

FILED / PRODUIT

Date: September 19, 2025

CT- 2024-010

Sarah Sharp-Smith for / pour
REGISTRAR / REGISTRAIRE

PUBLIC

CT-2024-010

OTTAWA, ONT.

178

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

**REPLY BOOK OF AUTHORITIES OF GOOGLE CANADA CORPORATION
AND GOOGLE LLC
VOLUME 9 OF 11**

PUBLIC

-2-

September 19, 2025

DAVIES WARD PHILLIPS & VINEBERG LLP
155 Wellington Street West
Toronto ON M5V 3J7

Kent E. Thomson (LSO# 24264J)
Tel: 416.863.5566
Email: kentthomson@dwpv.com

Elisa K. Kearney (LSO# 49342T)
Tel: 416.367.7450
Email: ekearney@dwpv.com

Chantelle T.M. Cseh (LSO# 60620Q)
Tel: 416.367.7552
Email: ccseh@dwpv.com

Chanakya A. Sethi (LSO# 63492T)
Tel: 416.863.5516
Email: csethi@dwpv.com

Chenyang Li (LSO# 73249C)
Tel: 416.367.7623
Email: cli@dwpv.com

Tel: 416.863.0900
Fax: 416.863.0871

Lawyers for the Respondents, Google
Canada Corporation and Google LLC

PUBLIC

-3-

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

Alexander M. Gay

Email: alexander.gay@cb-bc.gc.ca

Donald Houston

Email: donald.houston@cb-bc.gc.ca

John Syme

Email: john.syme@cb-bc.gc.ca

Derek Leschinsky

Email: derek.leschinsky@cb-bq.ca

Katherine Rydel

Email: katherine.rydel@cb-bc.gc.ca

Sanjay Kumbhare

Email: sanjay.kumbhare@cb-bc.gc.ca

Tel: 613.296.4470

Fax: 819.953.9267

Lawyers for the Applicant, the Commissioner of Competition

AND TO: THE REGISTRAR OF THE COMPETITION TRIBUNAL
Thomas D'Arcy McGee Building
90 Sparks Street, Suite 600
Ottawa, ON K1P 5B4

Email: Tribunal@ct-tc.gc.ca

PUBLIC

INDEX

TAB	AUTHORITY	PAGE NO.
SECONDARY SOURCES		
VOLUME 1		
1)	Deschamps, “Cineplex ordered to pay \$38.9-million by Competition Tribunal in ticket fee case”, <i>The Globe and Mail</i> (23 Sept. 2024)	1
2)	Gover, “Review of s. 11 of the Competition Act” (2008), online: https://competition-bureau.canada.ca/en/how-we-foster-competition/education-and-outreach/review-s-11-competition-act	3
3)	Innovation, Science and Economic Development Canada, “Consultation on the future of competition policy in Canada” (2024), online: https://ised-isde.canada.ca/site/strategic-policy-sector/en/marketplace-framework-policy/competition-policy/consultation-future-competition-policy-canada	47
4)	Kalintiri, “Burden of proof and judicial review” in Akman, Brook & Stylianou, eds., <i>Research Handbook on Abuse of Dominance and Monopolization</i> (Cheltenham: Edward Elgar, 2023)	50
JUDICIAL AUTHORITIES		
5.1)	<i>A. Menarini Diagnostics S.r.l. v. Italy</i> [2011], No. 43509/08 (ECHR) (Translation)	73
5.2)	<i>A. Menarini Diagnostics S.r.l. v. Italy</i> [2011], No. 43509/08 (ECHR)	110
VOLUME 2		
6)	<i>Archer Daniels Midland Co. v. Commission</i> , T-59/02 [2006], ECLI:EU:T:2006:272 (Eur. Gen. Ct.)	148
7)	<i>Blencoe v. B.C.</i> , 2000 SCC 44	285
8)	<i>Canada (Commissioner of Competition) v. Air Canada</i> , 2000 CarswellNat 1533 (FC)	387
VOLUME 3		
9)	<i>Canada (Commissioner of Competition) v. Cineplex Inc.</i> , 2024 CanLII 93716 (CT)	403

TAB	AUTHORITY	PAGE NO.
10)	<i>Canada (H.R.C.) v. Canada (A.G.)</i> , 2018 SCC 31	525
11)	<i>Canada v. Chatr Wireless Inc.</i> , 2013 ONSC 5315	588
12)	<i>Canada v. Maxzone Auto Parts (Canada) Corp.</i> , 2012 FC 1117	669
VOLUME 4		
13)	<i>Canada v. Southam Inc.</i> , 1984 CarswellAlta 121 (SCC) [<i>sub nom.</i> , <i>Hunter v. Southam Inc.</i>]	719
14)	<i>Canada v. Vavilov</i> , 2019 SCC 65	745
VOLUME 5		
15)	<i>City of Arlington v. F.C.C.</i> , 133 S. Ct. 1863	937
16)	<i>Commissioner of Competition v. Toronto Real Estate Board</i> , 2016 CACT 7 , affirmed, 2017 FCA 236 , leave refused, 2018 CanLII 78753 (SCC)	961
17)	<i>E.ON Energie v. Commission</i> , C-89/11 P [2012], ECLI:EU:C:2012:738 (Eur. Gen. Ct.)	1136
18)	<i>Engel v. The Netherlands</i> [1976], No. 5100/71 (ECHR)	1157
VOLUME 6		
19)	<i>Facebook Marketplace</i> [2024], AT.40684 (European Commission)	1219
VOLUME 7		
20)	<i>General Motors of Canada Ltd. v. City National Leasing</i> , 1989 CarswellOnt 125 (SCC)	1514
21)	<i>Guindon v. Canada</i> , 2015 SCC 41	1552
22.1)	<i>Intel Corporation v. Commission</i> , T-286-09 RENV, [2022] ECLI:EU:T:2022:19 (Eur. Gen. Ct.)	1618
22.2)	<i>Intel Corporation v. Commission</i> , C-240/22 P [2024] ECLI:EU:C:2024:915 (Eur. Gen. Ct.)	1690

TAB	AUTHORITY	PAGE NO.
VOLUME 8		
23)	<i>John Howard Society v. Saskatchewan</i> , 2025 SCC 6	1753
24)	<i>Kligman v. M.N.R.</i> , 2004 FCA 152	1906
VOLUME 9		
25)	<i>Qualcomm, Inc. v. Nvidia Corp.</i> , T-671/19 RENV [2024] ECLI:EU:T:2024:626 (Eur. Gen. Ct.)	1969
26)	<i>R. v. Appulonappa</i> , 2015 SCC 59	2088
27)	<i>R. v. Bissonnette</i> , 2022 SCC 23	2135
28)	<i>R. v. Chehil</i> , 2013 SCC 49	2206
29)	<i>R. v. Cross</i> , 2006 NSCA 30 , leave refused, 2006 CanLII 29077 (SCC)	2236
30)	<i>R. v. Durham</i> , 1992 CarswellOnt 99 (ONCA)	2269
VOLUME 10		
31)	<i>R. v. Jarvis</i> , 2002 SCC 73	2288
32)	<i>R. v. Kang-Brown</i> , 2008 SCC 18	2345
33)	<i>R. v. MacKenzie</i> , 2013 SCC 50	2458
34)	<i>R. v. Nur</i> , 2015 SCC 15	2509
VOLUME 11		
35)	<i>R. v. Rodgers</i> , 2006 SCC 15	2595
36)	<i>R. v. Samji</i> , 2017 BCCA 415 , leave refused, 2018 CanLII 48394 (SCC)	2650
37)	<i>R. v. Shoker</i> , 2006 SCC 44	2706
38)	<i>R. v. Wigglesworth</i> , 1987 CarswellSask 385 (SCC)	2735
39)	<i>Ravenshoe Services Ltd. v. Canada</i> , 2001 CanLII 28354 (ON SC)	2759

TAB	AUTHORITY	PAGE NO.
40)	<i>Rowan v. Ontario Securities Commission</i> , 2012 ONCA 208	2765
41)	<i>Slaight Communications Inc. v. Davidson</i> , 1989 CarswellNat 695 (SCC)	2797
42)	<i>United States Steel Corporation v. Canada</i> , 2011 FCA 176	2831



Reports of Cases

Please see in particular paras.
393, 805

JUDGMENT OF THE GENERAL COURT (First Chamber, Extended Composition)

18 September 2024*

(Competition – Abuse of dominant position – Market for UMTS baseband chipsets – Decision finding an infringement of Article 102 TFEU and Article 54 of the EEA Agreement – Predatory pricing – Competence of the author of the act – Rights of the defence – Definition of the relevant market – Dominant position – Abuse – Reconstruction of prices – Determining the cost benchmark – Price-cost test – No requirement to demonstrate the existence of actual effects – Intention to eliminate a competitor – Objective justification – Calculation of the fine – 2006 Guidelines on the method of setting fines – Value of sales – Additional amount – Unlimited jurisdiction)

In Case T-671/19,

Qualcomm, Inc., established in San Diego, California (United States), represented by M. Davilla, M. Pinto de Lemos Fermiano Rato, M. English and A. Kontosakou, lawyers,

applicant,

v

European Commission, represented by H. van Vliet, G. Conte, M. Farley and C. Urraca Caviades, acting as Agents,

defendant,

supported by

Nvidia Corp., represented by M. Dolmans, lawyer, P. Stuart, Barrister-at-Law and W. Lin, Solicitor,

intervener,

THE GENERAL COURT (First Chamber, Extended Composition),

composed of D. Spielmann, President, V. Valančius, R. Mastroianni (Rapporteur), I. Gâlea and T. Tóth, Judges,

Registrar: M. Zwodziak-Carbonne, Administrator,

having regard to the written part of the procedure,

* Language of the case: English.

further to the hearing on 13 to 15 March 2023,

gives the following

Judgment

- 1 By its action under Article 263 TFEU, the applicant, Qualcomm Inc., seeks annulment of Commission Decision C(2019) 5361 final of 18 July 2019 relating to a proceeding under Article 102 TFEU and Article 54 of the EEA Agreement (Case AT.39711 – Qualcomm (predation)) ('the contested decision') or, failing that, the cancellation or reduction of the fine imposed on it in that decision.

Background to the dispute

Context of the case

- 2 Qualcomm is a US company established in 1985 operating in the field of cellular and wireless technologies. It conducts its business primarily through Qualcomm CDMA Technologies ('QCT') and Qualcomm Technology Licensing. QCT is a developer and supplier of, amongst others, baseband chipsets, a type of semiconductor, and system software based on Code Division Multiple Access (CDMA), Orthogonal Frequency-Division Multiple Access (OFDMA) and other technologies primarily used in voice and data communications. Qualcomm's chipsets are sold (and its system software is licensed) to companies which use them in mobile phones, tablets, laptops, data modules and other consumer electronics. Qualcomm Technology Licensing operates Qualcomm's intellectual property licensing programme, licensing primarily mobile device suppliers.
- 3 Mobile devices such as mobile phones, tablets and other connected devices require mobile broadband connectivity to the internet through cellular mobile telecommunications networks.
- 4 The core component providing mobile connectivity in a device is the baseband processor, which provides the signal processing functionality according to communication protocols described by the cellular standards. Baseband processors can be embedded directly in mobile devices, such as smartphones, or in external modules which are in turn plugged into a device. Such a processor is made of semiconductor material (such as silicone die) and is packaged into a chip called a 'baseband chip'.
- 5 In addition to the baseband processor, certain types of mobile devices require an application processor, used for running the operating system and applications (such as messaging, internet browsing, imaging and games). That application processor can be provided as a standalone product, packaged into a separate chip, or can be integrated with the baseband processor within the same chip. Baseband chips can, accordingly, be divided into:
 - standalone baseband chips (also referred to as 'slim baseband chipsets' or 'slim modems'), where no application processor is included;
 - integrated baseband chips, where the baseband processor has been integrated with the application processor.

- 6 Regardless of the presence of an application processor, a baseband processor is typically paired with two additional components to complete its functionality, namely the Radio Frequency integrated circuit, also known as the 'RF transceiver', and the Power Management (PM) integrated circuit. All three functionalities (baseband processor, RF transceiver and PM circuitry) are necessary for mobile connectivity and are usually purchased from the same supplier, either as a bundle or separately.
- 7 Baseband chips are typically sold to original equipment manufacturers (OEMs), which incorporate them into devices using mobile connectivity, such as Apple, HTC Corporation, Huawei Technologies Co. Ltd ('Huawei'), LG Corp., Nokia Corporation, Samsung Group ('Samsung') and ZTE Corporation.
- 8 During the period from 2009 to 2011, mobile devices incorporating baseband chipsets could be grouped into two broad categories. First, mobile phones (of different types, ranging from those providing only basic functionality, such as voice services, to smartphones) and, second, MBB devices, namely devices providing connectivity other than mobile phones, usually without voice services (for example, tablets, data cards such as USB sticks with cellular access, wireless routers working on MiFi or laptops).
- 9 Many MBB devices, such as data cards, have tended to use mainly slim modems, because they did not require any processing functionality, but only connectivity, and the market for those devices, in particular the market for devices compatible with the third generation (3G) communication standards based on Universal Mobile Telecommunications System (UMTS) technology, was considerably smaller than that of mobile phones.
- 10 As stated in paragraph 4 above, in order to provide connectivity, a baseband chip must use one of the communication standards. Originally, the first generation communication standards (1G), namely analogue communication standards, and the second generation (2G) communication standards which replaced them, namely digital communication standards, provided only voice communications. Over time, the standard developed for the 2G communication standards, namely the 'Global System for Mobile Communication' (GSM), was expanded to support higher speeds and packet data transport, via 'General Packet Radio Services' (GPRS) and 'Enhanced Data rates for GSM Evolution' (EDGE).
- 11 The 3G communication standards, based on UMTS technology, namely a wireless and mobile communication technology, enabled, in their infancy (around the year 2000), processing of data rates of up to 0.348 megabits per second (Mbps), which was insufficient to support typical broadband applications such as full internet browsing or video streaming. Subsequent developments have strengthened the data transmission capacity of those communication standards. 'High Speed Packet Access' (HSPA) technology made it possible to process data rates up to 14 Mbps, then 'Evolved High Speed Packet Access' technology (HSPA+) made it possible to process data rates up to 28 Mbps and even 42 Mbps.
- 12 Typically, chipsets compliant with UMTS technology ('UMTS chipsets') also provide support for the broad GSM/EDGE standard, which was initially optimised for voice telephony. That is because that broad standard continued to be indispensable for mobile telephones, since, for most mobile network operators, GSM continued to play an important role in terms of coverage and capacity. That broad standard may also be useful for MBB devices, although it does not provide broadband connectivity. Via its basic connectivity support, however, GSM could ensure continuity of service in case of gaps in UMTS network coverage.

- 13 From the end of 2008, ‘Long Term Evolution’ (LTE) technology started to emerge. The initial LTE chipsets were compliant exclusively with that technology, which limited their practical use due to the limited deployment of networks using LTE technology. Gradually, the major baseband suppliers developed chipsets supporting both UMTS and LTE technologies, with the first such products becoming commercially available in 2011 or 2012. UMTS and LTE technologies were developed in parallel to improve performance and interoperability.

Administrative procedure

- 14 On 30 June 2009, Icera Inc. lodged a complaint with the European Commission against Qualcomm, subsequently replaced by a revised and updated version thereof dated 8 April 2010 (‘the complaint’), on the basis of which the Commission initiated its investigation.
- 15 In 2012, the intervener, Nvidia Corp., which had acquired Icera in May 2011, supplied further information, supplementing the complaint and making allegations of predatory pricing against Qualcomm.
- 16 Between June 2010 and July 2015, the Commission sent a number of requests for information to Qualcomm, Icera, Nvidia and other players in the baseband chip sector. In particular, it sent to Qualcomm (i) a request for information dated 7 June 2010, adopted pursuant to Article 18(1) and (2) of Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles [101 and 102 TFEU] (OJ 2003 L 1, p. 1), (ii) a request for information dated 3 November 2011, adopted pursuant to Article 18(3) of that regulation, (iii) a request for information dated 10 July 2013, adopted pursuant to Article 18(3) of that regulation, (iv) a request for information dated 13 February 2014, adopted pursuant to Article 18(1) and (2) of that regulation, (v) a request for information dated 13 October 2014, adopted pursuant to Article 18(3) of that regulation, and (vi) a joint request for information dated 14 January 2015, since it was also adopted in Case AT.40220 – Qualcomm (exclusivity payments). The final decision in that case was appealed before the General Court (judgment of 15 June 2022, *Qualcomm v Commission (Qualcomm – exclusivity payments)*, T-235/18, EU:T:2022:358).
- 17 On 16 July 2015, the Commission initiated, within the meaning of Article 2(1) of Commission Regulation (EC) No 773/2004 of 7 April 2004 relating to the conduct of proceedings by the Commission pursuant to Articles [101 and 102 TFEU] (OJ 2004 L 123, p. 18), proceedings against Qualcomm in Case AT.39711 – Qualcomm (predation). Those proceedings concerned alleged abuse of its dominant position by Qualcomm in the form of predatory pricing on the UMTS chipsets market.
- 18 On 8 December 2015, the Commission adopted, as provided for in Article 27(1) of Regulation No 1/2003 and Article 10(1) of Regulation No 773/2004, a statement of objections addressed to Qualcomm (‘the SO’).
- 19 Between December 2015 and July 2016, Qualcomm was granted access to the file.
- 20 In particular, by letter of 18 April 2016, Qualcomm applied to the Hearing Officer, in accordance with Article 3(7) and Article 7(1) of Decision 2011/695/EU of the President of the European Commission of 13 October 2011 on the function and terms of reference of the hearing officer in certain competition proceedings (OJ 2011 L 275, p. 29), for further access to certain parts of the file. Following a review by the Hearing Officer, more complete versions of the file were provided to Qualcomm.

- 21 On 15 August 2016, Qualcomm sent its response to the SO ('SO response'), which disputed the Commission's preliminary findings.
- 22 On 10 November 2016, an oral hearing took place at Qualcomm's request.
- 23 Following that hearing, the Commission took further investigative steps and, between 2017 and 2019, sent further requests for information to Qualcomm, as well as to other players in the baseband chipset sector.
- 24 In particular, on 30 January 2017, the Commission sent Qualcomm a request for information under Article 18(1) and (2) of Regulation No 1/2003, to which Qualcomm did not reply. On 31 March 2017, the Commission sent Qualcomm a request for information by decision pursuant to Article 18(3) of that regulation.
- 25 On 13 June 2017, Qualcomm lodged an action for annulment before the General Court against the Commission's decision of 31 March 2017. It also lodged an application under Articles 278 and 279 TFEU seeking, primarily, the suspension of that decision or, in the alternative, the adoption of interim measures in that regard. By order of 12 July 2017, *Qualcomm and Qualcomm Europe v Commission* (T-371/17 R, not published, EU:T:2017:485), the President of the General Court dismissed the application for suspension and, by judgment of 9 April 2019, *Qualcomm and Qualcomm Europe v Commission* (T-371/17, not published, EU:T:2019:232), the General Court dismissed the application for annulment of the decision of 31 March 2017. Qualcomm's appeal seeking the annulment of that judgment was dismissed in its entirety by the Court of Justice in its judgment of 28 January 2021, *Qualcomm and Qualcomm Europe v Commission* (C-466/19 P, EU:C:2021:76).
- 26 On 10 November 2017, the Commission sent Qualcomm a new request for information pursuant to Article 18(1) and (2) of Regulation No 1/2003.
- 27 On 19 July 2018, the Commission adopted a Supplementary Statement of Objections ('SSO') addressed to Qualcomm, alleging the duration of the predation was more limited and using a revised methodology to compare Qualcomm's prices and costs relative to the alleged predatory sales concerned.
- 28 Between 31 July and 28 September 2018, Qualcomm obtained access to the documents added to the Commission's file after the adoption of the SO of 8 December 2015.
- 29 On 22 October 2018, Qualcomm sent a response to the SSO ('the SSO response'), disputing the Commission's preliminary findings set out in the SO and supplemented by the SSO.
- 30 On 10 January 2019, a second oral hearing took place at Qualcomm's request.
- 31 On 5 February 2019, the Commission sent Qualcomm a request for information pursuant to Article 18(1) and (2) of Regulation No 1/2003.
- 32 On 22 February 2019, the Commission sent Qualcomm a letter of facts ('LoF') which, in its view, was intended to (i) provide Qualcomm with clarification regarding certain elements set out in the SSO with which Qualcomm had taken issue in the SSO response, (ii) inform Qualcomm of pre-existing evidence which was not expressly relied on in the SO and SSO, but which, on further analysis of the file, might have been relevant to support the preliminary conclusion reached in the

SO as supplemented by the SSO, and (iii) bring to its attention certain limited updates to the price-cost test conducted in the SSO. The LoF contained, as attachments, other documents which had not previously been provided to Qualcomm.

33 On 24 March and 25 April 2019, Qualcomm submitted its comments on the LoF.

34 On 18 July 2019, the Commission adopted the contested decision.

Content of the contested decision

Products concerned

35 After disputing Qualcomm's objections to alleged procedural irregularities affecting the administrative procedure, the Commission set out a detailed description of the context in which Qualcomm and its competitors, including Icera, were operating, in the area of technology and intellectual property. In particular, it stated that the products concerned by its investigation were UMTS chipsets, namely Qualcomm's MDM8200, MDM6200 and MDM8200A chipsets, which, at the time of the alleged infringement, competed with Icera's UMTS chips, in particular the ICE8040, ICE8042 and ICE8060 chipsets.

36 According to the Commission, all those products constituted standalone baseband chipsets supporting data connectivity at a maximum downlink data rate ranging from 7.2/14.4 Mbps up to 28 Mbps between 1 July 2009 and 30 June 2011 ('the relevant period'). In particular, the MDM8200 chipset was Qualcomm's first standalone baseband chip intended for MBB devices which supported HSPA+ technology, with downlink speeds of up to 28 Mbps. It was first marketed in May 2009 and moved to the End of Life commercial stage on 30 March 2011. Since 2010, it has been gradually replaced by the MDM8200A chipset, an improved version of the MDM8200 chip which, after the implementation of minor changes, could also support voice functionality. The MDM6200 chip, as for the MDM8200 and MDM8200A chips mentioned above, was mainly intended for data-only applications. It supported HSPA+ technology at downlink speeds of up to 14.4 Mbps and voice functionality without the need for modifications. Supplied in limited quantities from the second quarter of 2010, it was sold in higher quantities from 2011 and continued to be marketed at least until the end of 2017.

37 The Icera ICE8040, or Espresso-300, chip was also a standalone baseband chipset, launched in October 2008. Initially, it supported a maximum downlink speed of 10 Mbps and, on account of its characteristics, could easily benefit from performance upgrades and enhancements in the form of software updates, for example in order gradually to increase its downlink speed to 21 Mbps. The ICE8042 chipset, or Espresso-302, was an improved variant of the ICE8040 chipset, which was commercially launched in December 2009 with a downlink speed of up to 14.4 Mbps, which increased in March 2010 to 21 Mbps by means of software updates. A downgraded version of that chipset, namely the Espresso-302-1 chipset, able to deliver only a maximum downlink speed of 7.2 Mbps, was sold by Icera to ZTE. Finally, the ICE8060 or Espresso-400 chipset, announced in October 2010, benefited from Icera's software-defined modem architecture and a downlink speed of up to 28 Mbps. A downgraded version of that chipset, namely the E-400-1 chipset, reaching a maximum downlink speed of 7.2 Mbps, was also offered.

