:

> ... the victim impact statement is something to be presented to the judge while she/he is hearing evidence and submissions prior to the imposition of sentence. We are now 15 years after the date of the sentencing.
>
> Moreover, the Court of Appeal for Ontario in *R. v. Vaillancourt, supra*, at p. 551, said: "In my opinion, the proceedings pursuant to s. 745 cannot be said to be a part of the sentencing process ...".

64 In my view, the presiding judge erred in ruling that victim impact statements are at all times inadmissible at a s. 745 hearing. Evidence of the impact of a crime on the victim clearly has no relevance to a jury's assessment of an applicant's conduct while in custody or of his character under s. 745(2). To the extent that the impact on the victim is relevant to the third enumerated factor in s. 745(2) — the nature of the offence — this relevance will usually, but not always, have been exhausted at the applicant's initial sentencing hearing. The victim's suffering in the years since the crime was committed does nothing to alter the nature of the offence, and should not automatically be admitted into evidence for this purpose.

65 However, it would seem to be permissible for a judge presiding at a s. 745 parole eligibility hearing to receive victim impact statements in exercising the discretion to permit the jury to hear evidence of "such other matters as the judge deems relevant in the circumstances" in s. 745(2) of the Code. Whether a judge chooses to exercise the discretion to admit victim impact statements will depend on the circumstances of the particular case. A judge should be cautious in admitting such statements, for to focus the jury on the victim, some 15 years after the crime was committed, is to invite the jury to assess the appropriateness of the applicant's sentence in terms of its retribution, denunciation and punishment goals. As outlined earlier, these principles do not form the focus of a s. 745 hearing.

66 Victim impact statements were only recently made a part of the sentencing process, with the coming into force of *An Act to amend the Criminal Code (victims of crime)*, R.S.C. 1985, c. 23 (4th Supp.), in 1988 (now ss. 735(1.1), (1.2), (1.3) and (1.4) of the Code). More recently, victim impact statements were made a part of the parole process: *Corrections and Conditional Release Act*, S.C. 1992, c. 20. Legislation which would permit the introduction of victim impact statements as a matter of course in s. 745 parole eligibility review hearings is currently pending before Parliament:

Bill C-41, *An Act to amend the Criminal Code (sentencing) and other Acts in consequence thereof*, 1st Sess., 35th Parl., 1994 (1st reading June 13, 1994), ss. 745.6(2)(*d*), (3). In light of the current legislative debate over the issue, it would seem inappropriate for this court to adopt a blanket rule that would make victim impact statements always admissible at s. 745 hearings.

67 A judge presiding at a s. 745 parole eligibility hearing has a discretion to determine when victim impact statements may be relevant to the jury's deliberations. In the present case, the trial judge exercised this discretion against the admissibility of the statements stating that "the proposed victim impact statements [do] not form part of the relevant matters enunciated by s. 745(2)" (at p. 380 [C.C.C., p. 121 C.R.]). This ruling was an appropriate exercise of his discretion in this particular case and should not be interfered with by this court.

68 For these reasons, I would dismiss the appeal and uphold the jury's refusal to alter the date of the appellant's parole eligibility.

***Sopinka J.*:**

69 I agree with the reasons of the Chief Justice and his disposition of the case with the exception of his treatment of the issue relating to victim impact statements. In respect of this issue, I agree with Justice Major who concludes that in this case the judge exercised his discretion against their use and that we should not interfere. At the new hearing, the presiding judge should have the right to consider this matter afresh in light of the principles stated by Major J.

***McLachlin J.*:**

70 I agree with the reasons of the Chief Justice except on the issue of victim impact statements, upon which I agree with Major J. At the new hearing the presiding judge should consider this matter afresh.

Appeal allowed; new hearing ordered.