Relevant market

- 38 The Commission defined the relevant product market concerned as comprising the ‘free’ market for slim and integrated baseband chipsets, which are compliant with the UMTS standard (‘the UMTS chipset market’). It reached that conclusion by taking account, in particular, of the substitutability between UMTS chips and chips compliant with other technologies, as well as the absence of competitive constraints exerted by vertically integrated baseband chipset makers. From a geographic point of view, that market was defined as being worldwide.

Dominant position

- 39 The Commission found, on the basis of the elements set out below, that Qualcomm held a dominant position on the worldwide market for UMTS chipsets, at least from 1 January 2009 to 31 December 2011.
- 40 First, Qualcomm had a market share of around 60% on the relevant market during the period from 1 January 2009 to 31 December 2011.
- 41 Second, there were a number of barriers to entry and expansion on the relevant market, such as the need to undertake significant initial investments in research and development (R&D) activities relating to the design of UMTS chipsets, as well as various barriers relating to Qualcomm’s intellectual property rights, and its grant-back network.
- 42 Third, the commercial strength of customers who purchased Qualcomm’s chipsets was not capable of affecting Qualcomm’s dominant position during the relevant period.

Abuse of dominant position

- 43 The Commission concluded that Qualcomm had abused its dominant position by supplying, during the relevant period, certain quantities of three of its UMTS chipsets, namely the MDM8200, MDM6200 and MDM8200A chipsets, to two of its key customers, namely Huawei and ZTE, below cost prices, with the intention of eliminating Icera, its main competitor at the time in the leading-edge segment of the UMTS chipsets market.
- 44 According to the Commission, by limiting Icera’s growth in the leading-edge segment of the UMTS chipsets market, which was at the time made up almost exclusively of chipsets used in high-speed MBB devices, Qualcomm intended to prevent that undertaking, which was small and financially constrained, from gaining the reputation and scale necessary to challenge its dominant position on that market, in particular in view of the expected growth potential of that segment due to the global take-up of so-called ‘smart’ mobile devices. The Commission found that Qualcomm was thus seeking to deprive OEMs in that segment of an alternative source of chipsets for their mobile telephones, thereby reducing consumers’ choice.
- 45 The Commission identified the factors set out below as being key to its findings.
- 46 Qualcomm’s pricing practices took place in the context of Icera increasing its presence on the UMTS chipsets market as a viable supplier of UMTS chipsets, which posed a growing threat to Qualcomm’s business. In order to ensure that Icera’s business would not reach a critical size threatening its market position, Qualcomm took preventive measures in the form of pricing

concessions targeted at two of its strategically important customers, namely Huawei and ZTE. It found that Icera's growth prospects depended on its ability to establish commercial relations with those two undertakings. Qualcomm's preventive actions were based on a 'multi-chipset' strategy covering its three chipsets which competed with Icera's more advanced chipsets, which sought, in particular, to protect Qualcomm's market position in the segment of high-speed chipsets intended for mobile phones, a market which Icera intended to enter after having secured its presence on the segment of chipsets intended for high-speed MBB devices.

- 47 According to the Commission, analysis of the prices charged by Qualcomm to Huawei and ZTE and of Qualcomm's costs of manufacturing its chipsets demonstrated that Qualcomm had sold certain amounts of chipsets below its long-run average incremental costs ('LRAIC') and, in any event, below its average total costs ('ATC'), as well as a limited amount of the MDM6200 chipsets at prices below its average variable costs ('AVC'). The results of the price-cost test conducted were borne out by evidence in the form of internal and contemporaneous Qualcomm documents demonstrating Qualcomm's intention to eliminate Icera.

– *Lack of justification*

- 48 The Commission concluded that Qualcomm had not provided any valid objective justification or proper defence in respect of its conduct.

– *Single and continuous infringement*

- 49 The Commission concluded that Qualcomm's predatory sales to Huawei and ZTE, taken together, constituted a single and continuous infringement for the whole of the relevant period.

– *The Commission's jurisdiction*

- 50 According to the Commission, it has jurisdiction to apply Article 102 TFEU and Article 54 of the Agreement on the European Economic Area (OJ 1994 L 1, p. 3; 'the EEA Agreement') to Qualcomm's infringement, since that infringement was implemented and is liable to have substantial, immediate and foreseeable effects in the European Economic Area (EEA) and since it appreciably affected trade between Member States and between contracting parties to the EEA.

– *Penalty*

- 51 While Qualcomm's infringement had come to an end at the time when the contested decision was adopted, the Commission nevertheless required Qualcomm to refrain from repeating the conduct described in that decision and from any act or conduct which would have the same or an equivalent object or effect as for that conduct.
- 52 The fine imposed on Qualcomm in respect of the infringement, calculated by the Commission on the basis of the principles set out in the Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No 1/2003 (OJ 2006, C 210/2, p. 2, 'the 2006 Guidelines'), amounts to EUR 242 042 000.

Procedure and forms of order sought***Procedure***

- 53 By application lodged at the Registry of the General Court on 1 October 2019, the applicant brought the present action.
- 54 The Commission made two applications for an extension of the time limit for lodging the defence, on 4 February and 24 March 2020 respectively, given the length of the application and the number of annexed documents. That extension was granted.
- 55 By document lodged at the Court Registry on 17 March 2020, Nvidia applied for leave to intervene in the present proceedings in support of the form of order sought by the Commission. That application to intervene was served on the main parties in accordance with Article 144(1) of the Rules of Procedure of the General Court. The main parties raised no objections to it.
- 56 On 11 June 2020, the Commission lodged the defence at the Court Registry.
- 57 On 6 July 2020, the applicant applied for an extension of the time limit for lodging the reply, given the length of the defence and the number of annexed documents. That extension was granted.
- 58 On 5 October 2020, the applicant lodged the reply at the Court Registry.
- 59 By document lodged at the Court Registry on 15 October 2020, after having obtained a number of extensions of the time limit, the applicant and the Commission requested, pursuant to Article 144(2) and (7) of the Rules of Procedure, that certain information in the application and in some of the annexes thereto be treated as confidential vis-à-vis Nvidia. Those parties lodged a common non-confidential version of those documents.
- 60 On 23 October 2020, the Commission applied for an extension of the time limit for lodging the rejoinder, given the length of the reply and the number of annexed documents. That extension was granted.
- 61 By document lodged at the Court Registry on 19 November 2020, the Commission requested that certain information in the defence be treated as confidential vis-à-vis Nvidia. On the same date, with the agreement of the applicant, the Commission lodged a common non-confidential version of the defence and its annexes.
- 62 By document lodged at the Court Registry on 20 November 2020, the applicant requested that certain information in the defence and its annexes and in the procedural documents sent to the Registry during the period between 30 June and 5 October 2020 be treated as confidential vis-à-vis Nvidia.
- 63 By order of 25 November 2020, *Qualcomm v Commission* (T-671/19, not published), the President of the Fifth Chamber of the General Court ordered that Nvidia be granted leave to intervene and reserved the decision on costs.
- 64 By documents lodged at the Court Registry on 15 December 2020 and 18 January 2021, Nvidia raised objections to the requests for confidential treatment relating to the application, the defence and certain annexes.

- 65 By document lodged at the Court Registry on 16 December 2020, the Commission requested that certain information in the reply and in Annex C.8 to the reply be treated as confidential vis-à-vis Nvidia.
- 66 By document lodged at the Court Registry on 22 December 2020, the applicant requested that certain information in the reply and its annexes, and in the procedural documents sent to the Registry between 5 October and 9 December 2020, be treated as confidential vis-à-vis Nvidia. On the same date, the main parties lodged a common non-confidential version of the reply and its annexes.
- 67 On 21 January 2021 the Commission lodged the rejoinder at the Court Registry.
- 68 By document lodged at the Court Registry on 25 February 2021, after having obtained an extension of the time limit, the Commission requested that certain information in the rejoinder be treated as confidential vis-à-vis Nvidia. On the same date, with the agreement of the applicant, the Commission lodged a common non-confidential version of the rejoinder and its annex.
- 69 By document lodged at the Court Registry on 26 February 2021, after having obtained an extension of the time limit, the applicant requested that other information in the rejoinder and its annex, as well as in the procedural documents communicated to the Registry between 18 December 2020 and 10 February 2021, be treated as confidential vis-à-vis Nvidia.
- 70 By order of 22 July 2021, *Qualcomm v Commission* (T-671/19, not published, EU:T:2021:502), the President of the Fifth Chamber granted the requests for confidential treatment relating to certain information in the application and in Annexes A.1 and A.29, as well as in the defence, and rejected similar requests relating to the other procedural documents. Therefore, the applicant and the Commission were given a time period within which to submit new non-confidential versions of certain documents in the file. On 16 and 17 September 2021, after having obtained an extension of the time limit, the main parties lodged a common non-confidential version of those documents.
- 71 By document lodged at the Court Registry on 19 October 2021, Nvidia lodged its statement in intervention.
- 72 By document lodged at the Court Registry on 19 November 2021, the Commission stated that it had no observations regarding the statement in intervention.
- 73 By document lodged at the Court Registry on 29 November 2021, the applicant submitted observations on the statement in intervention.
- 74 The written part of the procedure was closed on 29 November 2021.
- 75 On 8 February 2022, the applicant made a request for a hearing.
- 76 On a proposal from the Fifth Chamber, the Court decided, pursuant to Article 28 of the Rules of Procedure, to refer the case to the Fifth Chamber sitting in extended composition.
- 77 Following a change in the composition of the Chambers of the Court, pursuant to Article 27(5) of the Rules of Procedure, the Judge-Rapporteur was assigned to the Extended Composition of the First Chamber of the General Court, to which the present case was, therefore, allocated.

- 78 Acting upon a proposal of the Judge-Rapporteur, the General Court decided to open the oral part of the procedure.
- 79 On 2 December 2022, by way of measures of organisation of procedure, the Court requested the main parties to answer certain questions. The applicant answered those questions on 16 December 2022. The Commission, having obtained an extension of the time limit for submitting its answers, responded on 16 January 2023.
- 80 At the request of the main parties, the time limit for lodging requests for confidential treatment of their replies to the Court's questions was extended. The time limit was ultimately set at 31 January 2023, the date on which common non-confidential versions of those answers were lodged.
- 81 By document lodged at the Court Registry on 16 February 2023, after having obtained an extension of the time limit, Nvidia raised objections to those requests for confidential treatment concerning the main parties' answers to the questions put by the Court.
- 82 A report for the hearing was sent to the parties. The applicant and the Commission submitted observations on that document on 27 January 2023 and 16 February 2023 respectively. The Court took formal note of those observations.
- 83 By order of 8 March 2023, *Qualcomm v Commission* (T-671/19, not published, EU:T:2023:125), the President of the First Chamber, Extended Composition, granted certain requests for confidential treatment relating to information in the main parties' answers to the questions put by the Court, and rejected others. Therefore, the applicant and the Commission were given a time period within which to submit new non-confidential versions of those answers. On 10 March 2023, the main parties lodged a common non-confidential version of those documents.
- 84 As a member of the First Chamber, Extended Composition was unable to sit, the President of the First Chamber designated another Judge to complete the chamber.
- 85 The oral procedure was closed at the end of the hearing on 15 March 2023. Since a member of the Chamber was prevented from taking part in the judicial deliberations following the expiry of his mandate on 27 September 2023, the Court's deliberations were continued by the three judges whose signatures the present judgment bears, in accordance with Article 22 and Article 24(1) of the Rules of Procedure.

Forms of order sought

- 86 The applicant claims that the Court should:
- annul the contested decision;
 - 'annul, or in the alternative, reduce substantially the amount of the fine';
 - order measures of organisation of procedure or measures of inquiry to require the Commission to confirm that the redactions in certain documents in the file are indeed based on sound assertions of legal professional privilege and to inform Qualcomm accordingly or to obtain those documents in order to examine the validity of the intervener's claims;

- order the Commission to pay the costs.

87 The Commission contends that the Court should:

- dismiss the action;
- order Qualcomm to pay the costs.

88 Nvidia claims that the Court should:

- dismiss the action;
- order Qualcomm to pay the costs.

Law

- 89 As a preliminary point, as indicated in paragraphs 59, 61 and 62 above, the main parties requested that certain information in their pleadings and in other procedural documents be omitted vis-à-vis Nvidia and, therefore, vis-à-vis the public. Nvidia raised objections to the requests for confidential treatment of certain information. By orders of 22 July 2021, *Qualcomm v Commission* (T-671/19, not published, EU:T:2021:502), and of 8 March 2023, *Qualcomm v Commission* (T-671/19, not published, EU:T:2023:125), the Presidents of the Fifth Chamber and of the First Chamber, Extended Composition, respectively, granted certain requests for confidential treatment and rejected others.
- 90 When a party makes an application under Article 144(2) of the Rules of Procedure, the President is to give a decision solely on the documents and information the confidentiality of which is disputed (see, to that effect and by analogy, order of 26 January 2018, *FV v Council*, T-750/16, not published, EU:T:2018:59, paragraph 14 and the case-law cited).
- 91 However, notwithstanding the fact that there is no challenge, the Court cannot be prevented from rejecting requests for confidential treatment in so far as they concern data the public nature of which is manifestly apparent from the information in the file or the confidential nature of which becomes manifestly obsolete as a result of the disclosure of other information in the file (order of 15 September 2016, *Deutsche Telekom v Commission*, T-827/14, not published, EU:T:2016:545, paragraph 46). Accordingly, in certain circumstances, it may decide to rule on the non-contested aspects of a request for confidential treatment (see, to that effect, order of 11 April 2019, *Google and Alphabet v Commission*, T-612/17, not published, EU:T:2019:250, paragraph 16).
- 92 It should also be recalled that, according to settled case-law, information which was confidential, but which is at least five years old, must for that reason be considered historical and be communicated to the other parties, unless, exceptionally, the party seeking to preserve that confidentiality shows that, in spite of its age, that information still constitutes essential secrets, in particular industrial or commercial secrets, disclosure of which would harm that party or the third party concerned (see order of 11 April 2019, *Google and Alphabet v Commission*, T-612/17, not published, EU:T:2019:250, paragraph 19 and the case-law cited).

- 93 In that regard, the Court, in the context of the application of Article 66 of the Rules of Procedure, must reconcile the principle that court rulings are made public with the right to the protection of personal data and the right to the protection of professional secrecy, regard also being had to the public's right of access, in accordance with the principles laid down in Article 15 TFEU, to court rulings (see, to that effect and by analogy, judgment of 5 October 2020, *Broughton v Eurojust*, T-87/19, not published, EU:T:2020:464, paragraph 49).
- 94 In the present case, the Court has decided not to redact, in the non-confidential version of the judgment, certain information covered by the requests of the main parties, the confidentiality of which has not been disputed by Nvidia. Some of those data may be inferred from the content of other parts of the present judgment and are therefore in the public domain. Some data are historic data for which maintaining confidentiality more than a decade later has not been appropriately justified. Lastly, certain other data provide factual details relating to the conduct investigated by the Commission. To redact that information would affect the public's understanding of the Court's judgment (see, to that effect, judgment of 2 February 2022, *Scania and Others v Commission* (T-799/17, EU:T:2022:48, paragraph 82).
- 95 In support of the application for annulment, the applicant puts forward 15 pleas in law:
- the first, alleging procedural irregularities;
 - the second, alleging 'manifest errors of assessment', of fact and of law, and failure to state adequate reasons as regards the definition of the relevant market and the applicant's dominant position during the relevant period;
 - the third, alleging a failure 'to apply the correct legal standard thereby committing manifest errors of law';
 - the fourth, alleging that the "predation theory" is illogical and unsupported by evidence';
 - the fifth, alleging 'manifest errors' of assessment and failure to state reasons regarding the reconstruction of alleged 'effectively paid' prices;
 - the sixth, alleging that the 'allocation of non-recurring engineering expenses is manifestly incorrect';
 - the seventh, alleging failure to 'establish an appropriate cost benchmark';
 - the eighth, alleging that the price-cost analysis is 'manifestly incorrect';
 - the ninth, alleging 'manifest errors of law and of appraisal' as regards the finding that the prices charged by the applicant foreclosed Icera and caused consumer harm;
 - the tenth, alleging manifest errors of assessment, of fact and of law, failure to state reasons and infringement of the right to be heard and of the principle of sound administration, in that the Commission concluded that the applicant's pricing practices were the implementation of a plan to exclude Icera;

- the eleventh, alleging a ‘manifest error of appraisal’ of fact and of law, and failure to state reasons as regards the Commission’s rejection of the objective justification put forward by the applicant;
 - the twelfth, alleging that the contested decision is not adequately reasoned;
 - the thirteenth, alleging manifest errors of assessment, lack of foundation and failure to state reasons in the contested decision as regards the duration of the infringement;
 - the fourteenth, alleging that the contested decision ‘manifestly errs’ in the imposition and calculation of the fine;
 - the fifteenth, alleging ‘manifest errors of law, fact and assessment’, and failure to state reasons in the contested decision, in establishing the Commission’s jurisdiction and the effect on trade.
- 96 Those pleas will be examined below in the order followed by the applicant, with the exception of the third, fourth and eighth pleas, which are based on, or summarise, certain arguments addressed in particular in the context of the sixth, seventh and ninth to eleventh pleas and which will, therefore, be dealt with after the eleventh plea.

The first plea: procedural irregularities

- 97 The first plea comprises two parts. The first alleges breach of the principle of sound administration in that the Commission failed to conduct a thorough, objective and diligent investigation. The second alleges breach of the rights of the defence and of the principle of equality of arms, in that the Commission failed to disclose to the applicant evidence relevant to its defence.

The first part: breach of the principle of sound administration

- 98 The first part comprises three complaints. The first alleges that the duration of the investigation was excessive. The second alleges that the case file was not sufficiently complete and accurate. The third alleges that the investigation was biased.

– Preliminary observations

- 99 Article 41(1) of the Charter of Fundamental Rights of the European Union (‘the Charter’), enshrines the right to good administration and provides that every person has the right to have his or her affairs handled impartially, fairly and within a reasonable time by the institutions, bodies, offices and agencies of the European Union. The Explanations relating to the Charter, published in the *Official Journal of the European Union* of 14 December 2007 (OJ 2007 C 303, p. 17), state that that article is based on the existence of the European Union as subject to the rule of law whose characteristics were developed in the case-law which enshrined good administration as a general principle of law (judgment of 13 December 2018, *Transavia Airlines v Commission*, T-591/15, EU:T:2018:946, paragraph 37 (not published)).

100 According to the case-law on the principle of sound administration, where, as in the present case, the institutions of the European Union have a power of appraisal, respect for rights guaranteed by the European Union legal order in administrative procedures is of even more fundamental importance. Those guarantees include, in particular, the duty of the competent institution to examine carefully and impartially all the relevant aspects of the individual case (judgments of 21 November 1991, *Technische Universität München*, C-269/90, EU:C:1991:438, paragraph 14; of 13 December 2018, *Transavia Airlines v Commission*, T-591/15, EU:T:2018:946, paragraph 38 (not published); and order of 17 January 2022, *Car-Master 2 v Commission*, T-743/20, not published, EU:T:2022:33, paragraph 66).

– *The first complaint: the duration of the investigation was excessive*

101 The applicant submits that the 10-year duration of the investigation is excessive and demonstrates, in particular, a lack of diligence on the part of the Commission.

102 According to the applicant, owing to the duration of the investigation, it was not in a position to defend itself properly. In particular, it raises changes in the make-up of the Commission team responsible for the investigation, a request for information sent eight years after the complaint was lodged, requests for clarification concerning documents which the Commission had had in its possession for a number of years and the modification of the scope of the investigation at a very advanced stage. It also states that the passing of time has affected recollection of the facts, both on its part and on the part of Huawei and ZTE, which, for that reason, were not in a position to respond to certain, sometimes crucial, information requests by the Commission. Lastly, it denies that the complexity of the case could have justified that duration and adds that it has always fully cooperated with the Commission.

103 The Commission disputes the arguments put forward by the applicant.

104 In accordance with settled case-law, compliance with the reasonable time requirement in the conduct of administrative procedures relating to competition policy constitutes a general principle of EU law whose observance the EU Courts ensure (see judgment of 19 December 2012, *Heineken Nederland and Heineken v Commission*, C-452/11 P, not published, EU:C:2012:829, paragraph 97 and the case-law cited).

105 Whether the time taken for each procedural stage is reasonable must be assessed in relation to the individual circumstances of each case, and in particular its context, the conduct of the parties during the procedure, what is at stake for the various undertakings concerned and its complexity (judgment of 20 April 1999, *Limburgse Vinyl Maatschappij and Others v Commission*, T-305/94 to T-307/94, T-313/94 to T-316/94, T-318/94, T-325/94, T-328/94, T-329/94 and T-335/94, EU:T:1999:80, paragraph 126).

106 In addition, in competition policy matters, the administrative procedure before the Commission may involve an examination in two successive stages, each corresponding to its own internal logic. The first stage, covering the period up to notification of the statement of objections, begins on the date on which the Commission, exercising the powers conferred on it by the EU legislature, takes measures which imply an accusation of an infringement and must enable the Commission to adopt a position on the course which the procedure is to follow. The second stage covers the period from notification of the statement of objections to adoption of the final decision. It must

enable the Commission to reach a final decision on the infringement concerned (judgment of 21 September 2006, *Nederlandse Federatieve Vereniging voor de Groothandel op Elektrotechnisch Gebied v Commission*, C-105/04 P, EU:C:2006:592, paragraph 38).

- 107 Furthermore, where the breach of the principle that cases must be dealt with within a reasonable time has affected the outcome of the proceedings, such a breach may be such as to result in the contested decision being set aside (see, to that effect, judgment of 21 September 2006, *Technische Unie v Commission*, C-113/04 P, EU:C:2006:593, paragraph 48 and the case-law cited).
- 108 It should however be stated that, for the purposes of the application of the competition rules, the fact that a reasonable time is exceeded can constitute a ground for annulment only in cases of decisions finding infringements where it has been proved that the breach of the principle that cases must be dealt with within a reasonable time has adversely affected the rights of defence of the undertakings concerned. Save in that specific case, failure to comply with the obligation to adopt a decision within a reasonable time cannot affect the validity of the administrative procedure under Regulation No 1/2003 (see, to that effect, judgment of 21 September 2006, *Nederlandse Federatieve Vereniging voor de Groothandel op Elektrotechnisch Gebied v Commission*, C-105/04 P, EU:C:2006:592, paragraphs 42 and 43).
- 109 In the present case, it must be observed that a period of more than six years elapsed between the complaint being lodged and the SO being sent. However, as stated in paragraph 15 above, it was not until mid 2012, that is to say three years after the complaint was lodged, that the complainant made its first allegations of predatory pricing and that the Commission was able to initiate its investigation into the conduct at issue. It follows that the first phase of the administrative procedure lasted for more than six years since the complaint was lodged, but only a little over three years since the complainant's first allegations of predation.
- 110 The second phase of the administrative procedure, lasting from receipt of the SO to the adoption of the contested decision on 18 July 2019, lasted approximately three and a half years.
- 111 Taken as a whole since the time of the first allegations of predation, the duration of the investigation, namely approximately seven years, is, however, not excessive in the light of the specific circumstances of the case, and, in particular, its complexity.
- 112 As the Court stated when ruling on the action for annulment brought against the Commission's decision of 31 March 2017, the practice alleged in the present case required complex analyses of large amounts of data, most of which data could be accessed only by the applicant, in order to re-construct the cost-price structure for the purpose of ascertaining whether or not pricing was predatory. Such an exercise was, in addition, all the more complex because it related to composite products (judgment of 9 April 2019, *Qualcomm and Qualcomm Europe v Commission*, T-371/17, not published, EU:T:2019:232, paragraph 125).
- 113 First, the applicant submitted more than 31 000 documents to the Commission, as is apparent from the application, in response to eight requests for information, sometimes followed by subsequent requests for clarification. Numerous meetings and telephone calls were also organised by the Commission, with the applicant, with the complainant and with third parties. In addition, it is apparent from Section 3 of the contested decision, which sets out the various stages of the administrative procedure, that the Commission did not remain inactive at any point during the investigation. Lastly, account must also be taken of the fact that that decision contains an analysis

of the conduct at issue which analysis is both complex and detailed, and that the Commission was at pains to respond to the numerous arguments raised by the applicant during that procedure, in compliance with the applicant's rights of defence.

- 114 Second, the conduct of the parties during the administrative procedure had an impact on the duration of that procedure. In that regard, it should be noted that it was only three years after having lodged the complaint that, for the first time, the complainant raised allegations of predation. As for the applicant, first of all, it called on the Hearing Officer on nine occasions to resolve questions relating to access to the file, then requested a number of time limit extensions, the postponement of a hearing, and requested that an additional hearing be held. Lastly, by bringing an action for annulment of the Commission's decision of 31 March 2017 and then an appeal against the judgment of 9 April 2019, *Qualcomm and Qualcomm Europe v Commission*, T-371/17, not published, EU:T:2019:232, which dismissed that action, the applicant could not have been unaware that that would necessarily slow down the investigation.
- 115 Consequently, since the duration of the investigation was not excessive, the present complaint must be rejected as being unfounded.
- 116 In any event, even if the duration of the investigation could be regarded as excessive, the applicant has not demonstrated how that could have had a negative impact on its ability to defend itself.
- 117 In the first place, the applicant in no way explains how simple changes within the Commission in the staff responsible for the investigation at all levels of the hierarchy could have affected the rigour, accuracy, stability and scope of the investigation or its rights of defence.
- 118 In the second place, as regards the document submitted in December 2013, in respect of which the Commission did not seek clarification until January 2017, it is sufficient to recall that, as the Court has held, account should also be taken of the general duty of care attaching to any undertaking or association of undertakings, by virtue of which they are required to ensure the proper maintenance, in their books or files, of information enabling details of their activities to be retrieved, in order, inter alia, to have the necessary evidence available in the event of legal or administrative proceedings. Accordingly, since the Commission had requested information from the applicant under Article 18(2) and (3) of Regulation No 1/2003, as from 7 June 2010 it was incumbent on the applicant, at least from that date, to act with greater diligence and to take all appropriate measures in order to preserve such evidence as might reasonably be available to it (see, to that effect, judgment of 9 April 2019, *Qualcomm and Qualcomm Europe v Commission*, T-371/17, not published, EU:T:2019:232, paragraph 136 and the case-law cited).
- 119 In the third place, the Commission has explained that, while the investigation had evolved over the course of the administrative procedure, that was so precisely in order to take account of the observations and arguments put forward by the applicant in response, in particular, to the SO and the SSO, which, contrary to the applicant's allegations, simply demonstrates that the Commission fully observed its rights of defence.
- 120 In the fourth place, the applicant does not explain how the fact that Huawei and ZTE were unable to provide certain explanations requested by the Commission concerning the payment of non-recurring engineering expenses ('the NRE payments') was linked to the passage of time. In any event, it must be held that the Commission examined whether, by granting such payments to Huawei and ZTE, the applicant had intended to grant price reductions to those two customers, which is as a result a subjective element, and therefore unrelated to those two companies, which

companies could not have adduced any significant exculpatory evidence in favour of the applicant. That is, moreover, confirmed by the fact that, as is apparent from the examination of the sixth plea, the Commission proved that element by relying on a body of consistent evidence which did not include testimony from those two undertakings.

- 121 In the light of the foregoing, even if it were to be well founded, the present complaint cannot result, in the present case, in a finding that the applicant's rights of defence were infringed, resulting in the annulment of the contested decision.

– *The second complaint: the case file was not sufficiently complete and accurate*

- 122 The applicant submits that, by failing to gather certain potentially exculpatory information, the Commission failed to compile a complete and accurate file. In its view, that failure is illustrated by the three examples set out below. In the first place, the Commission did not ask any questions of Huawei and ZTE concerning a Qualcomm employee, despite the large number of documents authored by that employee on which the Commission relies. In the second place, Huawei and ZTE were unable to provide a meaningful answer to a request for information concerning the NRE payments, even though they were crucial. In the third place, the applicant maintains that the Commission granted it access to certain documents which had been substantially redacted, without having ascertained whether the reasons for the documents' confidentiality, relied on by the complainant who had submitted them, were well founded, even though such documents might have contained potentially exculpatory evidence.
- 123 The Commission disputes the arguments put forward by the applicant.
- 124 In accordance with settled case-law, it is, in principle, for the Commission to decide whether a particular item of information is necessary in the context of an investigation into an infringement of the competition rules (see judgment of 15 July 2015, *GEA Group v Commission*, T-45/10, not published, EU:T:2015:507, paragraph 311 and the case-law cited). In addition, in so far as, in criticising the Commission in the present part of the plea for having failed to seek to obtain information which was probably exculpatory, it also relies on the guarantee of the rights of the defence in the present part of the plea, such a guarantee does not require the Commission to carry out further investigations where it considers that the investigation of the case has been sufficient (judgments of 16 May 1984, *Eisen und Metall v Commission*, 9/83, EU:C:1984:177, paragraph 32, and of 11 March 1999, *Thyssen Stahl v Commission*, 141/94, EU:T:1999:48, paragraph 110).
- 125 In addition, as regards the existence of potentially exculpatory documents which the Commission has not sought to obtain, it is apparent from the case-law that the undertaking concerned must show that it would have been able to use those documents for its defence, in the sense that, had it been able to rely on them during the administrative procedure, it would have been able to put forward evidence which was not consistent with the inferences made at that stage by the Commission and therefore could have had an influence, in any way at all, on the assessments made by the Commission in its decision (see, to that effect, judgments of 1 July 2010, *Knauf Gips v Commission*, C-407/08 P, EU:C:2010:389, paragraph 23 and the case-law cited, and of 6 September 2017, *Intel v Commission*, C-413/14 P, EU:C:2017:632, paragraph 97).

- 126 It follows that the undertaking concerned must establish, first, that it did not have access to certain exculpatory evidence and, second, that it could have used that evidence for its defence (judgments of 1 July 2010, *Knauf Gips v Commission*, C-407/08 P, EU:C:2010:389, paragraph 24, and of 6 September 2017, *Intel v Commission*, C-413/14 P, EU:C:2017:632, paragraph 98).
- 127 In the present case, the applicant does not explain why the Commission erred in concluding that the investigation of the case had been sufficient and how the potentially exculpatory information which the Commission had failed to gather, including the three examples which it cites, could have been used for its defence in the sense that if it had been able to rely on it during the administrative procedure, it could in any way have influenced the assessments made by the Commission in the contested decision. In any event, as is apparent from the case-law cited in paragraph 124 above, the Commission is not required to continue the investigation in order to gather all potentially exculpatory evidence, where it considers that the investigation of a case has been sufficient.
- 128 In particular, as regards the employee who is the author of numerous Qualcomm documents on which the Commission relies in the contested decision, the applicant provides no explanation at all as to how the answers to any questions to third parties on that topic by the Commission could have been of any importance for the investigation of the case or could have been used in any way to ensure its defence or could have had any influence on the assessments made by the Commission. While the Commission relied on some of those documents, principally in order to demonstrate that there was a plan to eliminate Icera, it also relied on other decisive evidence, which it concluded was sufficient. Lastly, the applicant does not explain how a third party could have been better placed than it to provide evidence challenging the role of that employee or the Commission's interpretation of the documents in question.
- 129 Similarly, even if Huawei and ZTE were unable to provide a meaningful answer to a request for information concerning the NRE payments, even though they were crucial, it must be observed that the Commission did not need those answers, since it relied in that regard on a body of consistent evidence, as is apparent from the examination of the sixth plea. The Commission was therefore entitled to conclude, without making a manifest error, that the investigation of the case was sufficient.
- 130 Lastly, as regards its access to documents which had been substantially redacted and which might potentially have contained exculpatory evidence, the applicant does not dispute that the complainant, which provided that information, considered it to be subject to legal professional privilege, and that the Commission itself did not possess unredacted versions. In any event, the Commission was, reasonably, able to conclude that it had sufficient other evidence for the carrying out of the investigation, without having to ask the complainant to provide it with versions of the documents it had submitted bearing fewer redactions.
- 131 For those reasons, the applicant's request that the Commission be ordered to confirm whether the numerous redactions in documents ID 1112-00146, 1112-00148, 1112-00150, 1112-00151, 1112-00154, 1112-00185, 1112-00218, 1112-00196, 1112-00229 and 1294 are based on sound assertions of legal professional privilege and to inform Qualcomm thereof or to obtain such presentations in order to examine the validity of Nvidia's assertions must also be rejected.
- 132 In the light of the foregoing, the present complaint must be rejected.

– *The third complaint: the investigation was biased*

- 133 The applicant submits that the contested decision is the result of a biased investigation, which resulted in a breach of the principle of sound administration and, to a lesser extent, of the principles of the presumption of innocence, *in dubio pro reo*, legal certainty and equality of arms and which infringes its rights of defence.
- 134 In support of the present complaint, the applicant puts forward three arguments.
- 135 In the first place, the Commission failed to assess impartially the arguments and evidence put forward by the applicant in the SO response and at the hearing. Rather, it engaged in a prolonged ‘fishing expedition’ by issuing multiple requests for information which resulted in vast amounts of data being gathered. Furthermore, the contested decision contained material differences and new elements compared with the SSO and the LoF, which, in turn, differed from the SO. In that regard, the applicant submitted a list of examples of such differences in Annex A.11 to the application.
- 136 In the second place, in the contested decision the Commission disregarded certain exculpatory evidence obtained from Huawei, in particular as regards NRE payments.
- 137 In the third place, the Commission met the complainant to discuss issues related to the SSO hearing, without the Hearing Officer being present, even though that matter falls under the mandate of the Hearing Officer, which raises serious questions as to the integrity and neutrality of the Commission’s investigation.
- 138 The Commission disputes the arguments put forward by the applicant.
- 139 In that regard, it should be noted that every person has the right to have his or her affairs handled impartially by the institutions of the European Union (see judgment of 2 February 2022, *Scania and Others v Commission*, T-799/17, EU:T:2022:48, paragraph 145 and the case-law cited). In the present case, however, it must be stated that none of the arguments put forward by the applicant makes it possible to establish that the Commission failed to offer all the guarantees to exclude any legitimate doubt regarding its impartiality in the investigation.
- 140 As regards, first of all, the applicant’s argument based on the fact that the Commission issued numerous requests for information which resulted in vast amounts of data being gathered, it should be recalled that, according to recital 23 of Regulation No 1/2003, the Commission should be empowered throughout the European Union to require such information to be supplied as is necessary, in particular, to detect any abuse of a dominant position prohibited by Article 102 TFEU. It is also apparent from Article 18(1) of Regulation No 1/2003 that, in order to carry out the duties assigned to it by that regulation, the Commission may, by simple request or by decision, require undertakings and associations of undertakings to provide ‘all necessary information’.
- 141 Given the Commission’s broad powers of investigation and assessment, it falls to it to assess whether the information which it requests from the undertakings concerned is necessary. As regards the Court’s power of review over that assessment by the Commission, it should be recalled that, according to the case-law, the concept of ‘necessary information’ must be interpreted by reference to the objectives for the achievement of which the powers of investigation in question have been conferred upon the Commission. Thus, the requirement that a correlation must exist between the request for information and the presumed infringement will be satisfied as long as,

at that stage in the procedure, the request may legitimately be regarded as having a connection with the presumed infringement, in the sense that the Commission may reasonably suppose that the information will help it to determine whether the alleged infringement has taken place (see judgment of 14 March 2014, *Holcim (Deutschland) and Holcim v Commission*, T-293/11, not published, EU:T:2014:127, paragraph 110 and the case-law cited).

- 142 As regards the present case in particular, it is apparent from paragraph 128 of the judgment of 9 April 2019, *Qualcomm and Qualcomm Europe v Commission* (T-371/17, not published, EU:T:2019:232), following the applicant having brought an action for annulment of the Commission's decision of 31 March 2017, that the scope of the Commission's investigation was such as to justify the provision of a significant amount of information.
- 143 In addition, as the Court also pointed out in paragraph 201 of the judgment of 9 April 2019, *Qualcomm and Qualcomm Europe v Commission* (T-371/17, not published, EU:T:2019:232), it was precisely in order to prepare its final decision on the possible existence of an infringement of Article 102 TFEU with all due care and attention and to take that decision on the basis of all the information which might have a bearing on it that the Commission was entitled to adopt that decision. The same reasoning applies by analogy to the other requests for information communicated by the Commission in the administrative procedure, there being no need to consider that there was any 'fishing expedition'. First, a demonstration of the Commission's bias during the investigation with regard to the applicant cannot be inferred in the abstract from the Commission having a margin of discretion in how that investigation is conducted and, second, the applicant has not adduced evidence capable of demonstrating in practice that those other requests for information could be explained only by such bias.
- 144 As regards, next, the applicant's argument concerning the differences between the SO, the SSO, the LoF and the contested decision, it is apparent from the case-law of the Court of Justice that observance of the rights of the defence means that the undertaking concerned must have been afforded the opportunity, during the administrative procedure, to make known its views on the truth and relevance of the facts and circumstances alleged and on the documents used by the Commission to support its claim that there has been an infringement of the competition rules (see judgment of 5 December 2013, *SNIA v Commission*, C-448/11 P, not published, EU:C:2013:801, paragraph 41 and the case-law cited; judgment of 25 March 2021, *Deutsche Telekom v Commission*, C-152/19 P, EU:C:2021:238, paragraph 106).
- 145 That obligation is satisfied if the final decision does not allege that the persons concerned have committed infringements other than those referred to in the statement of objections and takes into consideration only facts on which the persons concerned have had the opportunity of stating their views (judgments of 24 May 2012, *MasterCard and Others v Commission*, T-111/08, EU:T:2012:260, paragraph 266; of 18 June 2013, *ICF v Commission*, T-406/08, EU:T:2013:322, paragraph 117; and of 13 December 2018, *Slovak Telekom v Commission*, T-851/14, EU:T:2018:929, paragraph 180).
- 146 However, the essential facts on which the Commission is relying may be set out summarily in the statement of objections and the decision is not necessarily required to be a replica of the statement of objections, since that statement is a preparatory document containing assessments of fact and of law which are purely provisional in nature (judgment of 17 November 1987, *British American Tobacco and Reynolds Industries v Commission*, 142/84 and 156/84, EU:C:1987:490, paragraph 70; see also judgment of 5 December 2013, *SNIA v Commission*, C-448/11 P, not published, EU:C:2013:801, paragraph 42 and the case-law cited; judgment of 24 May 2012,

MasterCard and Others v Commission, T-111/08, EU:T:2012:260, paragraph 267). Thus, it is permissible for the Commission to supplement the statement of objections in the light of the parties' replies, whose arguments show that they have actually been able to exercise their rights of defence. The Commission may also, in the light of the administrative procedure, revise or supplement its arguments of fact or law in support of its objections (judgment of 9 September 2011, *Alliance One International v Commission*, T-25/06, EU:T:2011:442, paragraph 181). Accordingly, until a final decision has been adopted, the Commission may, in view, in particular, of the written or oral observations of the parties, abandon some or even all of the objections initially made against them and thus alter its position in their favour or decide to add new complaints, provided that it affords the undertakings concerned the opportunity of making known their views in that respect (see judgment of 30 September 2003, *Atlantic Container Line and Others v Commission*, T-191/98 and T-212/98 to T-214/98, EU:T:2003:245, paragraph 115 and the case-law cited).

- 147 In the present case, a demonstration of the Commission's bias during the investigation with regard to the applicant cannot be inferred in the abstract from the fact that there were differences between the SO, the SSO, the LoF and the contested decision. In addition, the applicant has not adduced evidence making it possible to demonstrate in practice that those differences could be explained only by such bias.
- 148 It is, however, necessary to consider whether, in the contested decision, the Commission relied on new complaints or evidence against the applicant, in respect of which the applicant did not have the opportunity to make known its views during the administrative procedure.
- 149 In that regard, the applicant simply asserts, in general terms, that the contested decision contains significant differences and new elements which are not contained in the arguments put forward in the SSO and in the LoF, and does no more than cite in a footnote certain recitals of that decision and make a reference to Annex A.11 to the application.
- 150 Even if those elements were in fact to constitute new elements, not contained in the previous procedural documents, the fact remains that the applicant does not explain in any way how those elements would constitute new complaints or evidence against it in relation to which it has not had the opportunity to make known its views, and not simply the taking into account, in the contested decision, of the observations received by the Commission, including its own observations.
- 151 As is apparent from the case-law cited in paragraph 146 above, the contested decision cannot be a replica of the SO, the SSO or the LoF, precisely because the Commission is required to take account of the observations submitted by the parties during the administrative procedure. By simply drawing up a list of differences between that decision and the earlier procedural documents, without further explaining the specific implications, to its disadvantage, of such changes to the Commission's legal reasoning and the characterisation of the facts, or how the scope of the conduct at issue was altered accordingly, the applicant has not demonstrated that the Commission conducted a biased investigation.
- 152 Lastly, as regards the applicant's argument that the Commission met the complainant to discuss issues related to the SSO hearing, without the Hearing Officer being present, even though that matter falls under the mandate of the Hearing Officer, that does not call into question the Commission's integrity or its ability to deal with the case in a neutral and objective manner. The

applicant also does not demonstrate how such a meeting could have affected its rights of defence, particularly since there was nothing to prevent it from asking the Hearing Officer for an equivalent meeting if it considered that to be necessary.

153 The present complaint must, therefore, be rejected.

154 Consequently, the first part of the first plea must be rejected.

The second part: infringement of the rights of the defence and of the principle of equality of arms

155 The third part is based on two complaints. The first alleges inadequate access to the file. The second alleges, in essence, that the content of the case file submitted was insufficient.

– *Preliminary observations*

156 The rights of the defence are fundamental rights forming an integral part of the general principles of law whose observance the General Court and the Court of Justice ensure (judgment of 25 October 2011, *Solvay v Commission*, C-109/10 P, EU:C:2011:686, paragraph 52).

157 Observance of the rights of the defence is a general principle of EU law which applies where the authorities are minded to adopt a measure which will adversely affect an individual (judgment of 16 January 2019, *Commission v United Parcel Service*, C-265/17 P, EU:C:2019:23, paragraph 28).

158 That general principle of EU law is enshrined in Article 41(2)(a) and (b) of the Charter (judgment of 25 March 2021, *Deutsche Telekom v Commission*, C-152/19 P, EU:C:2021:238, paragraph 105).

159 In the context of competition law, observance of the rights of the defence requires that any addressee of a decision finding that that addressee has committed an infringement of the competition rules must have been afforded the opportunity, during the administrative procedure, to make known its views on the truth and relevance of the facts and circumstances alleged as well as on the documents used by the Commission to support its claim that there has been such an infringement, as is apparent from the case-law cited in paragraph 144 above.

160 According to settled case-law, an infringement of the rights of the defence, in particular the right to be heard, results in the annulment of the decision taken at the end of the administrative procedure at issue only if, had it not been for such an irregularity, the outcome of the procedure might have been different. An applicant who relies on infringement of his or her rights of defence cannot be required to show that the decision of the EU institution concerned would have been different in content, but simply that such a possibility cannot be totally ruled out (see judgment of 18 June 2020, *Commission v RQ*, C-831/18 P, EU:C:2020:481, paragraphs 105 and 106 and the case-law cited), since that party would have been better able to ensure its defence had there been no procedural error (judgments of 2 October 2003, *Thyssen Stahl v Commission*, C-194/99 P, EU:C:2003:527, paragraph 31; of 1 October 2009, *Foshan Shunde Yongjian Housewares and Hardware v Council*, C-141/08 P, EU:C:2009:598, paragraph 94; and of 13 December 2018, *Deutsche Telekom v Commission*, T-827/14, EU:T:2018:930, paragraph 129).

161 Such an assessment must be made in the light of the factual and legal circumstances of each case (judgment of 18 June 2020, *Commission v RQ*, C-831/18 P, EU:C:2020:481, paragraph 107).

– *The first complaint: inadequate access to the file*

- 162 The applicant submits that it had access to the file only once the SO and the SSO had been adopted and after it had had to make repeated requests to that effect. It also claims that it had to devote ‘an inordinate amount of time and resources’ to consulting certain documents, which constituted an ‘unnecessary and harmful distraction’ and negatively affected its ability to defend itself.
- 163 The Commission disputes the arguments put forward by the applicant.
- 164 A corollary of the principle of respect for the rights of the defence, the right of access to the file means that the Commission must give the undertaking concerned the opportunity to examine all the documents in the investigation file which may be relevant for its defence. Those documents include both incriminating evidence and exculpatory evidence, save where the business secrets of other undertakings, the internal documents of the Commission or other confidential information are involved (judgments of 7 January 2004, *Aalborg Portland and Others v Commission*, C-204/00 P, C-205/00 P, C-211/00 P, C-213/00 P, C-217/00 P and C-219/00 P, EU:C:2004:6, paragraph 68, and of 12 July 2011, *Toshiba v Commission*, T-113/07, EU:T:2011:343, paragraph 41).
- 165 In the present case, the applicant complains, in the first place, that it had to insist to the Commission in order to obtain access to the documents in the file, which caused it to lose time and caused memories to fade and, consequently, had a negative effect on its defence.
- 166 The applicant’s arguments concerning the length of the administrative procedure and its consequences for the applicant’s ability to defend itself must be rejected for the same reasons as those set out in paragraphs 116 to 121 above. Furthermore, in so far as the applicant submits that it was given access to the file only at a late stage, it is common ground that the applicant did have access to the file during the administrative procedure and that it was able to take account of the documents contained in the file when organising its defence. Accordingly, even if the applicant did not have immediate access to its file, the fact remains that it has not proved that that access was at a late stage and that its rights of defence were infringed, with the result that that argument must be rejected.
- 167 As regards, in the second place, the alleged inadequate access to the file, it should be noted, as is apparent from recitals 45 and 46 of the contested decision, which the applicant does not dispute, that, as regards the SO, the applicant itself acknowledged that any access to file issues were resolved before it submitted the SO response and that, as regards the SSO, it did not make use of the opportunity offered to it by the Commission of supplementing the SSO response after having had access to a revised non-confidential version of certain documents in the file, with the result that it cannot validly claim that its rights of defence were affected.
- 168 Consequently, the present complaint must be dismissed.

– *The second complaint: the content of the file submitted was insufficient*

- 169 The applicant submits that the Commission failed to fulfil its obligation to take detailed notes of all meetings, telephone calls and interviews, whether formal or informal, conducted for the purpose of collecting information relating to the subject matter of an investigation, and properly to provide it with those notes.

- 170 In the first place, the applicant submits that the Commission failed to take notes of seven conference calls and five meetings with the applicant. The Commission could then not refer to those notes, which were likely to have contained exculpatory evidence.
- 171 In the second place, the applicant submits that the Commission was too late in sending it certain notes of meetings or conference calls with third parties, sometimes a number of years after those meetings were held.
- 172 In the third place, the applicant maintains that the notes which the Commission sent it relating to certain conference calls with third parties, namely a conference call with Huawei and seven conference calls with the complainant, were too brief and did not enable it to understand the information exchanged therein.
- 173 The Commission disputes the arguments put forward by the applicant.
- 174 At the outset, it must be stated that Article 19(1) of Regulation No 1/2003 empowers the Commission to interview any natural or legal person who consents to be interviewed for the purpose of collecting information relating to the subject matter of an investigation, in order to carry out the duties assigned to it by that regulation.
- 175 In accordance with Article 3 of Regulation No 773/2004, the Commission may record the statements made by persons interviewed in any form when conducting an interview on the basis of Article 19 of Regulation No 1/2003. Article 3(2) of Regulation No 773/2004 also states that such an interview may be conducted by any means including by telephone or electronic means.
- 176 In that regard, it is apparent from the case-law that, if the Commission decides to carry out such an interview on the basis of Article 19(1) of Regulation No 1/2003, it must record the interview in full, without prejudice to the fact that it is free to decide on the type of recording. It follows that the Commission is required to record, in a form of its choosing, any interview which it conducts, under that article, for the purpose of collecting information relating to the subject matter of an investigation (judgments of 6 September 2017, *Intel v Commission*, C-413/14 P, EU:C:2017:632, paragraphs 90 and 91, and of 9 March 2023, *Les Mousquetaires and ITM Entreprises v Commission*, C-682/20 P, EU:C:2023:170, paragraph 89).
- 177 For that purpose, it is not sufficient for the Commission to make a brief summary of the subjects addressed during the interview. It must be in a position to provide an indication of the content of the discussions which took place during the interview, in particular the nature of the information provided during that interview on the subjects addressed (judgment of 15 June 2022, *Qualcomm v Commission (Qualcomm – exclusivity payments)*, T-235/18, EU:T:2022:358, paragraph 190; see also, to that effect, judgment of 6 September 2017, *Intel v Commission*, C-413/14 P, EU:C:2017:632, paragraphs 91 and 92).
- 178 In the first place, as regards the contacts which took place between the Commission and the applicant itself during the administrative procedure, the applicant complains that the file contained no notes relating to seven conference calls and five meetings.
- 179 It should be noted that the applicant in no way explains how, if a procedural irregularity had occurred, its rights of defence could have been affected, by demonstrating that it would have been better able to ensure its defence had the Commission taken notes of those contacts with it. Since those meetings took place between the Commission and the applicant itself, the applicant

was fully aware of their content and of the subjects discussed with the Commission at those meetings. It was therefore perfectly able to use any exculpatory evidence which might potentially have been addressed during those contacts in order to be better able to ensure its defence. In addition, in such a situation, it might have been expected that the applicant would have taken the precaution of itself sending the Commission a summary of the contact in question, in order to leave a written record of any potential exculpatory evidence in the file.

- 180 In the second place, as regards certain notes relating to meetings or conference calls with third parties, the applicant complains that it obtained access thereto only at a late stage, which infringed its rights of defence.
- 181 In that regard, irrespective of whether or not the meetings and telephone calls in question constitute ‘interviews’ within the meaning of Article 19(1) of Regulation No 1/2003 which the Commission was required to record, which, moreover, the applicant does not even attempt to demonstrate, it is not disputed that the applicant had access to the notes relating to those meetings and telephone conversations on 31 July and 27 August 2018, that is to say just after the Commission sent the SSO.
- 182 While it is regrettable that access to the notes relating to the meetings and conference calls in question was actually granted long after those meetings and conference calls were held, the fact remains that the applicant responded to the SSO on 22 October 2018, that is to say, several weeks after receiving those notes, which gave it sufficient time to examine them, to extract any potentially exculpatory evidence from them and to rely on them in that response.
- 183 In that regard, it should be noted that the circumstances of the present case must be distinguished from those underlying the case which gave rise to the judgment of 15 June 2022, *Qualcomm v Commission (Qualcomm – exclusivity payments)* (T-235/18, EU:T:2022:358), in which the General Court annulled Commission Decision C(2018) 240 final of 24 January 2018 relating to a proceeding under Article 102 TFEU and Article 54 of the EEA Agreement (Case AT.40220 – Qualcomm (exclusivity payments)), in particular due to the Commission having sent certain notes relating to interviews with third parties at a late stage.
- 184 Thus, it is apparent from paragraphs 168 and 169 of the judgment of 15 June 2022, *Qualcomm v Commission (Qualcomm – exclusivity payments)* (T-235/18, EU:T:2022:358), that, in the case which gave rise to that judgment, the Commission had not forwarded to Qualcomm any information during the administrative procedure concerning either the existence or the content of certain interviews with third parties and that it was only after the adoption of Decision C(2018) 240 final that it forwarded such notes, some of which had even been provided during the proceedings before the Court, in response to measures of inquiry ordered by the Court.
- 185 Moreover, it is not disputed that, in the case which gave rise to the judgment of 15 June 2022, *Qualcomm v Commission (Qualcomm – exclusivity payments)* (T-235/18, EU:T:2022:358), unlike in the present case, Qualcomm did not have access to those notes during the administrative procedure and was therefore unable to make known its views on them or use any exculpatory evidence in them to defend itself before the adoption of the decision finding Qualcomm to have made exclusivity payments. Those circumstances of significance, which led the Court to annul Decision C(2018) 240 final, constitute a fundamental difference from the present case.

- 186 It follows from the foregoing that the applicant has failed to demonstrate that its rights of defence were infringed by the fact that the Commission sent to it the notes relating to the meetings and conference calls in question at a relatively late stage. The applicant's argument alleging that the Commission sent those notes at a late stage must therefore be rejected.
- 187 In the third place, the applicant complains that certain notes relating to conference calls with third parties, namely a conference call with Huawei and seven conference calls with the complainant, are too brief.
- 188 In that regard, at the hearing, the Commission acknowledged, first, that at least some of the conference calls to which the applicant referred could actually be characterised as 'interviews' within the meaning of Article 19(1) of Regulation No 1/2003 and, second, that it had not recorded them. It should also be observed that the notes relating to those interviews, as set out in Annex A.9 to the application, are too brief to be able to compensate for that failure to make a recording.
- 189 As regards the inferences to be drawn from such a procedural irregularity, it is necessary to determine whether, in the light of the factual and legal circumstances specific to the present case, the applicant has demonstrated adequately that it would have been better able to defend itself had there been no such irregularity. In the absence of such demonstration, that irregularity cannot result in the annulment of the contested decision.
- 190 Where the undertaking concerned can give a useful indication of the authors and the nature and content of the documents which have been withheld from it, it must present the facts and adduce the evidence to prove that it could have used in its defence parts of the file to which it, in error, did not have access, whether it be inculpatory or exculpatory (see, to that effect, Opinion of Advocate General Kokott in *Solvay v Commission*, C-110/10 P, EU:C:2011:257, point 37).
- 191 If inculpatory evidence has been withheld from it, it is sufficient for the undertaking concerned to demonstrate that the administrative procedure could have led to a different result if that evidence was disallowed, in so far as the Commission relied on that evidence (see, to that effect, judgments of 7 January 2004, *Aalborg Portland and Others v Commission*, C-204/00 P, C-205/00 P, C-211/00 P, C-213/00 P, C-217/00 P and C-219/00 P, EU:C:2004:6, paragraphs 71 and 73, and of 12 July 2011, *Toshiba v Commission*, T-113/07, EU:T:2011:343, paragraph 46).
- 192 If exculpatory evidence has been withheld from it, the undertaking concerned must show that it would have been able to use that evidence for its defence, in the sense that, had it been able to rely on it during the administrative procedure, it would have been able to invoke evidence which was not consistent with the inferences made at that stage by the Commission and therefore could have had an influence, in any way at all, on the assessments made by the Commission in its decision (see judgment of 6 September 2017, *Intel v Commission*, C-413/14 P, EU:C:2017:632, paragraph 97 and the case-law cited).
- 193 In the present case, it must be observed that the applicant has failed to establish that, had it not been for the procedural irregularity identified, it would have been better able to defend itself.
- 194 In particular, despite the fact that it was, overall, possible to deduce from the notes sent by the Commission the content of the interviews in question and, consequently, to infer that evidence may exist which it could have used to defend itself, the applicant puts forward no detailed argument making it possible to understand how it would have been better able to defend itself, even when the Court expressly questioned it in that regard at the hearing.

- 195 Lastly, it must be observed that in the judgment of 15 June 2022, *Qualcomm v Commission* (*Qualcomm – exclusivity payments*) (T-235/18, EU:T:2022:358), in which the Court annulled Decision C(2018) 240 final, in particular because the notes sent by the Commission relating to certain interviews with third parties were incomplete, the applicant had adduced, in order to substantiate the claims made in that regard in the application, an annex intended to clarify the issues which might have been discussed during those interviews and how that material could have assisted its defence. In the present case, the applicant has not put forward any such information.
- 196 It follows that the procedural irregularity based on the notes relating to conference calls with third parties being overly brief, which has been observed in the present case, cannot result in the annulment of the contested decision.
- 197 Consequently, the present complaint must be rejected, as must the second part of the first plea. Therefore, since the first part of the first plea has also been rejected (see paragraph 154 above), that plea must be rejected in its entirety.

The second plea: ‘manifest errors of assessment’, of fact and of law, and failure to state adequate reasons as regards the definition of the relevant market and the applicant’s dominant position during the relevant period

- 198 The second plea comprises five parts. The first part relates to shortcomings in the contested decision as regards the definition of the relevant market. The second relates to the competitive constraints exerted directly by captive supply on the merchant market. The third relates to the competitive constraints exerted indirectly by captive supply on the merchant market. The fourth relates to the applicant’s dominant position during the relevant period. The fifth relates to the definition of the leading edge segment of the UMTS chipset market on which the Commission based its analysis.

The first part: shortcomings in the contested decision as regards the definition of the relevant market

- 199 The present part of the plea is based on three complaints. The first alleges manifest errors of assessment and of law in that the Commission relied, in order to define the relevant market, on a selection of vague answers to unclear requests for information. The second alleges manifest errors of assessment and of law in that the Commission failed to examine whether a chain of substitution existed. The third alleges manifest errors of assessment and of law in that the Commission concluded that it was not required to apply the ‘small but significant and non-transitory increase in price’ test (the ‘SSNIP test’).

Preliminary observations

- 200 It should be recalled that, in the application of Article 102 TFEU, the objective of the definition of the relevant market is to define the boundaries within which it must be assessed whether the undertaking concerned is able to behave, to an appreciable extent, independently of its competitors, its customers and consumers (see judgment of 30 January 2020, *Generics (UK) and Others*, C-307/18, EU:C:2020:52, paragraph 127 and the case-law cited).

- 201 The determination of the relevant market is therefore, as a general rule, a prerequisite of any assessment of whether the undertaking concerned holds a dominant position, which involves defining, first, the products or services in that market and, second, the geographical dimension of that market (see judgment of 30 January 2020, *Generics (UK) and Others*, C-307/18, EU:C:2020:52, paragraphs 127 and 128 and the case-law cited).
- 202 As regards the product or services market, the concept of the ‘relevant market’ implies that there can be effective competition between the products or services which form part of it, and this presupposes that there is a sufficient degree of interchangeability or substitutability between those products and those services. That interchangeability or substitutability is not assessed solely in relation to the objective characteristics of the products and services at issue. There must also be taken into consideration the conditions of competition and the structure of supply and demand on the market (see judgment of 30 January 2020, *Generics (UK) and Others*, C-307/18, EU:C:2020:52, paragraph 129 and the case-law cited).
- 203 Such an assessment presupposes, however, that there is a sufficient degree of interchangeability between the products or services which form part of the relevant market and those which are intended to satisfy the demand on that market. Such is the case if the person making an alternative offer is in a position, within a short period, to satisfy the demand with sufficient strength to constitute a serious counterbalance to the power held by the undertaking concerned on that market (see, to that effect, judgment of 30 January 2020, *Generics (UK) and Others*, C-307/18, EU:C:2020:52, paragraphs 132 and 133).
- 204 Lastly, according to settled case-law, in so far as the definition of the market concerned involves complex economic assessments on the part of the Commission, it is subject to only limited review by the EU Courts (judgments of 17 September 2007, *Microsoft v Commission*, T-201/04, EU:T:2007:289, paragraph 482; of 7 May 2009, *NVV and Others v Commission*, T-151/05, EU:T:2009:144, paragraph 53; and of 15 December 2010, *CEAHR v Commission*, T-427/08, EU:T:2010:517, paragraph 66).
- 205 The applicant’s argument concerning the definition of the relevant market adopted by the Commission in the contested decision must be examined in the light of those considerations.
- *The first complaint: manifest errors of assessment and of law in that the Commission relied on a selection of vague answers to unclear questions*
- 206 The applicant submits that, in the contested decision, the Commission ruled out the potential substitutability between chipsets supporting the UMTS standard and chipsets supporting other standards on the basis of the biased analysis of selected responses to poorly worded questions.
- 207 In particular, according to the applicant, the contested decision is based on unclear or ambiguous answers to questions which were confusing and open to misinterpretation, set out in requests for information sent a number of years after the alleged infringement, with the result that a number of respondents to the questionnaires of 4 November 2014 and 30 April 2015 interpreted the questions posed as relating to the market as it stood at the point in time when those requests for information were issued, and not at the time of the alleged infringement. Furthermore, the wording of certain questions relating to substitutability between UMTS chipsets and chipsets supporting other standards led the undertakings questioned to answer the question whether they intended to switch supplier for chipsets intended to be incorporated into existing devices instead

of future devices. Lastly, the drafting of the questions prejudged the existence of two distinct markets, one covering UMTS chipsets and the other covering chipsets supporting LTE, since respondents were asked whether they would switch from one type of chipset to another.

- 208 The Commission disputes the arguments put forward by the applicant.
- 209 At the outset, it should be observed that, in the contested decision, the Commission concluded on the basis of a large amount of data that there was no substitutability between UMTS chipsets and chipsets supporting other standards. That is apparent from footnotes 245, 246 and 248 to 251 to that decision as regards the lack of substitutability between UMTS chipsets and other chipsets supporting the GSM standard, from footnotes 254 to 258 to that decision as regards the lack of substitutability between UMTS chipsets and other chipsets supporting the CDMA standard, from footnotes 260 and 264 to that decision as regards the lack of substitutability between the 'Frequency-division-duplexing' (FDD) variant of UMTS chipsets and the same chips in the 'Time-division-duplex' (FDD) variant, which do not support FDD mode, and from footnotes 271 to 273 to the contested decision concerning the lack of substitutability between UMTS chipsets and other chipsets supporting the WiFi/WiMax standard. Furthermore, as is apparent from footnotes 277 and 279 to the contested decision, the Commission also relied on a large number of documents in order to conclude that UMTS chipsets supporting various versions of that standard were substitutable.
- 210 In addition, it should be noted that the Commission relied not only on the replies to the questionnaires sent in 2014 and 2015, but also on the replies to two questionnaires sent in 2010 which also concerned the definition of the relevant market, which the Commission expressly confirmed in response to a measure of organisation of procedure in the form of a written question put by the Court, and also relied on industry reports, as is apparent from footnotes 244, 261 and 270 to the contested decision.
- 211 Consequently, the Commission cannot be criticised for having relied solely on a selection of answers when it defined the relevant market.
- 212 In addition, even if some of the undertakings questioned had been able to reply to the questionnaires of 2014 and 2015 referring to an incorrect time frame, it must be stated that not all the respondents to whom the Commission refers in footnotes 244, 261 and 270 to the contested decision made such an error, which the applicant does not dispute, since it simply cites a number of examples of undertakings whose responses do not, in its view, relate to the relevant period.
- 213 As regards, in particular, the questionnaire of 30 April 2015, it should be noted that it states, by way of introduction, that replies are to be provided for the period from 2010 to 2014. As to why that questionnaire did not concern 2009, even though the second quarter of that year is included in the relevant period, when questioned in that regard in writing by the Court, the Commission stated that many respondents to that questionnaire had expressly referred to a time frame prior to 2010 or had made statements which applied generally, regardless of the reference period and which, therefore, were also valid for 2009.
- 214 It follows that, even if the some of the respondents to the questionnaires of 4 November 2014 and 30 April 2015 to which the applicant refers provided vague responses, as the applicant maintains, referring to a time frame which differed from the infringement time frame, such an error would not in any event be capable of calling into question the Commission's analysis in the

light of all the responses regarding the lack of substitutability between UMTS chipsets and chipsets supporting other standards, having regard to the very large amount of consistent data on which the Commission relied in that regard.

- 215 Furthermore, by maintaining that the wording of certain questions relating to substitutability between UMTS chipsets and chipsets supporting other standards resulted in the undertakings questioned answering the question whether they intended to switch supplier for chipsets intended to be incorporated into existing devices, rather than into future devices, the applicant submits, in essence, that the Commission ought to have examined whether, hypothetically, there was a competitive constraint exerted by suppliers of chipsets to be incorporated into future devices, namely products which did not yet exist.
- 216 That line of argument, however, cannot succeed.
- 217 It is apparent from paragraph 7 of the Commission Notice on the definition of the relevant market for the purposes of Community competition law (OJ 1997 C 372, p. 5; the ‘Notice on market definition’) that a relevant product market comprises all those products or services which are regarded as interchangeable or substitutable by the consumer, by reason of the products’ characteristics, their prices and their intended use, which implies that the assessment is to be based on the types of products which the undertakings in question sell at that time, and not by reference to hypothetical future products, whose characteristics, price and use are not yet known to consumers.
- 218 It should also be observed in that regard that the applicant does not explain in any event how the hypothetical competitive constraint exerted by chipsets intended for devices which do not yet exist could have had any influence at all on the outcome of the analysis conducted by the Commission, which, as stated in paragraphs 209 and 210 above, relied on a large amount of consistent data.
- 219 Lastly, it is necessary to reject as unfounded the applicant’s argument that, by asking the respondents whether they would switch from one type of chipset to the other, the Commission prejudged the existence of two distinct markets, namely a UMTS chipsets market and a market for chipsets supporting LTE.
- 220 The questions put by the Commission in that regard refer only to specific technologies, in particular the GSM, UMTS and LTE standards, each of which has its own characteristics, and specifically concern whether or not the chipsets supporting those standards are regarded as substitutable by those who purchase them and, consequently, as potentially forming part of the same product market.
- 221 It follows from the above that the present complaint must be rejected.

– *The second complaint: manifest errors of assessment and of law in that the Commission failed to examine whether a chain of substitution exists*

- 222 The applicant claims that the Commission committed manifest errors of assessment and of law by failing to examine whether a chain of substitution exists between UMTS chipsets and chipsets supporting earlier or later standards.

- 223 According to the applicant, the Commission ought to have examined whether, at the time of the transition from one standard to another, there was what it described as a ‘chain of substitution’, that is to say, in its own words, ‘a continuum of products on offer or, in the alternative, an obvious structural “breaking point” between the two standards’. In particular, it disputes the Commission’s conclusion that there was no chain of substitution between UMTS chipsets and chipsets which had previously supported the broad GSM/EDGE standard.
- 224 The Commission disputes the arguments put forward by the applicant.
- 225 It must be stated that, in paragraph 57 of the Notice on market definition, the Commission explains that the existence of chains of substitution might lead, in certain cases, to the inclusion in a market of certain products which are not directly substitutable, where product B is a demand substitute for products A and C. In that situation, even if products A and C are not direct demand substitutes, they might be found to be in the same relevant product market since their respective pricing might be constrained by substitution to B.
- 226 Clearly, in the present complaint, the applicant is, in essence, criticising the Commission for having concluded, first, that chipsets supporting an earlier standard and UMTS chipsets were not substitutable and, second, that UMTS chipsets and chipsets supporting a later standard were not substitutable. In other words, it complains that the Commission carried out two ‘traditional’ assessments of substitutability between two products, and did not assess possible substitutability via a chain of substitution between two products which were not directly substitutable but which would become so indirectly, by virtue of their both being substitutable for a third product.
- 227 In that regard, it is sufficient to recall that the Commission examined in the contested decision the substitutability between UMTS chipsets and chipsets supporting other standards, either earlier or later than the UMTS standard, relying on a large amount of consistent data, as is apparent from paragraphs 209 and 210 above.
- 228 It follows from the above that the present complaint must be rejected.
- *The third complaint: manifest errors of assessment and of law in that the Commission concluded that it was not required to apply the SSNIP test*
- 229 The applicant is of the view that, by failing to apply the SSNIP test in the contested decision, the Commission made a manifest error of assessment and an error of law. According to the applicant, while the judgment of 11 January 2017, *Topps Europe v Commission* (T-699/14, not published, EU:T:2017:2), to which the Commission refers in that decision, does indeed refer to tools being available to the Commission other than that test, including market studies or an assessment of consumers’ and other competitors’ points of view, the fact remains that the Commission is still required to rely on suitable, convincing and reliable evidence, which it did not do in the present case, since it relied on a selection of answers to confusing questions set out in requests for information. The applicant also criticises the Commission for having concluded, in recital 248 of that decision, that such a test was not in any event appropriate since prices of UMTS chips may already have been set at a supra-competitive level.
- 230 The Commission and the intervener dispute the applicant’s arguments.

- 231 As a preliminary point, it should be recalled that the SSNIP test consists of examining whether a small increase in the price of a product, in the order of 5 to 10%, would lead to a significant number of customers choosing another product, which will in that case be regarded as substitutable for the first product.
- 232 It should also be noted that, although the SSNIP test is a recognised method for defining the market at issue, it is not the only method available to the Commission. It may also take into account other tools for the purposes of defining the relevant market, such as market studies or an assessment of consumers' and competitors' points of view (judgments of 11 January 2017, *Topps Europe v Commission*, T-699/14, not published, EU:T:2017:2, paragraph 82, and of 5 October 2020, *HeidelbergCement and Schwenk Zement v Commission*, T-380/17, EU:T:2020:471, paragraph 331 (not published)), which the applicant does not dispute.
- 233 Furthermore, it is clear both from the case-law and from paragraph 25 of the Notice on market definition that there is no rigid hierarchy between the different criteria available to the Commission (see, to that effect, judgments of 11 January 2017, *Topps Europe v Commission*, T-699/14, not published, EU:T:2017:2, paragraph 82, and of 5 October 2020, *HeidelbergCement and Schwenk Zement v Commission*, T-380/17, EU:T:2020:471, paragraph 331 (not published)), which the applicant also does not dispute.
- 234 In addition, it should be recalled that the Commission has a certain margin of discretion with regard to the definition of the relevant market, in so far as such definition involves complex economic assessments (see, to that effect, judgment of 15 December 2010, *CEAHR v Commission*, T-427/08, EU:T:2010:517, paragraph 66 and the case-law cited).
- 235 It follows that the Commission is not obliged, when defining the relevant market for the purposes of applying Article 102 TFEU, to carry out a SSNIP test.
- 236 The Commission therefore did not err in law when it stated, in recital 180 of the contested decision, that it was able in the present case to define the relevant market without having to carry out a SSNIP test.
- 237 Furthermore, it is apparent from the analysis of the first complaint relied on by the applicant in support of the first part of its first plea that, when it defined the relevant market in the contested decision, the Commission relied on suitable, convincing and reliable evidence, and not, as the applicant claims, on a selection of answers to confusing questions set out in requests for information. The applicant therefore has failed to demonstrate that the Commission erred in failing to carry out the SSNIP test in the present case.
- 238 Moreover, the applicant has not even attempted to demonstrate that the use of the SSNIP test would have made any difference to the conclusions reached by the Commission in the contested decision (see, to that effect, judgment of 5 October 2020, *HeidelbergCement and Schwenk Zement v Commission*, T-380/17, EU:T:2020:471, paragraph 331 (not published)).
- 239 The present complaint must therefore be rejected, there being no need to give a ruling on the substance of one of the justifications given by the Commission for its failure to use the SSNIP test in the present case, which is disputed by the applicant, namely the fact that such a test was not in any event appropriate in the present case since the price of UMTS chipsets was already set at a supra-competitive level.

240 The first part of the second plea must therefore be rejected.

The second part: the competitive constraints exerted directly by captive supply on the merchant market

241 In support of the present part of the plea, the applicant puts forward four complaints.

242 In the first place, the applicant maintains that, in order to conclude that there was no competitive constraint directly from the captive supply of certain vertically integrated original equipment manufacturers in the UMTS chipset market, the Commission erred in relying on the inconsistent and irrelevant statements of those manufacturers, but did not question customers about their arrangements and ability, in the event of an increase in the price of chipsets on that market, to switch to self-supply or to increase self-supply for those already vertically integrated.

243 In the second place, the applicant submits that the Commission erred in excluding [confidential]1F's captive production from the relevant market on the ground that it was minimal during the relevant period. It refers in that regard to its replies to the SO and to the SSO, in which it demonstrated that [confidential] exerted a significant competitive constraint.

244 In the third place, the applicant criticises the Commission's rejection of certain evidence relating to market dynamics and trends in the sector, whereas, in a sector as dynamic as that concerned by the contested decision, it was necessary to take account of those developments and trends. That was all the more so in the present case since, as regards other aspects of that decision, in particular in order to substantiate the significant growth potential of the leading edge segment of the UMTS chipsets market, the Commission took account of future projections.

245 In the fourth place, the applicant complains that the Commission failed to acknowledge commercial realities, in particular the fact that it had lost approximately 70% of its sales of UMTS chipsets for Huawei MBB devices to captive supply from Huawei's subsidiary.

246 The Commission disputes the arguments put forward by the applicant.

247 According to paragraph 7 of the Notice on market definition, a relevant product market comprises all those products and/or services which are regarded as interchangeable or substitutable by the consumer, by reason of the products' characteristics, their prices and their intended use.

248 Moreover, according to paragraph 13 of the Notice on market definition, undertakings are subject to three sources of competitive constraints, namely demand substitutability, supply substitutability and potential competition, and in the context of market definition, demand substitution constitutes the most immediate and effective disciplinary force on the suppliers of a given product. An undertaking can have a significant impact on the prevailing conditions of sale only if customers are in a position to switch easily to available substitute products, which results in identifying the effective alternative sources of supply for the customers of the undertakings involved.

249 Moreover, as is stated in paragraph 20 of the Notice on market definition, supply-side substitutability may also be taken into account when defining the relevant market in those situations in which its effects are equivalent to those of demand substitution in terms of

¹ Confidential data redacted.

effectiveness and immediacy. That means that suppliers are able to switch production to the relevant products and market them in the short term without incurring substantial additional costs or risks in response to small and permanent changes in relative prices (judgments of 17 September 2007, *Microsoft v Commission*, T-201/04, EU:T:2007:289, paragraph 484, and of 9 September 2009, *Clearstream v Commission*, T-301/04, EU:T:2009:317, paragraph 50).

- 250 In addition, it is apparent from paragraph 24 of the Notice on market definition that potential competition is not taken into account when defining markets, since the conditions under which potential competition will actually represent an effective competitive constraint depend on the analysis of specific factors and circumstances relating to the conditions of entry.
- 251 Lastly, it is clear in particular from points 16, 20, 21 and 23 of the Notice on market definition that the necessary substitutability for the purposes of the definition of the relevant market must materialise in the short term (see, to that effect, judgment of 29 March 2012, *Telefónica and Telefónica de España v Commission*, T-336/07, EU:T:2012:172, paragraph 123).
- 252 In the present case, it is apparent from recital 215 of the contested decision, which the applicant does not, in essence, dispute, that, during the relevant period, only three vertically integrated undertakings self-supplied UMTS chipsets, [confidential] In the light of [confidential]’s minimal production of UMTS chipsets during that period, the Commission stated in that recital that it would not take [confidential]’s chipsets into account in its analysis.
- 253 As regards the first complaint, alleging that the Commission erred in relying on the inconsistent and irrelevant statements of certain manufacturers of vertically integrated original equipment manufacturers in the UMTS chipset market in order to conclude that there was no competitive constraint directly from the captive supply of those manufacturers, the Commission cannot be criticised for having questioned [confidential] during its examination as to the destination of the chipsets which they self-produced and as to their intentions in that regard. As is apparent from paragraph 13 of the Notice on market definition, in order to be able to determine whether customers would be in a position to switch easily to available substitute products, it is necessary to identify the effective alternative sources of supply for those customers.
- 254 In that regard, the responses from [confidential] are very clear, since it is apparent from recital 218 of the contested decision that [confidential] and since it is apparent from recital 219 of that decision that [confidential]. In addition, it is apparent from recital 220 of that decision that [confidential]. Such statements do not in any way appear to be inconsistent or without basis, in contrast to the applicant’s general and unexplained assertions.
- 255 It follows that the captive production of [confidential] did not constitute an effective source of supply for third-party buyers of UMTS chipsets during the relevant period, with the result that those customers were not in a position to switch easily to that captive production as referred to in paragraph 13 of the Notice on market definition. In response to a measure of organisation of procedure, the Commission also stated that, in accordance with paragraph 24 of that notice, when defining the relevant market, it did not have to take into account products which were potentially (but not currently) in competition, which was the situation for the chipsets produced by [confidential], which were, during that period, only at a very early stage of their development. Consequently, the Commission did not make a manifest error of assessment and did provide an adequate statement of reasons when it found, on the basis of those responses, that captive

production was not generally available for supply to third-party customers, which is sufficient to rule out the possibility that such captive production could have directly exerted a competitive constraint on UMTS chipset producers during that period.

- 256 It is also necessary to reject the applicant's criticism that the Commission ought rather to have questioned customers about their arrangements and ability to switch to self-supply or to increase self-supply for customers who are already vertically integrated, should the price of UMTS chipsets on the merchant market increase. Having regard to the characteristics of the UMTS chipsets market and, in particular, to the high barriers to entry represented, in particular, by the significant costs of research and development (R&D) necessary for the development of such chipsets (Section 11.4.1 of the contested decision), it is difficult to imagine that non-vertically integrated customers could, in the short term, have started to produce such chipsets.
- 257 As regards vertically integrated customers, it is apparent from recital 220 of the contested decision that [confidential]. It was therefore no longer conceivable for [confidential] to increase its self-supply in the short term during the relevant period. As for [confidential], it is apparent from recital 230 of the contested decision, based on [confidential]'s answers to questions asked in that regard by the Commission, [confidential]. It is therefore reasonable to infer that, even if the price of UMTS chipsets on the merchant market were to increase, that manufacturer would not in any event have increased its captive production in the short term, which resulted in the creation of a direct competitive constraint on the producers of UMTS chipsets active on that market.
- 258 It is therefore necessary to reject the present complaint.
- 259 As regards the second complaint, alleging that the Commission erred in excluding [confidential]'s captive production, it should be noted that the applicant does not dispute that [confidential]'s captive production, which, as is apparent from footnote 285 to the contested decision, represented only 0.1% of total UMTS chipset sales on the merchant market in 2010 and 2011, was minimal.
- 260 The applicant also does not dispute that [confidential] used its captive production during the relevant period exclusively or almost exclusively for internal purposes and that it was only from [confidential], that is to say well after that period, that that manufacturer began to supply third-party customers on the merchant market, as is apparent from recital 225 of the contested decision.
- 261 It follows from the minimal nature of [confidential]'s self-supply and from its use of captive production exclusively or almost exclusively for internal purposes during the relevant period, which are not disputed by the applicant, that it is difficult to imagine that [confidential] was able, during the relevant period, to discipline the prices offered by the applicant on the UMTS chipsets market, contrary to the applicant's allegations, and that the Commission gave sufficient reasons for, and did not make a manifest error of assessment in, excluding that captive production from its analysis, which is sufficient to reject the present complaint.
- 262 In any event, it should be observed that, even if the Commission had included [confidential]'s captive production in the relevant market, having regard to the minimal nature of that production, which is not disputed by the applicant, such inclusion would not have had the slightest influence on the Commission's conclusion regarding the applicant's dominant position on that market.

- 263 As regards the third complaint, alleging that the Commission did not take sufficient account of market dynamics and trends in the sector, it should be recalled that it is apparent from point 24 of the Notice on market definition that potential competition is not taken into account when defining markets. The Commission was therefore not required to take account of such developments subsequent to the relevant period.
- 264 Contrary to the applicant's allegations, such an approach is not incompatible with the fact that, in recital 363 of the contested decision, the Commission took account of the significant growth potential of the leading edge segment of the UMTS chipset market, since that recital is found in Section 12 of that decision which deals with abuse, in which the Commission may take account of projections, in particular with a view to assessing the potential effects of the conduct at issue, and is not found in Section 10 of that decision which deals with market definition, in which the Commission must determine which products are, during the relevant period, regarded by customers as substitutable for the purposes of including them in the same product market. Since those are two different analyses, pursuing different objectives, it is normal for the Commission to take different factors into account when undertaking such analyses, without that giving rise to any inconsistency or incompatibility at all.
- 265 Lastly, it should be noted that the applicant simply disputes in general terms the failure to take into account what it describes as 'evidence on market dynamics and industry trends', and does not explain in any way what evidence is involved, how such evidence could have influenced the Commission's analysis and, in particular, how that evidence ought to have led the Commission to conclude that the captive production of vertically integrated undertakings was a direct competitive constraint on producers active on the UMTS chipset market.
- 266 The present complaint must, therefore, be rejected.
- 267 As regards the fourth complaint, alleging that the Commission failed to acknowledge commercial realities, the applicant relies solely on the fact that it had lost approximately 70% of its sales of UMTS chipsets for Huawei MBB devices to captive supply by Huawei's subsidiary. It is apparent from Huawei's reply to question 25 of the request for information dated 19 July 2013, to which the applicant refers, that it was only in 2013 that HiSilicon provided 69% of Huawei's supplies as captive sales, that is to say, after the relevant period. The Commission, therefore, made no manifest error of assessment in failing to take that circumstance into account, which is sufficient to reject the present complaint.
- 268 Accordingly, it must be held that the Commission did not make a manifest error of assessment and did not fail to fulfil its obligation to state reasons when it concluded that there was no competitive constraint directly from the captive supply on the UMTS chipset market. The second part of the second plea must therefore be rejected.

The third part: the competitive constraints exerted indirectly by captive supply on the merchant market

- 269 In support of the present part of the plea, the applicant puts forward four complaints.
- 270 In the first place, the applicant argues that the Commission erred in limiting its analysis of whether there was an indirect competitive constraint on the downstream market for mobile phones incorporating a UMTS chipset, on the pretext that during the relevant period self-supply

of UMTS chipsets for other devices, including MBB devices, was negligible. In the applicant's view, such an approach, furthermore, contradicts the 'theory of harm' developed by the Commission, which focuses on 'leading edge chipsets' used in MBB devices.

- 271 In the second place, the applicant submits that, in the absence of the SSNIP test, the Commission's assertion, in recital 237 of the contested decision, that a hypothetical price increase for UMTS chipsets would not lead to a sharp drop in demand for such chipsets on the merchant market, is unsubstantiated and immaterial.
- 272 In the third place, the rejection of indirect constraints stemming from competition on the downstream market is irreconcilable with the 'theory of harm' developed by the Commission for two reasons.
- 273 First, the Commission cannot, without contradicting itself, argue that a hypothetical price increase of 5 to 10% in the upstream market, namely the UMTS chipset market, would have had a negligible impact on prices on the downstream market, namely the market for devices incorporating such chipsets (recital 235 of the contested decision) while also criticising the applicant for having engaged in indirect predation.
- 274 Second, the Commission cannot, without contradicting itself, argue that, even if [confidential]'s captive production were included in the relevant market, that would not, given that production was minimal, have had any impact on the applicant's market share and therefore acknowledge that captive production exerted some degree of competitive constraint on the merchant market (footnote 311 to the contested decision) while also concluding that that captive production did not exert a competitive constraint on the merchant market during the relevant period.
- 275 In the fourth place, the applicant claims that the Commission erred in stating in footnote 311 to the contested decision that [confidential]'s captive production could be included in the relevant market, but [confidential]'s captive production could not, on the ground that [confidential] sourced UMTS chipsets during the relevant period for its MBB devices solely on the merchant market.
- 276 According to the applicant, the Commission could not exclude [confidential]'s captive production because [confidential] did not self-supply chips for its MBB devices, when the relevant market definition adopted by the Commission in the contested decision was not limited to UMTS chips for MBB devices, but also included UMTS chips for other devices. In addition, it is apparent from recital 220(b) of that decision that, while [confidential] announced in 2009 that it was ceasing captive production, in fact it self-supplied until the third quarter of 2013.
- 277 The Commission disputes the arguments put forward by the applicant.
- 278 As a preliminary point, it should be observed that, in Section 10.2.9.2 of the contested decision, the Commission explained the reasons which led it to conclude that the captive production of the only two vertically integrated undertakings during the relevant period did not exert an indirect competitive constraint on the UMTS chipset market, via competition on the downstream market.
- 279 In order to reach such a conclusion, the Commission first explained that it had carried out its analysis of a possible indirect competitive constraint taking into account only possible downstream competition between mobile phones including a UMTS chipset, to the exclusion of

other devices, including MBB devices. In recital 230 of the contested decision, it stated that it had done so since that was the only possible indirect competitive constraint, since the self-supply of UMTS chipsets for devices other than mobile phones was, in any event, negligible during the relevant period.

280 Furthermore, the Commission also explained that it had confined itself to examining the indirect competitive constraint exerted by [confidential], since, during the relevant period, [confidential]'s captive production was minimal and therefore could not exert an indirect competitive constraint on the merchant market.

281 The Commission then explained, first, that, given that the dilution factor of the products concerned was low, since the price of a UMTS chipset represented, during the relevant period, only approximately 6% of the retail price of the mobile phone incorporating it, an increase of 5 to 10% in the price of that chipset would have only a negligible impact on the price of the finished product, with the result that such an upstream increase in the price of UMTS chipsets on the merchant market would remain profitable for the chip producer, who would not see the volume of its sales negatively affected by such an increase (recital 235 of the contested decision).

282 Second, the Commission has demonstrated that, in view of the fact that mobile phones are highly differentiated products depending on the brand, with highly specific characteristics, an increase in the price of a mobile phone brand following an increase in the price of UMTS chipsets incorporated in them on the merchant market does not mean that customers would switch to another mobile phone brand and, in particular, that they would instead buy a mobile phone incorporating a self-supplied chipset, which was not subject to such a price increase. That confirms that an upstream increase in the price of UMTS chipsets on the merchant market would remain profitable for the chipset manufacturer, who would not see the volume of its sales negatively affected by such an increase (recital 237 of the contested decision).

283 From that, the Commission inferred that captive production was not capable of exerting an indirect competitive constraint on the UMTS chipset market during the relevant period.

284 As regards the first complaint, alleging that the Commission erred in limiting its analysis of whether there was an indirect competitive constraint on the downstream market for mobile phones incorporating a UMTS chipset, it should be noted that captive production of UMTS chipsets was the highest for precisely those devices, estimated, for example, [confidential], with the result that limiting the Commission's analysis to that segment of the market was the situation most likely to demonstrate that there was an indirect competitive constraint and, consequently, the most favourable to the applicant.

285 Furthermore, the fact that such limiting allegedly contradicts the 'theory of harm' developed by the Commission, focusing on 'leading edge chipsets' used in MBB devices, in no way alters the fact that that approach is more favourable to the applicant and in no way affects its validity. In that regard, it should be observed that captive production of 'leading edge chipsets' to be incorporated into those devices was, according to the Commission, much more limited than the captive production of UMTS chipsets to be incorporated into mobile phones, which the applicant, moreover, does not dispute.

286 As regards the second complaint, alleging that the Commission's assertion in recital 237 of the contested decision that a hypothetical increase in the price of UMTS chipsets would not lead to a sharp drop in demand for such chips on the merchant market on account of the absence of the

SSNIP test is unfounded and immaterial, it is sufficient to recall that the Commission is not required to carry out such a test (see paragraph 235 above). In addition, it must be stated that the applicant has put forward no evidence other than the absence of a SSNIP test in the present case in order to call into question that assertion by the Commission.

- 287 As regards the third complaint, alleging that the rejection of indirect constraints on the merchant market stemming from downstream competition is irreconcilable with the ‘theory of harm’ developed by the Commission, it must be stated that the indirect predation which the Commission alleges against the applicant cannot, in itself, invalidate the analysis of whether there was an indirect competitive constraint, for two reasons.
- 288 First, contrary to the applicant’s allegations, the Commission did not err and did not contradict itself when it (i) concluded that a hypothetical price increase of 5 to 10% on the upstream market, namely the UMTS chipset market, would have had only a negligible impact on the prices of devices incorporating those chipsets on the downstream market, namely the market for devices incorporating those chips, and (ii) also criticised the applicant for having engaged in indirect predation. It is not because a general increase in the price of UMTS chipsets on the upstream market would have had almost no downstream impact on the price of devices incorporating such chips that a selective reduction in the price of UMTS chipsets offered by the applicant solely to Huawei would not have favoured Huawei, allowing it better to compete with its rival ZTE on the downstream market.
- 289 Second, it must be observed that, in footnote 311 to the contested decision, the Commission in no way implied that [confidential]’s captive production represented some degree of competitive constraint on the merchant market. In that footnote, the Commission simply stated that, in any event, even if [confidential]’s entire captive supply of UMTS chipsets, that is to say the chipsets intended for mobile phones and the chipsets intended to be incorporated into other devices, were to be included in the relevant market, the applicant’s market share would remain unchanged in 2009 and would fall only marginally in 2010 and 2011, and would in any event remain above the 50% threshold. The applicant’s argument is therefore based on a misreading of that footnote.
- 290 As regards the fourth complaint, alleging that the Commission erred in stating in footnote 311 to the contested decision that [confidential]’s captive production could be included in the relevant market, but not [confidential]’s, on the ground that [confidential] sourced UMTS chipsets during the relevant period for its MBB devices solely on the merchant market, that is also based on a misreading of that footnote. In that footnote, the Commission in no way concluded that [confidential]’s captive production could be included in the relevant market but [confidential]’s could not be.
- 291 It should be stated, first of all, that footnote 311 to the contested decision relates to recital 240 of that decision, and in particular to whether, hypothetically, an indirect constraints analysis focusing on MBB devices would have led to a different outcome.
- 292 In that regard, in respect of [confidential], the Commission simply indicated that Huawei’s captive production of chipsets intended for both mobile phones and other devices was so minimal during the relevant period that, even if it had been included in the relevant market (whether in the indirect constraints analysis focused on mobile phones or the indirect constraints analysis focused on MBB devices), that would not have resulted in the applicant’s market share falling below the presumed dominance threshold of 50%.

- 293 However, as regards [confidential], the Commission indicated in footnote 311 to the contested decision that, in the hypothetical scenario of an indirect constraints analysis focused on MBB devices, [confidential]'s captive production would not have been taken into account, because [confidential] sourced all UMTS chipsets for its MBB devices from the merchant market and had announced in 2009 that it would cease its captive production, as is apparent from recital 220(b) of that decision. By contrast, in the analysis which the Commission did undertake of whether there was any indirect downstream constraint focused on mobile phones, it did take account of [confidential]'s captive production of UMTS chipsets intended for its mobile phones, since [confidential] did actually self-supply for those devices.
- 294 In addition, the fact that it is apparent from recital 220 of the contested decision that [confidential] shipped the last of those UMTS chipsets [confidential] in 2013 does not invalidate either the finding that [confidential] obtained its supplies solely on the merchant market for UMTS chipsets for its MBB devices and saw its captive production limited to chipsets for mobile phones, or the finding that [confidential] had decided in 2009 to put an end to its captive production and had ceased development of new UMTS chipsets in July 2010, since a number of years may well elapse between (i) that decision and the development of new UMTS chipsets coming to an end and (ii) the delivery of the last UMTS chipsets produced.
- 295 It follows from the foregoing that none of the complaints set out in support of the present part of the plea is capable of calling into question the Commission's analysis in Section 10.2.9.1 of the contested decision, which concluded that during the relevant period captive production of UMTS chips on the merchant market was not an indirect constraint.
- 296 Consequently, the third part of the second plea must be rejected.

The fourth part: the applicant's dominant position during the relevant period

- 297 In support of the present part of the plea, the applicant puts forward the four complaints set out below.
- 298 In the first place, the applicant submits that, if the product market had been correctly defined and had included the captive sales of vertically integrated manufacturers, its market shares would have been below 40%, that is to say below the dominance threshold.
- 299 In the second place, the applicant argues that the Commission erred by overstating the importance of its market shares. According to the applicant, the baseband chips sector is characterised by short innovation cycles, with the result that market shares are ephemeral and do not correctly reflect market power. In addition, it maintains that, if the Commission had taken proper account of the constraints imposed on it, it would have come to the conclusion that the applicant did not have significant and durable market power.
- 300 In the third place, the applicant submits that the Commission erred when it concluded that the relevant market was characterised by high barriers to entry and expansion. In the view of the applicant, new entrants were encouraged to enter the market without being impeded by the need to make significant R&D investments on account of the fact that much of the relevant technology is standardised. It asserts that the grant-back network from which it benefited is also not a barrier to entry, which is demonstrated by the fact that only a small minority of respondents to a question from the Commission concerning barriers to entry mentioned that grant-back network as being such a barrier.

- 301 In the fourth place, the applicant complains that the Commission failed to quantify the other barriers to entry identified by it, namely the need to have baseband chipsets certified by mobile network operators and OEMs, its brand image, reputation and strong business relations.
- 302 The Commission disputes the arguments put forward by the applicant.
- 303 In accordance with the case-law, the dominant position referred to in Article 102 TFEU relates to a position of economic strength enjoyed by an undertaking which enables it to prevent effective competition being maintained on the relevant market by affording it the power to behave to an appreciable extent independently of its competitors, its customers and ultimately of consumers (judgment of 13 February 1979, *Hoffmann-La Roche v Commission*, 85/76, EU:C:1979:36, paragraph 38).
- 304 As a general rule, the existence of a dominant position may derive from several factors which, taken separately, are not necessarily decisive (judgments of 14 February 1978, *United Brands and United Brands Continentaal v Commission*, 27/76, EU:C:1978:22, paragraph 66, and of 15 December 1994, *DLG*, C-250/92, EU:C:1994:413, paragraph 47). Among those factors, the existence of large market shares is highly important (judgments of 12 December 1991, *Hilti v Commission*, T-30/89, EU:T:1991:70, paragraph 90, and of 25 June 2010, *Imperial Chemical Industries v Commission*, T-66/01, EU:T:2010:255, paragraphs 255 and 256).
- 305 According to the case-law, very large market shares are in themselves, and save in exceptional circumstances, evidence of the existence of a dominant position (judgment of 13 February 1979, *Hoffmann-La Roche v Commission*, 85/76, EU:C:1979:36, paragraph 41). In particular, a market share of 50% in itself, and save in exceptional circumstances, constitutes a dominant position (see, to that effect, judgment of 3 July 1991, *AKZO v Commission*, C-62/86, EU:C:1991:286, paragraph 60).
- 306 Other factors may also be taken into account when analysing the existence of a dominant position, such as the relationship between the market shares of the undertaking concerned and of its immediate competitors (see, to that effect, judgment of 13 February 1979, *Hoffmann-La Roche v Commission*, 85/76, EU:C:1979:36, paragraph 48) or the existence of barriers to entry or expansion, resulting in particular from the need to make significant investments (see, to that effect, judgment of 14 February 1978, *United Brands and United Brands Continentaal v Commission*, 27/76, EU:C:1978:22, paragraph 122) or even, in certain circumstances, of ownership of intellectual property rights (see, to that effect, judgment of 1 July 2010, *AstraZeneca v Commission*, T-321/05, EU:T:2010:266, paragraph 270 and the case-law cited).
- 307 As regards the first complaint, alleging that, if the relevant product market had been correctly defined and had included vertically integrated manufacturers' captive sales, the applicant's market shares would have been below 40%, it is sufficient to recall that, as is apparent from the analysis of the first three parts of the second plea, the Commission did not err in defining the relevant product market as the UMTS chipset market, which permits the rejection of that complaint.
- 308 As regards the second complaint, alleging that, in the light of the specific characteristics of the sector, the importance of the applicant's market shares, which the applicant regards as ephemeral, did not show that it had significant and durable market power, it must be stated that, even if the relevant market were characterised by short innovation cycles, that would not constitute exceptional circumstances within the meaning of the case-law cited in paragraph 305

above, allowing a finding that market shares of such a size do not, by themselves, constitute evidence of the existence of a dominant position, especially where the market shares of the closest competitor are much smaller, as in the present case. In any event, it is apparent from the data set out in Tables 3 and 5 of the contested decision, the essence of which the applicant does not dispute, that the applicant had a market share of 61.2% in 2009, 59.7% in 2010 and 62.5% in 2011 in terms of revenue and a market share of 58.9% in 2009, 57.8% in 2010 and 65.3% in 2011 in terms of volume. Such relatively stable market shares cannot therefore be described as ephemeral, contrary to the applicant's assertions.

309 As regards market power, it is also apparent from the data set out in Tables 3 and 5 of the contested decision, the essence of which the applicant does not dispute, that its two closest competitors in terms of revenue were, in 2009 ST-Ericsson with 15.1% market share and Intel with 12.6% market share, in 2010 Intel with 18.9% market share and ST Ericsson with 8.9% market share and in 2011 Intel with 19.1% market share and Broadcom with 4.4% market share. In terms of volume, its two closest competitors were, in 2009, ST Ericsson with 20 to 30% market share and Intel with 10 to 20% market share, in 2010 Intel with 10 to 20% market share and ST Ericsson and Marvell with 5 to 10% market share and in 2011 Intel with 20 to -30% market share and Marvell with 5 to 10% market share. Contrary to the applicant's assertions, those tables clearly demonstrate that during the relevant period, the applicant faced competition from only a few competitors, who were in a much weaker position and had relatively unstable market shares, in contrast with the applicant itself, which confirms that the applicant had significant and durable market power and makes it hard to believe that its competitors would be able in practice to constrain it. The second complaint must therefore be rejected.

310 As regards the third complaint, alleging, in essence, that the Commission erred in regarding the investments necessary in order to design a UMTS chipset, in particular R&D investments, as barriers to entry or expansion, and the fourth complaint, alleging that the Commission failed to quantify the other barriers to entry identified, namely the need to have baseband chipsets certified by mobile network operators and OEMs, the applicant's brand image, reputation and strong business relations, it is sufficient to note that they relate to other factors which may be taken into account when analysing whether there is a dominant position (see paragraph 306 above) and are not able to call into question the evidence of the existence of a dominant position, as has been established in accordance with the case-law cited in paragraph 305 above.

311 It follows from the foregoing that the fourth part of the second plea must be rejected.

The fifth part: the definition of the leading edge segment of the UMTS chipset market on which the Commission based its analysis

312 In support of the fifth part of the plea, the applicant complains, in essence, that the Commission based its analysis on the leading edge segment of the UMTS chipsets market, even though it is a construct of convenience which never existed and which is at odds with the technical and commercial realities of the relevant period.

313 That line of argument must be regarded as ineffective if it is relied on in order to call into question the definition of the relevant market or the applicant's dominant position. Indeed, the Commission did not define the leading edge segment of the UMTS chipsets market in Section 10 of the contested decision which dealt with that definition, or in Section 11 of that decision which

dealt with that dominant position, but rather in Section 12 of that decision which dealt with abuse, and in particular in its analysis of the applicant's strategy to counter Icera in that leading edge segment (Section 12.4 of the contested decision).

- 314 When questioned in that regard by way of a measure of organisation of procedure, the applicant stated that, while it had set out its criticism of the definition of the leading edge segment of the UMTS chipset market on which the Commission based its analysis in the second plea, it did so in order to raise that fundamental point at the earliest opportunity in its written pleadings, because such a criticism potentially influenced the other pleas set out subsequently and because it wished to highlight the inconsistencies in the definition of the relevant market, including in relation to that leading edge segment which forms part of the relevant market.
- 315 Such a response is, however, not sufficient to circumvent the fact that the present part of the plea is ineffective, since, even if the complaint set out in support thereof were to succeed, that cannot call into question the conclusion reached by the Commission as regards the definition of the relevant market and the applicant's dominant position.
- 316 It follows that the fifth part of the second plea must be rejected. Therefore, since the other parts of that plea have also been rejected (see paragraphs 240, 268, 296 and 311 above), that plea must be rejected in its entirety.

The fifth plea: 'manifest errors of assessment' and failure to state reasons as regards the reconstruction of alleged 'effectively paid' prices

- 317 The fifth plea comprises two parts. The first part alleges that the 'price restatement' conducted in the contested decision was unnecessary. The second part alleges errors made in that decision as regards that 'restatement'.

The first part: the 'price restatement' conducted in the contested decision was unnecessary

- 318 In support of the present part of the plea, the applicant submits, in essence, that, by failing to rely on Qualcomm's accounting data in order to determine chipset prices, the Commission undertook an unnecessary and unjustified 'restatement' of its price data. It thereby calls into question the contested decision's reconstruction of the prices actually paid to Qualcomm by Huawei and ZTE during the relevant period.
- 319 In the first place, the applicant submits that, in the price reconstruction carried out in the contested decision, the Commission failed to take sufficient account of its objections to the price-cost test conducted in the SO, which criticised the fact that (i) that reconstruction excluded certain revenue by incorrectly treating certain limited instances of average sales price volatility as accounting errors and (ii) it failed to take into account the effects of delayed revenue recognition.
- 320 In the second place, the applicant submits that the Commission erred in its assessment of Qualcomm's price data in its price-cost test by using a quarterly reference period. According to the applicant, the most meaningful and commercially relevant period for assessing pricing data was six months, or even one year. It states that it does not agree prices with its customers or revise them on a quarterly basis, but typically concludes agreements for much longer periods.

- 321 The applicant adds that the Commission incorrectly rejected the argument that aggregation over time would address problems arising from delayed revenue recognition, given that that risk concerns only limited amounts, and given that the risk that predatory pricing periods would be difficult to identify because their average over a longer reference period would exist only if the price-cost test were conducted not only over the period of predation, but also over the entirety or a portion of the recoupment period. According to the applicant, since the Commission-alleged predation in the present case took place over two years, it would have been possible to conduct the price-cost test on the basis of six-month reference periods.
- 322 In the third place, the applicant maintains that the exercise of restatement of average sales prices in the contested decision is unnecessary since, as regards the average sales prices recorded in its accounting data, the discrepancy compared with the result of the Commission's calculations is, in any event, minimal. In addition, it submits that the price-cost test carried out by the Commission in the SO, which relied on its data, indicated, at most, intermittent below-cost pricing of a very short duration, which is inconsistent with the 'theory of harm' developed by the Commission based on anticompetitive foreclosure. In the applicant's view, that suggests that the Commission restated average sales prices solely in order to avoid a finding of intermittent predation and, consequently, that there was no infringement.
- 323 The Commission disputes the arguments put forward by the applicant.
- 324 As a preliminary point, it should be recalled that Section 12.5 of the contested decision sets out the Commission's methodology and the calculation of the quarterly average sales prices which Huawei and ZTE effectively paid per unit for the chipsets under investigation during the relevant period.
- 325 In the SO, the Commission had based its calculations mainly on Qualcomm's accounting data. However, due to the application of United States Generally Accepted Accounting Principles ('US GAAP') and the arguments put forward in the SO response, the Commission concluded that it was inappropriate to base its price-cost test on those accounting data without making adjustments to take account of the revenue accounting principle and to reflect business reality more accurately during the relevant period.
- 326 In particular, according to the Commission, (i) the revenues initially recorded during a given quarter potentially understated the final effective price of units sold during that quarter and (ii) the delayed recognition of the reserves accumulated by Qualcomm which had not yet been paid inflated the revenues of the quarter in which they were recorded. That delayed recognition was due to the USA GAAP applied by the applicant, under which, at the time of physically shipping a chipset, Qualcomm had to account only for revenue which was certain and measurable. Reserves re-enter Qualcomm's accounts only at the time when the precise quantity of chipsets for which a financial incentive applies is verified.
- 327 For that reason, the Commission concluded that it was inappropriate to rely on Qualcomm's accounting data without making adjustments to take account of the difference between the quarter during which chipsets were sold and the quarter during which revenues were recorded.
- 328 Therefore, the Commission assessed the prices 'effectively paid' by taking into account the reserves which would re-enter Qualcomm's accounts, so as to calculate the gross revenues collected in the quarter during which the sale took place.

- 329 In recitals 608 to 610 of the contested decision, the Commission also stated that it had relied on quarterly reference periods in the light of the fact that (i) it was apparent from certain documents of the [confidential], that Qualcomm's pricing decisions were based on calendar quarters, (ii) customers also submitted their incentive claims on a quarterly basis and (iii) that period was consistent with the AVC data provided by Qualcomm, which were also recorded at a quarterly level.
- 330 As regards the first complaint, alleging, in essence, that the Commission did not correctly take into consideration the arguments which the applicant had set out in the SO response, it must be stated that the applicant does not explain how the Commission failed to take appropriate account of its observations or why it was not necessary to reconstruct prices charged in the contested decision in order to respond to the criticisms set out in that response.
- 331 In any event, it is sufficient to recall that, as stated in the contested decision, due to the application of US GAAP and the arguments put forward in the SO response, the Commission concluded that it was inappropriate to base its price-cost test on Qualcomm's accounting data without making adjustments to take account of the revenue accounting principle. The Commission accordingly took that circumstance into account in the price reconstruction conducted in that decision by matching the adjustments made in the accounts to the sales concerned, so as to reflect business reality more accurately during the relevant period. In particular, it adjusted those accounting data, relying on documents held by the applicant, in order to reallocate the various incentive payments to the corresponding units and thereby to calculate the price effectively paid by Huawei and ZTE.
- 332 In addition, it should be noted, as the Commission did, that the Commission had, in the past, already made certain adjustments based on the price and cost statements of the dominant undertaking and on all other relevant information provided by that undertaking, in order to reflect business reality. That approach has been endorsed by the case-law of the General Court, for example, in the judgments of 30 January 2007, *France Télécom v Commission* (T-340/03, EU:T:2007:22, paragraphs 131 to 137); of 10 April 2008, *Deutsche Telekom v Commission* (T-271/03, EU:T:2008:101, paragraphs 208 to 211); and of 13 December 2018, *Slovak Telekom v Commission* (T-851/14, EU:T:2018:929, paragraphs 220 to 235).
- 333 In those circumstances, the first complaint must be rejected.
- 334 As regards the second complaint, alleging that the quarterly reference period was not the most appropriate for conducting the price-cost test, it should be recalled that, in areas giving rise to complex economic assessments, the EU Court must not only establish whether the evidence put forward is factually accurate, reliable and consistent but must also determine whether that evidence contains all the relevant data that must be taken into consideration in appraising a complex situation and whether it is capable of substantiating the conclusions drawn from it. In that regard, the EU Courts must carry out their review of legality on the basis of the evidence adduced by the applicant in support of the pleas in law put forward (see judgment of 10 July 2014, *Telefónica and Telefónica de España v Commission*, C-295/12 P, EU:C:2014:2062, paragraphs 54 and 56, and the case-law cited).
- 335 In the present case, in recitals 609, 610 and 630 to 633 of the contested decision, the Commission set out the evidence which led it to adopt a quarterly reference period and the reasoning followed in order to reject the objections raised by the applicant.

- 336 It should be observed at the outset that, while it is true that the data reproduced in Tables 28 to 30, 44 and 45 of the contested decision do not demonstrate complete uniformity in the determination of purchase periods, the fact remains that it follows from those data that the most frequently used period is in fact the quarterly period. It should be added, first, that the period in which customers were to submit their incentive claims was the quarterly period and, second, that Qualcomm itself provided the cost data relating to AVC on a quarterly basis. In addition, the applicant has not put forward, in its written pleadings or in its SO or SSO response to which it referred, any argument or evidence supporting its contention that the Commission ought to have used a reference period of six months or one year.
- 337 The other factors relied on by the applicant also do not permit the inference that the Commission erred in adopting a quarterly reference period in order to conduct the price-cost test.
- 338 First, the applicant has failed to demonstrate how the issue of delayed recognition, which affects the whole of the relevant period, could have been resolved by altering the reference period, as it argues.
- 339 Second, even if it were true, as the applicant maintains, that taking a longer reference period into account could distort the analysis only if prices relating to a period outside the predation period were taken into account, that does not mean that the choice of reference period must necessarily be that suggested by the applicant. The choice between a quarterly, half-yearly or annual reference period was made by the Commission in the present case on the basis of the most relevant data and circumstances concerning the applicant's business. In that regard, it must be stated that the applicant has not succeeded in demonstrating that the choice of a quarterly reference period was vitiated by error.
- 340 In those circumstances, the second complaint must be rejected.
- 341 As regards the third complaint, alleging that the Commission's restatement of average sales prices is unnecessary since, as regards the average sales prices recorded in the applicant's accounting data, the discrepancy compared with the result of the Commission's calculations is, in any event, minimal, it is apparent from recitals 614, 739, 740, 774, 775 and 922 of the contested decision that the difference between the applicant's accounting prices and the prices reconstructed by the Commission was very often small. That fact was, in essence, confirmed by the parties at the hearing.
- 342 However, the applicant has not established that that fact affects the lawfulness of the contested decision. While the difference between the average sales prices recorded in the accounting data and the average sales prices reconstructed by the Commission is only minimal, it cannot be inferred therefrom that the Commission erred in reconstructing the average sales prices. In those circumstances, the present complaint must be rejected.
- 343 In addition, the applicant in no way substantiates its argument that a price-cost test which relied on its accounting data indicated, at most, intermittent below-cost pricing of a very short duration, and is therefore inconsistent with a finding of an infringement. Indeed, the applicant does not explain what it regards as intermittent predation and why that type of predation could not constitute an infringement of competition law.
- 344 In the light of the foregoing considerations, the third complaint must be rejected, as must the first part of the fifth plea in its entirety.

The second part: errors in the contested decision regarding the ‘restatement’ conducted

- 345 In support of the present part of the plea, the applicant puts forward five complaints.
- 346 In the first place, the applicant maintains that, in order to calculate the ‘effectively paid’ prices, the Commission incorrectly allocated certain financial incentives from the quarters when they were recorded in Qualcomm’s accounting system to the quarters where the units concerned were shipped to the customer on the basis of an incorrect manipulation of incentive claims submitted to Qualcomm by Huawei and ZTE, found in ‘document packets’ which were unsuitable for the purposes of conducting a reliable price-cost test.
- 347 The applicant also states that the reasons why the ‘document packets’ in question were unsuitable had been set out in the SSO response, in which it had explained that they were prepared in great detail by customers, who were no longer able to provide clarification of them at the time when the Commission requested such clarification from them, in 2017. In addition, those ‘document packets’ were incomplete and sometimes vitiated by inconsistencies and errors.
- 348 In the second place, the applicant complains that the Commission’s approach unduly introduced *ex post* hindsight, in that it transferred reserves based on the assumption that Qualcomm could have forecasted incentive claims with perfect certainty at the time of sale.
- 349 In that regard, the applicant argues that the finding in recital 620 of the contested decision – that what matters is that Qualcomm was ready to incentivise the purchase of all units falling, a priori, within the scope of certain agreements providing for incentives – makes no sense. The application of US GAAP means that, at the time chipset orders were received and dispatched, Qualcomm was obliged to assume that all chipset units would qualify for each potentially applicable incentive, without allowing it the slightest uncertainty. That does not mean that Qualcomm accepted that all units would be granted the maximum incentive.
- 350 In the third place, the applicant submits that the Commission’s approach is inconsistent, in that the Commission, on the one hand, rejected Qualcomm’s accounting prices as ‘unsuitable’ and, on the other hand, selectively resorted to the use of those same prices in two crucial calculations, namely the calculation of the price of chipsets for which no ‘document packets’ existed and the calculation conducted in order to allocate incremental R&D costs for the purposes of the price-cost test.
- 351 In the fourth place, the applicant maintains that the Commission’s approach contradicts Decision C(2014) 7465 final adopted in the case of 15 October 2014 relating to a proceeding under Article 102 TFEU and Article 54 of the EEA Agreement (Case AT.39523) – Slovak Telekom), in which the Commission concluded that it was preferable, with a view to legal certainty, to make assessments on the basis of the cost data as used by the undertaking in question rather than on the basis of data resulting from complex *ex post* adjustments and calculations.
- 352 In the fifth place, the applicant observes that the Commission’s methodology results in prices which, in certain instances, are demonstrably not the prices ‘actually paid’ by Qualcomm’s customers. For instance, there is no uncertainty as to the actual price paid by Huawei for backlog orders of [confidential] units of MDM8200 chipsets sold by Qualcomm, for which the agreed final, flat price was [confidential] (USD) per chipset, net of any incentives; in contrast, the price reconstructed by the Commission following its manipulations is USD [confidential] per chipset.

Similarly, the price paid by Huawei in the first quarter of 2011 for the MDM8200 chipset was USD [confidential] per chipset, whereas the Commission concluded, on the basis of its incorrect methodology, that the average net sales price for that chipset was USD [confidential] per chipset.

- 353 In addition, the applicant argues that the Commission is not able to explain why the average sales price net of the Master Incentive in the first quarter of 2011 was inconsistent with the average sales price net of the Master Incentive quoted in the [confidential] slide: the two reformulated prices, which the Commission attempts to justify by relying on a slide in the [confidential] presentation deck dated 4 August 2010, are clearly not ‘actual’ prices.
- 354 The Commission disputes the arguments put forward by the applicant.
- 355 As regards the first complaint which, in essence, alleges that the ‘document packets’ containing the incentives claims submitted to Qualcomm by Huawei and ZTE were unsuitable for the purposes of conducting a reliable price-cost test, it is sufficient to observe, as the Commission did, that the documents concerned were used by the applicant itself when issuing billing credit notes and when establishing client account statements, as indicated in recital 597 of the contested decision, which was not disputed by the applicant. Therefore, in the absence of other evidence put forward by the applicant, the present complaint must be rejected.
- 356 As regards the second complaint, alleging that the Commission’s approach unduly introduced *ex post* hindsight, in that it transferred reserves based on the assumption that Qualcomm could have forecast the incentive claims with perfect certainty at the time of sale, it must be stated that, contrary to the applicant’s assertions, the Commission’s methodology is not based on parameters which Qualcomm was unable to assess. Qualcomm’s prices were structured as a gross price to which the incentives, that is to say discounts, were applied. Accordingly, when Qualcomm took pricing decisions, it knew what the lowest unit price could be if all incentives were applied. That calculation, as the Commission maintains, was intended simply to establish, on the basis of the information available to Qualcomm, on which the latter relied for drawing up its accounts, the price actually paid by Huawei and ZTE. Those considerations are sufficient to reject the present complaint.
- 357 As regards the third complaint, alleging that the Commission’s approach to Qualcomm’s prices is inconsistent, it is sufficient to reject the argument that it is based on the incorrect premiss that the contested decision found that Qualcomm’s accounting prices were ‘unsuitable’. In recitals 603, 613 and 618 of that decision, to which the applicant refers, the Commission clearly identifies which elements in those accounting prices were unsuitable, without, however, rejecting the possibility of using those elements after having made the necessary adjustments on the basis of other sources of information.
- 358 As regards the fourth complaint, alleging a contradiction with Decision C(2014) 7465 final of 15 October 2014 relating to a proceeding under Article 102 TFEU and Article 54 of the EEA Agreement (Case AT.39523 – Slovak Telekom), it should be observed that, while it is true that, in certain cases, the Commission initially relied on the figures in the accounts of the dominant undertaking, which was sufficient on occasion, where those figures were not available or did not reflect market realities, it constructed appropriate representative values, also based on all relevant information provided by the dominant undertaking. As has been pointed out in paragraph 332 above, that approach has been endorsed by the Court. The present complaint must therefore be rejected.

- 359 As regards the fifth complaint, alleging that the Commission's methodology results in prices which, in certain instances, are manifestly not the prices 'actually paid' by Qualcomm's customers, it should be observed that, as regards the first example relied on by the applicant, the slide on which the Commission's defence is based (Annex A.2.2.19 to the application) actually demonstrates that the price paid by Huawei for the MDM8200 chipset after the incentive was applied was USD [confidential] (rounded to USD [confidential]) per chipset which corresponds to the price calculated by the Commission and indicated in recital 743 of the contested decision. As regards the second example, it should be noted that the document referred to by the Commission (Annex A.2.4.12 to the application) to demonstrate that the prices approved by the [confidential] had undergone successive variations, as clarified in the Commission's reply to questions put by the Court, confirms that the price communicated to Huawei for the MDM8200 chipset in the first quarter of 2011 was lower than that presented to the [confidential] and corresponded to the actual price of USD [confidential] as calculated by the Commission.
- 360 It follows that the applicant has not demonstrated that there were errors in the methodology used by the Commission and in the results arrived at by the Commission in the contested decision. In those circumstances, the present complaint must be rejected.
- 361 It follows that the second part of the fifth plea must be rejected. Therefore, since the first part of the fifth plea has also been rejected (see paragraph 344 above), that plea must be rejected in its entirety.

The sixth plea: incorrect 'allocation of non-recurring engineering expenses'

- 362 By the present plea, the applicant submits that, in its assessment of the NRE payments, the Commission committed 'manifest errors of fact and of law, and breach[ed] the principle of legal certainty, the presumption of innocence and the principle *in dubio pro reo*'. In addition, the contested decision fails to provide a sufficient statement of reasons, including because it does not 'address' numerous important arguments made by Qualcomm during the administrative procedure. The applicant argues that the Commission thereby failed to fulfil its 'duty of sound administration'.
- 363 The Commission disputes the arguments put forward by the applicant.
- 364 Pursuant to Article 21 of the Statute of the Court of Justice of the European Union and Article 76(d) of the Rules of Procedure, each application is required to state the subject matter of the proceedings and a summary of the pleas in law on which the application is based and it is necessary, in order for an action to be admissible, that the basic legal and factual particulars relied on be indicated, at least in summary form, coherently and intelligibly in the application itself.
- 365 That information must be sufficiently clear and precise to enable the defendant to prepare its defence and the General Court to rule on the action. The same considerations also apply to all claims, which must be accompanied by pleas and arguments enabling both the defendant and the Court to assess their validity (judgment of 13 December 2018, *Slovak Telekom v Commission*, T-851/14, EU:T:2018:929, paragraphs 74 and 75 (not published)).
- 366 In the present case, it must be observed that, while the applicant's arguments raised in the context of the present plea may be read as seeking to highlight alleged errors of assessment by the Commission concerning (i) the NRE payment to ZTE (first part) and (ii) the NRE payment to

Huawei (second part), the applicant has not provided any information accompanying those alleged infringements enabling an assessment of their substance to be made. It follows that the applicant's arguments alleging those infringements, in particular the infringement of the principle of legal certainty, infringement of the principle of the presumption of innocence and infringement of the principle *in dubio pro reo*, must be regarded as being inadmissible in that they are not accompanied by sufficient details to enable an assessment of their substance to be made.

367 Moreover, it should be recalled that, in accordance with the case-law, although Article 296 TFEU requires the Commission, when taking a decision in the context of the application of the competition rules, to state the factual matters justifying the adoption of a decision together with the legal considerations which have led to its adopting it, that provision does not require the Commission to discuss all the matters of fact and law which may have been dealt with during the administrative proceedings. The statement of the reasons on which a decision adversely affecting a person is based must allow the Court of Justice to exercise its power of review as to the legality of the decision and must provide the person concerned with the information necessary to enable him or her to decide whether or not the decision is well founded (judgment of 11 July 1985, *Remia and Others v Commission*, 42/84, EU:C:1985:327, paragraph 26). In the light of that case-law, the applicant cannot therefore legitimately rely on the fact that the Commission failed to respond specifically in the contested decision to all the observations of fact or of law which it had raised during the administrative procedure.

The first part: the NRE payment to ZTE

368 In support of the first part of the sixth plea, after describing, without disputing, the chronology of the events relating, in particular to (i) the agreement regarding non-recurring engineering expenses concluded with ZTE and (ii) the NRE payment to ZTE, the applicant submits that the Commission erred in treating that payment as a per-unit rebate of USD [confidential] for MDM6200 chipsets purchased by ZTE in 2010, even though the approval of December 2009 was never formalised in an agreement or communicated to ZTE.

369 According to the applicant, if the Commission had not taken into account that per-unit rebate to ZTE, it would not have found predation in the price-cost test for MDM6200 chipsets.

370 In the first place, the applicant considers that the approval, at the end of 2009 and in May 2010, of a set of potential incentives for ZTE was part of a wider package of incentives for ZTE, which were not limited to the leading edge segment of the UMTS chipsets market.

371 In the second place, as regards the Commission's conclusion that the NRE payment to ZTE was equivalent to a per-unit rebate for MDM6200 chipsets purchased by ZTE in 2010, the applicant puts forward the arguments set out below.

372 First, the applicant maintains that the terms of the approval changed between December 2009 and May 2010, following a considered reassessment, which meant that the NRE payment to ZTE could no longer be perceived as a rebate. It adds that the Commission treats the USD [confidential] lump-sum payment as if it were a rebate of USD [confidential] per unit, that is to say much higher than the rebate of USD [confidential] per unit allegedly foreseen by Qualcomm in December 2009.

- 373 Second, the Commission adduces no evidence that Qualcomm intended to offer, or was even aware that it was offering, to ZTE an incentive equivalent to a rebate of USD [confidential] per unit, or that ZTE was aware of such a per-unit rebate. It follows that the NRE payment to ZTE could not have incentivised ZTE to purchase MDM6200 chipsets in 2010. Conversely, the Commission itself provides evidence demonstrating that Qualcomm perceived the price of those chipsets for sale to ZTE to be higher than that which would have resulted from applying a USD [confidential] per-unit rebate.
- 374 Third, by treating the NRE payment to ZTE as a rebate received for each chipset purchased by ZTE, the contested decision arrived at an artificially inflated per-chipset rebate of USD [confidential], precisely because that payment was independent of the number of units sold and, at the same time, ZTE's demand for MDM6200 chips in 2010 represented a minute fraction of the demand anticipated by Qualcomm in December 2009, which led the Commission to spread that USD [confidential] payment over a small fraction of the 1 250 000 units mentioned in the December 2009 emails. If the payment in question had actually incentivised ZTE to purchase more units of the MDM6200 chipset, the implied per-unit rebate would have been lower and a finding of below-cost pricing less likely.
- 375 Fourth, the applicant maintains that, although, in the contested decision, the Commission concedes that the inflated figure is the result of weak demand by ZTE for the MDM6200 chipset, the decision then speculates that that lower demand may have been one of the reasons why Qualcomm changed the terms of the approval in the [confidential] meeting of 24 May 2010. Qualcomm identified correspondence dating from May 2010, from which it is apparent that ZTE had forecast demand for 475 000 units of the MDM6200 chipset for that year. According to Qualcomm, applying that figure to the USD [confidential] payment leads to a hypothetical rebate of USD [confidential] per unit at the time of the May 2010 approval, and prices paid by ZTE for the MDM6200 chipset which are consistently above the contested decision's LRAIC.
- 376 Fifth, even if Qualcomm had intended the NRE payment to constitute a per-unit rebate of USD [confidential], that would, in any event, have been economically irrelevant, since that payment never constituted an incentive for ZTE to purchase MDM6200 chipsets instead of chipsets supplied by a competitor, as the amount of the incentive was fixed and would not increase with the purchase of more chipsets.
- 377 Sixth, the fact that, in February 2011, Qualcomm acceded to ZTE's request to extend the carrier qualification deadline for MDM8200A-based devices until 30 June 2011, but refused an equivalent request for MDM6200-based devices, demonstrates that the lump-sum payment was contractually and effectively linked to MDM8200A-based devices, which is also confirmed by Qualcomm internal correspondence.
- 378 In the third place, the applicant criticises an inconsistency in the contested decision between (i) the findings relating to predation and (ii) the finding of an increase in the price and margin for the MDM6200 chipsets sold to ZTE. According to the applicant, there is also an anomaly in the allocation of the alleged R&D costs between the MDM6200 and the MDM6600 chipsets in 2010, since the prices used in the Commission's calculation for the MDM6200 chipsets sold to ZTE are not reduced by the NRE rebate.
- 379 The Commission disputes the arguments put forward by the applicant.

- 380 As a preliminary point, it should be stated that, in particular in recitals 677 to 693 of the contested decision, the Commission calculated the prices paid by ZTE and Huawei and, in accordance with the considerations set out in particular in Sections 12.4.2.3, 12.4.2.4, 12.4.2.6 and 12.4.2.11 of that decision, reallocated two rebates deriving from the non-recurring engineering expenses granted by Qualcomm to those two customers. According to the Commission, while each rebate was formally linked to the MDM8200A chipsets sold to those customers, contemporaneous evidence demonstrated that Qualcomm's real intention was (i) to grant a lump-sum payment of USD [confidential] (initially USD [confidential]) to ZTE, to be applied to sales made in 2010, with the aim of encouraging ZTE to buy and develop solutions based on the MDM6200 chipset and (ii) to grant a retroactive rebate in the form of a lump-sum payment of USD [confidential] to Huawei in order to reduce the price of the MDM8200 chipset units which it had purchased from Qualcomm, but which had proved to be too costly to make it possible for Huawei to win downstream tenders.
- 381 As regards the NRE payment to ZTE, in order to reach its conclusion, the Commission, in Sections 12.4.2.4, 12.4.2.6 and 12.4.2.11 of the contested decision, refers to internal Qualcomm documents demonstrating, in its view, that Qualcomm was not in a position to offer ZTE a price lower than that offered to Huawei, and feared lowering at too early a stage the price of the MDM6200 chipset, which at that time had not yet been launched. Therefore, it was proposed, from December 2009, to deal with the question of setting prices via one-off rebates arising from non-recurring engineering expenses, which as to one part was subject to the condition that ZTE obtain carrier qualification for MDM8200A chipset devices and as to the other part was subject to the condition that ZTE obtain carrier qualification for MDM6200 chipset devices, in both cases prior to 31 December 2010 (a deadline which was then deferred to 30 June 2011 for the qualification for the MDM8200A chip). According to the Commission, the purpose of that payment was, in reality, to reduce the price of the MDM6200 chipset by USD [confidential] per chipset which Qualcomm intended to sell to ZTE in 2010. Following a significant decrease in ZTE's orders compared to Qualcomm's forecasts, the amount of the reduction actually granted was USD [confidential] per chipset.
- 382 In the first place, it should be stated that the fact that Qualcomm implemented a package of incentives to ZTE in relation to various chipsets, including chipsets not used for the leading edge segment of the UMTS chipsets market, does not mean that some of them cannot be taken into account for the purposes of the price-cost test conducted in order to assess predation.
- 383 In the second place, it is clear from the applicant's description that the difference between the incentive approved in December 2009 and the incentive approved in May 2010 lies in the fact that the former incentive entailed (i) a payment of USD [confidential], to be made upon signature of the agreement, and (ii) a payment of USD [confidential], to be made subject to ZTE obtaining carrier qualification for MDM8200A chipset devices, while the second incentive entailed a payment of USD [confidential], payable on condition that ZTE obtain carrier qualification for MDM6200 chipset devices. However, the applicant does not explain why the fact that 'the terms of approval changed from December to May demonstrates a considered reassessment' or how that is favourable to it for the purposes of assessing predation.
- 384 Conversely, as described in recitals 501 and 502 of the contested decision, internal communications from December 2009 between senior directors (such as the QCT Product Management Director and the Vice-Presidents of Finance and of Sales), report that, in the first place, the prices offered to ZTE for the MDM6200 chipset could not be lower than those offered to Huawei, and that Qualcomm was not in favour of making 'big price moves'; in the second place, Qualcomm feared losses for the MDM6200 chipset resulting from the collaboration between ZTE

and Icera and, in the third place, the envisaged solution was an NRE payment tied to MDM6200 or MDM8200A chipsets, to prevent ‘Icera gain[ing] a lot of business’. The solution to that concern was identified in the ‘ZTE MDM6200 Price Proposal’ dated December 2009 which, to some extent, was not a ‘big price move’ in that it was not a price move but rather an incentive, and which included a payment tied to carrier qualification for the MDM8200A chipset and the purchase of a number of units of the MDM6200 chipset, with the possibility of clawing back payment if one or other of the conditions were not met.

- 385 Moreover, it is apparent from the presentation to the [confidential] meeting of 8 February 2010, which therefore post-dated the December 2009 approval, that the payment which, at the time, was supposed to be formally envisaged for both the MDM8200A chipset and the MDM6200 chipset, was in fact intended solely to reduce the price of the latter chipset.
- 386 In addition, it should be noted, as the Commission did, that the condition initially proposed, requiring ZTE to purchase [confidential] units of the MDM6200 chipset in 2010 (corresponding to ZTE’s demand forecasts at the time), was not formalised in the [confidential]’s approval. However, in May 2010, taking into account the fact that ZTE’s demand forecasts had fallen to 475 000 units, the [confidential] modified the NRE payment structure. In addition, contrary to the applicant’s assertions, there is nothing to indicate that those modifications corresponded to a change in the intention underlying those payments which was to encourage ZTE to purchase MDM6200 chipsets. Indeed, if the initial objective had been, in December 2009, to promote the MDM8200A chipset, or if that was the objective in May 2010, it would not have been necessary or logical to reduce the rebate for MDM8200A chipsets from USD [confidential] to USD [confidential] (a 60% decrease). By contrast, having significantly revised ZTE’s forecasted demand for MDM6200 chipsets from [confidential] units to fewer than [confidential] units, it was no longer justified, from Qualcomm’s point of view, to offer to ZTE the initially planned rebate of USD [confidential].
- 387 The modification of the NRE payment structure nevertheless made it possible to maintain a payment equivalent to a rebate of USD [confidential] per unit formally tied to MDM8200A chipsets (but actually intended for MDM6200 chipsets), while also offering to double the payment (which would therefore reach USD [confidential]) if the customer obtained carrier qualification for the MDM6200 chipset before the end of 2010, that is to say, if ZTE stimulated the development of an MDM6200 solution during 2010. The Commission correctly states that Qualcomm’s refusal to extend the carrier qualification deadline for MDM6200 chips in February 2011 is consistent with that structure and Qualcomm’s conclusion that ZTE had not done enough to promote the MDM6200 chipset in 2010 to merit receiving the remainder of the rebates resulting from non-recurring engineering expenses.
- 388 As regards the applicant’s argument that the fact that Qualcomm refused in February 2011 to extend the deadline for carrier qualification for devices containing an MDM6200 chipset demonstrates that the NRE payment to ZTE was contractually, and actually, tied to the MDM8200A chipset, it must be pointed out that that circumstance and, consequently, the fact that Qualcomm did not pay ZTE the USD [confidential] amount relating thereto, are perfectly consistent with Qualcomm’s initial intention to prescribe a clawback mechanism for part of the NRE payment if ZTE did not purchase the expected volumes of MDM6200 chipsets.

- 389 As regards the NRE payment to ZTE being treated as a per-unit discount, it must be observed that there can be no finding of error on the part of the Commission as regards the accounting treatment of that payment to the applicable units, or as regards the calculation of the rebate or the assessment of the context.
- 390 First, in order to be able to quantify the size of the NRE payment to ZTE, any payment relating to the MDM6200 chipsets ordered and delivered, namely 145 775 units, must be accounted for by dividing the total amount of the payments by the total number of units ordered and purchased.
- 391 The fact that the NRE payment to ZTE ultimately gives rise to a per-unit rebate three times higher than that initially provided for results simply from the significant reduction in the quantity of MDM6200 chipsets ordered and purchased by ZTE compared with Qualcomm's forecast, namely [confidential] units. Since the amount of the incentive had been established a priori, each chipset benefited from a much larger price reduction than originally planned. In other words, that increase in the rebate applied to each chipset is no more than a by-product of Qualcomm's incorrect sales forecast regarding ZTE.
- 392 As regards the fact that ZTE was not aware that the NRE payment intended for it was to be treated as a per-unit rebate, it must be stated that the case-law does not require the customer of the undertaking in a dominant position to be aware of the methodology used to arrive at a price below cost being applied. It is sufficient, on the one hand, that the price-cost test reveals a price higher than the measure of cost chosen and, on the other hand, that there is an intention to eliminate the targeted competitor (see, to that effect, judgment of 3 July 1991, *AKZO v Commission*, C-62/86, EU:C:1991:286, paragraphs 71 and 72).
- 393 In addition, as regards the argument that the payment did not incentivise ZTE to purchase more chipsets, it should be noted that in the judgment of 12 May 2022, *Servizio Elettrico Nazionale and Others* (C-377/20, EU:C:2022:379, paragraph 53 and the case-law cited), the Court of Justice held that the characterisation of a practice of a dominant undertaking as abusive does not mean that it is necessary to show that the result of a practice of such an undertaking, intended to drive its competitors from the market concerned, has been achieved and, accordingly, to prove an actual exclusionary effect on the market. The purpose of Article 102 TFEU is to penalise abuse by one or more undertakings of a dominant position within the internal market or in a substantial part of it, irrespective of whether or not such abuse has proved successful.
- 394 In the third place, the applicant provides only a bare outline of its argument alleging inconsistencies in the contested decision, such that it is difficult to understand how such inconsistencies could affect the lawfulness of that decision, with the result that that argument must be declared inadmissible. In any event, the explanation given by the Commission, namely that the increase in the price and margin of the MDM6200 chipsets sold to ZTE during the relevant period is a consequence of the discounts stemming from NRE payments, is entirely consistent with the remainder of its reasoning. As regards the alleged anomaly in the allocation of the alleged R&D costs between the MDM6200 and MDM6600 chipsets in 2010, it is sufficient to note that recital 841 of that decision provides a detailed and credible explanation of the reasons which prompted the Commission to do so, reasons which, moreover, the applicant disputes only in generic terms.
- 395 In the light of the foregoing, the first part of the sixth plea must be rejected.

The second part: the NRE payment to Huawei

- 396 According to the applicant, even if it had intended the NRE payment to Huawei to act as ‘compensation’ for the inventory of MDM8200 chipsets which Huawei had accumulated, that payment pertained to chipsets already purchased and could not therefore have incentivised Huawei to make further purchases of those chips. In addition, as is also apparent from Huawei’s response to a Commission request for information, the terms of the non-recurring engineering expenses agreement concluded with Huawei and that payment, linked to carrier qualification of MDM8200A-based chipset devices, did not incentivise Huawei to purchase such chipsets, but instead to purchase MDM8200A-based chipsets, for an indefinite period.
- 397 More generally, the applicant criticises the Commission for having removed from recital 1142 of the contested decision the sentence containing an explicit ‘quasi-allegation’ of ‘obfuscation’ introduced into the SSO with regard to the NRE payments to ZTE and Huawei, which Qualcomm had addressed during the administrative procedure, while the remainder of the recital concerning those NRE payments remained unchanged. In its view, that removal constitutes a failure to provide a proper statement of reasons and further illustrates the Commission’s failure to establish Qualcomm’s intention to exclude Icera from the market.
- 398 The Commission disputes the arguments put forward by the applicant.
- 399 As a preliminary point, it should be noted that, as regards the NRE payment to Huawei, the Commission refers, in Section 12.4.2.3 of the contested decision, to internal Qualcomm documents, which, in its view, demonstrate that, since a number of senior directors of Qualcomm were opposed to giving in to the pressure from Huawei, which was requesting significant price reductions on MDM8200 chipsets, Qualcomm eventually granted a retroactive price reduction for shipments of the MDM8200 chipset after 23 November 2009, as well as ‘MDM8200A NRE’, that is to say, a payment officially intended to cover non-recurring engineering expenses incurred in connection with the certification of a specific end device incorporating the MDM8200A chipset, in the amount of [confidential] (subsequently USD [confidential]). According to the Commission, although the NRE payment was formally associated with obtaining carrier qualification for the latter chipset, the NRE payment was clearly linked to Huawei’s stock of the MDM8200 chipset and enabled a retroactive per-unit price reduction to be applied.
- 400 In the first place, the applicant’s argument – that Huawei had already purchased the MDM8200 chipsets and could not therefore have been incentivised by the NRE payment which was intended for it to purchase more of them – cannot succeed. It is apparent from the documents and correspondence referred to, in particular, in recitals 480 to 486 of the contested decision that that incentive was granted to Huawei in order to assist it in disposing of an excess of those chipsets, in a context in which Huawei relied increasingly on the competitive pressure exerted by Icera, in particular via the ICE8042 chip, in order to obtain more favourable conditions.
- 401 In addition, it is apparent from the documents and correspondence referred to in particular in recitals 480 to 486 of the contested decision that Qualcomm was not in a position to ignore Huawei’s requests, which demonstrates that price negotiations were still taking place when Qualcomm decided to grant the NRE payment to Huawei, and that the conditions of sale of MDM8200 chipsets had, at that time, not yet been finally determined.

- 402 As regards the applicant's argument based on the fact that the terms of the non-recurring expenditure agreement and the NRE payment to Huawei did not incentivise Huawei to purchase MDM8200 chipsets, but rather MDM8200A chipsets, it must be stated, as the Commission did, that Huawei's responses to the Commission's questions do not demonstrate that Huawei believed that payment to relate to MDM8200A chipsets. On the contrary, as stated in recital 681 of the contested decision, Huawei's response simply repeats the terms of that agreement, which are not evidence concerning the true purpose of that payment. It is apparent from the evidence referred to in recitals 482 and 679 of that decision, and from Qualcomm's own admission in the SO response, that that payment was to serve as a retroactive rebate for the MDM8200 chipsets. In addition, Qualcomm's assertion that Huawei believed the payment in question to relate to the MDM8200A chipsets is contradicted by the contemporaneous evidence referred to in recitals 491, 527 and 543 of that decision, in which Huawei requested Qualcomm to modify rebates stemming from non-recurring engineering expenses in order to take account of additional stock units for MDM8200 chipsets which it had identified. It is apparent from those elements that Huawei was perfectly aware that the true intention underlying the NRE payment was that it was to act as a rebate for MDM8200 chipsets and not for MDM8200A chipsets.
- 403 Finally, as regards the explicit 'quasi-allegation' of 'obfuscation' introduced in the SSO in relation to the NRE payments to ZTE and Huawei, it is true, first, that the last sentence of paragraph 771 of the SSO asked whether the fact that Qualcomm had not properly accounted for non-recurring engineering expenses for chipsets was an attempt to conceal the rebate tied to the payment of those expenses, and, second, that that question was not set out in the contested decision. However, the applicant's criticism – concerning the removal of that 'quasi-allegation', according to which that removal constitutes a failure to provide a proper statement of reasons and also illustrates the Commission's failure to establish Qualcomm's intention to exclude Icera from the market – cannot succeed.
- 404 It is sufficient to note in that regard that, in the light of the case-law cited in paragraph 307 above, the Commission was not required to respond specifically in the contested decision to all the observations of fact and law which it had raised during the administrative procedure. Moreover, as the Commission submits, the removal in the contested decision of the last sentence of paragraph 771 of the SSO shows, contrary to the applicant's assertions, that the Commission took account of Qualcomm's response during the administrative procedure, without, however, that having affected the evidence of Qualcomm's intention to exclude Icera from the relevant market.
- 405 In the light of the foregoing, the second part of the sixth plea must be rejected. Therefore, since the first part of the sixth plea has also been rejected (see paragraph 395 above), that plea must be rejected in its entirety.

The seventh plea: failure 'to establish an appropriate cost benchmark'

- 406 By the seventh plea, which is divided into three parts, the first alleging infringement of the principle of legal certainty and the principle *in dubio pro reo*, the second alleging that LRAIC is not the appropriate cost benchmark and the third alleging that the LRAIC calculated by the Commission is not 'true' LRAIC, the applicant submits that the treatment of costs in the contested decision is vitiated by numerous flaws and breaches of general principles of law.

Preliminary observations

- 407 In Section 12.6 of the contested decision, the Commission explained, in relation to the chipsets under investigation, the reasons why it had concluded that the most appropriate cost benchmark for the price-cost test was LRAIC. In the calculation of LRAIC, it took into account (i) manufacturing costs, which vary according to the quantity of chipsets produced and thus represent the relevant variable component of LRAIC (Section 12.6.2 of that decision) and (ii) Qualcomm's R&D costs as recorded in the Qualcomm [*confidential*], thereby capturing the most important fixed portion of the incremental production cost of a chipset (Section 12.6.3 of that decision). It added that other types of fixed costs, such as commercialisation costs, were not included, with LRAIC calculated by the Commission therefore being below Qualcomm's ATC.
- 408 According to the Commission, having regard to the criteria established by the EU Courts in that field, LRAIC was the most appropriate cost measure in the present case in order to calculate the minimum required rate of recovery of costs by Qualcomm for the relevant products. In its view, since Qualcomm is a multi-product undertaking benefiting from economies of scope, a number of products could share the same production activities, with the result that the relevant costs do not vary with the number of products supplied ('common costs'). It follows, according to the Commission, that those costs are not taken into account in LRAIC, since LRAIC only comprises the production costs specific to the products under investigation. Therefore, the average of all variable and fixed costs incurred by Qualcomm to produce a particular product (namely LRAIC) is below ATC for each product.
- 409 The Commission's view in the contested decision is that LRAIC being below ATC for each product is not called into question by the fact that each chipset was likely to generate, or to have received, R&D spillovers for future chips. According to the Commission, the spillovers from which a particular chip benefited are likely to be roughly balanced by the spillovers generated in turn by that particular chip for other later chips. It stated that the R&D costs incurred for a chip were not, therefore, discounted by the spillovers likely to have been generated by that chip in favour of a later chip. However, with regard to the MDM8200 and MDM8200A chipsets, the Commission adjusted its allocation of development costs to account for the fact that evidence in the file indicated that the MDM8200 chipset generated substantially more spillovers for the MDM8200A chipset than it had itself received.
- 410 In practice, in order to calculate the AVC, the Commission relied on the 'average unit cost' parameter taken from Qualcomm data which could be presented according to two accounting criteria: one which reflected the average unit cost of chips sold in a given quarter and a second which reflected the unit cost of the chips purchased by Qualcomm (from foundries) in a given quarter. Initially, in the SO, the Commission used the first approach. Subsequently, in the SSO and the contested decision, in order to take account of certain observations made by Qualcomm, the Commission instead used the second approach, subject to certain adjustments, aimed primarily at resolving an inventory accounting issue.
- 411 By contrast, in order to calculate Qualcomm's R&D costs to be attributed to each chipset, the Commission identified certain cost elements in the [*confidential*] as being 'incremental' to that chipset, which Qualcomm used to record and allocate certain fixed costs to certain chips. In particular, the 'incremental' costs were identified based on an internal Qualcomm document in which that term was used, namely an internal presentation entitled [*confidential*], concerning the

[*confidential*] ('the [*confidential*]'), and the explanations given by Qualcomm during the administrative procedure regarding the categories of costs it regarded as 'incremental' in that document.

The first part: infringement of the principle of legal certainty and the principle in dubio pro reo

- 412 The applicant submits that the Commission infringed the principle of legal certainty, the principle of the presumption of innocence and the principle *in dubio pro reo* by using two different approaches in order to quantify Qualcomm's total R&D investment, namely a 'top down' approach in the SO and a 'bottom-up' approach in the SSO and the contested decision. In particular, the Commission acknowledged in the SO that the [*confidential*] was unsuitable for use in a price-cost test. By contrast, in the SSO and the contested decision, the Commission used data from that database and the methodology employed led to very different margins between chipsets and from one quarter to another relative to the SO.
- 413 The applicant also maintains that the difference between the methodology used in the SO, on the one hand, and the methodology used in the SSO and the contested decision, on the other hand, meant that it was unable to foresee the methodology which would ultimately be used by the Commission or its results when it made the relevant chipset pricing decisions or, a fortiori, R&D investment decisions. Indeed, the Commission itself did not anticipate even the fundamentals of the methodology ultimately employed in that decision, or its results, after over half a decade of investigation.
- 414 The Commission disputes the arguments put forward by the applicant.
- 415 As a preliminary point, it should be observed, as was done in paragraphs 364 to 366 above, that the applicant's complaints alleging infringement of the principle of the presumption of innocence and of the principle *in dubio pro reo* must be regarded as being inadmissible in that sufficient details are not provided to enable an assessment of their substance to be undertaken.
- 416 Furthermore, in the first place, as regards the applicant's argument concerning, in essence, the difference between the analysis methodologies used by the Commission in the SO, on the one hand, and in the SSO and the contested decision on the other, it should be recalled that, in accordance with the case-law cited in paragraph 146 above, until a final decision has been adopted, the Commission may, in view, in particular, of the written or oral observations of the parties, abandon some or even all of the objections initially made against them and thus alter its position in their favour or decide to add new complaints, provided that it affords the undertakings concerned the opportunity of making known their views in that respect. The same is true of the methodology used by the Commission in its price-cost test.
- 417 It should be recalled that, according to settled case-law, while the principle of legal certainty requires that legal rules be clear and precise, and aims to ensure that situations and legal relationships governed by EU law remain foreseeable (see judgments of 15 September 2005, *Ireland v Commission*, C-199/03, EU:C:2005:548, paragraph 69 and the case-law cited, and of 29 March 2012, *Spain v Commission*, T-398/07, EU:T:2012:173, paragraph 107), the fact remains that it follows from the provisional nature of the methodology used in the SO in order to determine the most appropriate measure of costs for the price-cost test that the Commission's final decision cannot be annulled on the sole ground that the results arising from applying another methodology in the SSO and in the contested decision are not an exact match for the

results which would have arisen from the methodology initially used in the SO (see, by analogy, judgment of 5 December 2013, *SNIA v Commission*, C-448/11 P, not published, EU:C:2013:801, paragraph 43).

- 418 In addition, it must be noted that, in the present case, the applicant does not deny that it had the opportunity to explain its views during the administrative procedure and, in particular, after the SSO was sent, on the methodology to be applied in the contested decision.
- 419 Moreover, the applicant simply refers to the ‘top down’ and ‘bottom up’ nature of the methodologies used by the Commission and to a difference between the margins required between the chips and from one quarter to another, without explaining, except by making a reference to its written submissions submitted during the administrative procedure and annexed to the application, the specific differences between the ‘top down’ and ‘bottom up’ approach and their practical implications. In that regard, it must be stated, as the Commission did, that the methodology adopted in the contested decision (and in the SSO) is based on the actual R&D costs which Qualcomm itself posted in its accounts for each chipset. For that reason, the Commission concluded that that methodology offered a more accurate reflection of the R&D costs actually incurred in developing each chipset than the methodology applied in the SO.
- 420 Consequently, even if the analysis methodologies used by the Commission in the SO, on the one hand, and in the SSO and the contested decision, on the other, were to produce different results, as the applicant maintains, that does not permit the inference in the present case that the Commission erred in adopting in the contested decision a methodology based on actual R&D costs which Qualcomm itself had posted in its accounts for each chipset. In those circumstances, that argument cannot succeed.
- 421 In the second place, as regards the applicant’s argument that it was impossible for it to know, when making its decisions on chipset pricing and R&D investments, the methodology which would be used by the Commission in order to determine the relevant cost benchmark, put forward solely in support of the alleged infringement of the principle of legal certainty, it should be recalled that, in the SSO, the Commission had stated that the modification of the LRAIC calculation had been made in order to take account of the objections raised by the applicant in its SO response concerning the LRAIC calculation made in the SO.
- 422 It should be noted in that regard that, while it is true that the account taken of the costs of the dominant undertaking allows that undertaking, in the light of its special responsibility under Article 102 TFEU, to assess the lawfulness of its own conduct, and is therefore consistent with the general principle of legal certainty (see, to that effect, judgments of 14 October 2010, *Deutsche Telekom v Commission*, C-280/08 P, EU:C:2010:603, paragraph 202, and of 17 February 2011, *Teliasonera Sverige*, C-52/09, EU:C:2011:83, paragraph 44), that does not mean it is impossible for the Commission to make certain adjustments, based on the price and cost statements of the dominant undertaking and on all other relevant information provided by the dominant undertaking (see, to that effect, judgments of 30 January 2007, *France Télécom v Commission*, T-340/03, EU:T:2007:22, paragraphs 131 to 137; of 10 April 2008, *Deutsche Telekom v Commission*, T-271/03, EU:T:2008:101, paragraphs 208 to 211; and of 13 December 2018, *Slovak Telekom v Commission*, T-851/14, EU:T:2018:929, paragraphs 220 to 235).

423 It follows that the principle of legal certainty does not require the dominant undertaking to have detailed forecasts relating to the exact methodology to be used by the Commission in order to calculate its costs. The methodology adopted by the Commission must take account of the particular circumstances of the case and, in particular, the available information provided by the dominant undertaking.

424 In the light of the foregoing, the first part of the seventh plea must be rejected.

The second part: LRAIC is not the appropriate cost benchmark

425 According to the applicant, the Commission ought to have concluded that the most appropriate cost benchmark for the purposes of the price-cost test in the present case was AVC or average avoidable costs ('AAC'), and not LRAIC.

426 In the first place, it argues that pricing decisions are based on competitive circumstances existing at the time when Qualcomm's R&D costs had already become 'sunk', in the sense that they could no longer be avoided. Prices below LRAIC will, according to the applicant, often be profit maximising in the short term and not imply profit sacrifice.

427 In the second place, the applicant argues that LRAIC is designed for a static world, since it focuses on a given product and does not take account of past and future related products. In a dynamic sector such as the semiconductors sector, with inter-temporal effects, their use is not appropriate.

428 In the third place, the extremely narrow allegations of abuse in the present case (relating to the sale of three chipsets to only two customers for only certain quarters) means that true LRAIC is in fact AAC or AVC, or extremely close thereto.

429 In that regard, the Commission erred in concluding that products belonging to the relevant market were characterised by low marginal or variable costs, whereas the Commission had itself, on a number of occasions, stated that AVC was an important parameter of competition.

430 In the fourth place, the applicant submits that the Commission's decision to base its analysis on LRAIC rather than on ATC is not, contrary to the Commission's assertion, more favourable to the applicant. According to the applicant, it is unlikely that ATC, correctly calculated, would be higher than LRAIC, since LRAIC also includes common costs, fails to take into account the revenues derived from its patent licensing business and has undergone post hoc manipulations, resulting in LRAIC of the MDM8200A chip being significantly inflated.

431 The Commission and the intervener dispute the applicant's arguments.

432 It should be recalled, first of all, that when an action for the annulment of a decision applying Article 102 TFEU is brought before it under Article 263 TFEU, the Court must as a general rule undertake, on the basis of the evidence adduced by the applicant in support of the pleas in law put forward, a full review of the question whether or not the conditions for the application of that provision are met and that, in carrying out such a review, the Court cannot use the Commission's margin of discretion, by virtue of the role assigned to it in competition policy by the EU and FEU Treaties, as a basis for dispensing with the conducting of an in-depth review of the law and of the facts (see, by analogy, judgment of 11 September 2014, *MasterCard and Others v Commission*, C-382/12 P, EU:C:2014:2201, paragraphs 155 and 156).

- 433 Furthermore, it should be observed that the Commission's use of a methodology based on prices above AVC and below ATC simply follows from the case-law. According to the Court of Justice, prices below AVC by means of which a dominant undertaking seeks to eliminate a competitor must be regarded as abusive. A dominant undertaking has no interest in applying such prices except that of eliminating competitors so as to enable it subsequently to raise its prices by taking advantage of its monopolistic position, since each sale generates a loss, namely the total amount of the fixed costs (that is to say, those which remain constant regardless of the quantities produced) and at least part of the variable costs relating to the unit produced. Moreover, prices below ATC, including fixed costs and variable costs, but above AVC, must be regarded as abusive if they are determined as part of a plan for eliminating a competitor. Such prices could drive from the market undertakings which are perhaps as efficient as the dominant undertaking but which, because of their smaller financial resources, are incapable of withstanding the competition waged against them (judgment of 3 July 1991, *AKZO v Commission*, C-62/86, EU:C:1991:286, paragraphs 71 and 72).
- 434 That case-law has been confirmed in a number of subsequent judgments which have consistently held that, first, prices below AVC must in principle be regarded as abusive in so far as, in applying such prices, an undertaking in a dominant position is presumed to pursue no economic purpose other than that of eliminating its competitors. Second, prices below ATC but above AVC are only to be considered abusive if they are determined in the context of a plan having the purpose of eliminating a competitor (judgments of 14 November 1996, *Tetra Pak v Commission*, C-333/94 P, EU:C:1996:436, paragraph 41, and of 2 April 2009, *France Télécom v Commission*, C-202/07 P, EU:C:2009:214, paragraph 109).
- 435 In the light of the case-law resulting from the judgment of 3 July 1991, *AKZO v Commission* (C-62/86, EU:C:1991:286, paragraphs 71 and 72), the Commission, in order to find an abuse of a dominant position, was therefore obliged in the present case, first, to find that the applicant's prices were below ATC and, second, to prove it intended to exclude a competitor. The Commission found in the contested decision, as recalled in paragraphs 408 and 409 above, that Qualcomm's LRAIC was, for each product, below its ATC.
- 436 In that regard, contrary to the applicant's assertions in its fourth complaint, it must be held that, since ATC includes, inter alia, all common costs, whereas LRAIC includes only the costs associated with the specific products concerned, it cannot, in essence, be accepted that ATC is below LRAIC. Even if the Commission erred in regarding certain common costs as specific to the products in question, the applicant cannot legitimately maintain that LRAIC could be above ATC.
- 437 Indeed, it must be stated that the Commission calculated ATC in Section 12.7.5.2 of the contested decision and concluded that it was above LRAIC. Qualcomm has neither disputed that point nor proposed any other calculation methodology. Therefore, the Commission cannot be criticised for having used LRAIC instead of ATC for the purposes of its price-cost test in so far as LRAIC is more favourable to the applicant than ATC. Moreover, as the intervener correctly points out, it was not necessary for the Commission to determine whether the applicant's prices were also below AVC or LRAIC, since the Commission chose to ascertain whether Qualcomm intended to exclude a competitor. It follows that the applicant's fourth complaint cannot succeed.
- 438 As regards the other three complaints put forward by the applicant disputing the appropriateness of the LRAIC as a cost benchmark, it must be stated, as the Commission did, that a price calculation based solely on variable costs is unsuitable for identifying predatory prices in a sector

where, as is apparent in particular from recitals 109 to 119 and 280 to 284 of the contested decision, R&D activity and the importance of intellectual property rights generate high R&D costs, which would not be taken into account in a calculation based solely on variable costs.

- 439 In particular, it is not disputed that, as the Commission indicated in recital 787 of the contested decision, the semiconductor industry is characterised by low variable costs (for example, the costs of manufacturing chipsets) and high fixed costs (for example, the costs of R&D investment necessary to design and develop chipsets) which are mostly sunk by the time the products are commercialised. Therefore, the failure to include product-specific sunk costs, such as R&D investments, does not reflect the market reality for the costs associated with entering the market and competing on it, thereby making it very difficult, if not impossible, to detect predation aimed at eliminating a competitor.
- 440 Since LRAIC covers the fixed and variable costs specific to each product incurred both before and during the period when the abusive conduct took place, it is, therefore, the most appropriate cost benchmark in the present case in order to calculate the minimum required rate of recovery of costs for the products under investigation (recital 780 of the contested decision).
- 441 Moreover, the applicant's argument that selling at a price above AVC but below LRAIC can be profit maximising in the short term cannot succeed. It should be noted, as the Commission did, that the applicable case-law recognises that pricing above AVC but below ATC (which, in the present case, is above LRAIC) is abusive only if done with the intention to exclude a competitor (see, to that effect, judgment of 3 July 1991, *AKZO v Commission*, C-62/86, EU:C:1991:286, paragraphs 71 and 72). As recalled in recital 785 of the contested decision, the Commission demonstrated exactly that. First, the applicant charged prices below LRAIC and, second, it did so in the context of a plan intending to exclude Icera. Therefore, the argument that prices above AVC could be used for legitimate purposes is simply a recognition of the distinction made in the applicable case-law and does not demonstrate that LRAIC would be an inappropriate benchmark in the present case.
- 442 As regards the applicant's assertion that LRAIC is an inappropriate reference in the present case because of the limited scope of the infringement, it must be stated that, in relation to a two-year predatory practice in a sector which, as the applicant itself confirmed (see, for example, paragraphs 333 and 337 of the applicant's SSO response, Annexes A.2.2 and A.2.4 to the application and paragraphs 715 to 723 of the applicant's SO reply), is characterised by short innovation cycles requiring significant R&D investments, to ignore all costs associated with the development of the products which are the subject of the alleged predation would amount to ignoring a significant part of the costs which determine the pricing decisions of both the dominant undertaking and those of its rivals. If it was true, as the applicant maintains, that in 'R&D intensive' sectors, undertakings could set optimal prices at levels which do not permit recovery of all R&D costs which could be associated with a certain product, the profitability of their businesses would then be seriously challenged. However, those costs play an important role in the strategy for defining prices, particularly in the case of markets characterised by a rapid succession of products, since relatively old products are rapidly succeeded by more innovative products within relatively short periods of time. The fact that an R&D activity may benefit from previous results or facilitate future developments or discoveries does not mean that those investments cannot be taken into account, but rather means that costs must be allocated carefully between the various products.

443 In the light of those considerations, the applicant's complaints disputing the appropriateness of LRAIC as a cost benchmark must be rejected. Indeed, while the Commission has a margin of discretion in competition policy, which is subject to in-depth review of the law and of the facts by the General Court (see, to that effect, judgment of 11 September 2014, *MasterCard and Others v Commission*, C-382/12 P, EU:C:2014:2201, paragraph 156), the fact remains that the evidence adduced by the applicant does not permit the inference that, in choosing not to use AVC or AAC as the cost benchmark, the Commission erred.

444 In the light of all of the foregoing, the second part of the seventh plea must be rejected.

The third part: LRAIC calculated by the Commission is not 'true' LRAIC

445 In support of the third part of the plea, the applicant relies on eight complaints.

446 In the first place, the applicant complains that the Commission erred in its definition of LRAIC, in that it failed to take account of the fact that, where there were spillover benefits from one chip to another, the costs liable to be so classified could not, by their non-specific nature, be attributed to a particular chipset and could not therefore simply be included in the calculation of LRAIC.

447 In the second place, the applicant complains of an inconsistency between the justifications given by the Commission for its calculations in the SSO and the justifications for its calculations in the contested decision. According to the applicant, in the SSO, the Commission refers to the need to resolve the 'accounting-induced distortions' identified in the SO response, whereas, in the contested decision, the Commission refers rather to the need to address the concerns raised. In particular, the applicant criticises the fact that (i) the AVC reconstruction by the Commission in that decision is excessively complex and (ii) the Commission did not use average unit costs (AUC) in its calculations, contrary to the methodology the applicant had defended in its replies to the SO and the SSO.

448 In the third place, the applicant maintains that the [confidential] is unsuitable for identifying its incremental R&D costs, in that that [confidential] is used solely for internal management and accounting purposes and is not designed or suitable for the purposes of the Commission's analysis.

449 In the fourth place, the applicant complains that the Commission treated certain costs recorded in the [confidential], namely the [confidential] and [confidential] cost categories, as 'incremental' costs, even though they were not, since they were associated with a given chip solely as a result of [confidential] allocations, and not because they related specifically to that chip.

450 In that regard, the applicant argues, first, that a distinction must be made between costs allocated directly to a chip and those allocated *ex post*, that is to say, not because they were considered to be specifically linked to that particular chip, but solely because of a simple internal allocation mechanism. According to the applicant, QTC employees [confidential].

451 Accordingly, hardware-related costs not recorded directly against a chip, namely, [confidential] in the [confidential] category, [confidential].

452 Similarly, from September 2009, software-related costs are the result [confidential].

- 453 Due to the specific nature of R&D in the semiconductor sector, even the costs recorded in the [confidential] directly against a chip may not be truly specific to that chip. In any event, even if the Commission had regarded such directly recorded R&D costs as ‘incremental’ or ‘product-specific’, it would not have been able to find predation.
- 454 In practice, the Commission provides no robust justification for classifying the [confidential] and [confidential] cost categories as ‘incremental’ and simply relies on (i) the use of the term ‘incremental’ in a single Qualcomm document in its possession, namely the [confidential], and (ii) the explanations given by Qualcomm during the administrative procedure, which confirm that the Commission did not conduct any independent assessment.
- 455 Second, the applicant submits, as regards the [confidential] used by the Commission to identify the category of incremental costs within the cost categories borne by the applicant, that that document concerned a specific chipset, the [confidential], not covered by the investigation, which was not developed at the same time as the investigated chipsets and which, unlike them, was not a ‘thin’ modem. However, a number of documents in the Commission’s possession, including documents relating to the chipsets covered by the investigation, make no reference to incremental costs.
- 456 In addition, the [confidential], which dates from April 2011, post-dates the major R&D investment decisions for the chips in question.
- 457 Moreover, in recital 847 of the contested decision, the Commission ignores and misconstrues the [confidential], where it contains a reference to ‘incremental R&D’. According to the applicant, the Commission ought also to have taken account of the reference, in the same document, to the concept of ‘incremental portfolio margin’, which would have enabled a better understanding of the term ‘incremental’. Similarly, the applicant claims that it never stated, as the Commission asserts in recital 848 of the contested decision, that the expression [confidential] was of more general application within Qualcomm than in that document.
- 458 Third, the applicant submits that it has, on a number of occasions, explained that more than USD [confidential] of the USD [confidential] incorrectly recorded in the [confidential] and [confidential] cost categories, which the Commission regarded as ‘incremental’ for the MDM8200 and MDM8200A chipsets, in fact relate to the development of [confidential], which is definitely not specific to any chip or chipsets. In that regard, [confidential] notes that [confidential], which demonstrates that that USD [confidential] is not specific to a given chip.
- 459 In addition, according to the applicant, the justifications given in the contested decision for rejecting its arguments in that regard are implausible.
- 460 In the fifth place, the applicant complains that the Commission erred in disregarding the revenues generated by Qualcomm through its patent licensing business. In essence, its view is that the Commission ought to have excluded the R&D costs associated with the chipsets in question in so far as those costs stemmed from obtaining patents which Qualcomm had included in its licensed patent portfolio and which could not therefore be regarded as specific to the chips concerned. According to the applicant, the Commission erred in concluding, first, [confidential] and, second, that the incremental revenues generated by those licences were unlikely to have a measurable impact on the revenues generated by that activity.

- 461 The applicant observes that the Commission, however, itself, stated in footnote 1238 to the contested decision, that [confidential]. It adds that the relevant question is not whether the revenue generated by patent licensing activity is likely to have a measurable impact or not on the revenue generated through Qualcomm's technology licensing business. According to the applicant, the relevant question is rather whether the R&D is truly 'incremental' to the three chipsets in question and whether it results in patents which are then licensed, with the result that that R&D is not specific to those chipsets.
- 462 According to the applicant, it is also not possible to draw a direct link between the chipsets in question and software-related patents, since the software-related costs are not recorded directly against a specific chip.
- 463 In the sixth place, the applicant maintains that the contested decision relies on an extract from the [confidential] which does not link any costs therein to any specific customers. Nevertheless, the Commission finds that R&D costs associated with the development of the relevant chipsets were 'incremental' costs for Huawei and ZTE. According to the applicant, a price-cost test targeting only Huawei and ZTE ought, however, to exclude all R&D costs, which militates further in favour of using AVC or AAC.
- 464 In particular, first, according to the applicant, the fact that sales to customers other than ZTE and Huawei would not have justified developing the chipsets in question does not mean that sales to Huawei and ZTE would have been sufficient to justify the development of those chipsets. Second, the Commission itself acknowledged, in recitals 131, 132 and 354 of the contested decision, that the MDM8200 chipset had been developed in cooperation with operators other than ZTE and Huawei. Third, data for sales of the MDM8200A chipset to ZTE and Huawei, as set out in recital 980 and Table 58 of that decision, hardly support the claim that R&D associated with that chipset had to be regarded as specific to those two customers. Fourth, the documents referred to by the Commission in footnote 1277 to that decision provide no support whatsoever for the Commission's contention. Fifth, Qualcomm [confidential].
- 465 In the seventh place, the applicant criticises the post hoc manipulation carried out by the Commission by reallocating the costs from the [confidential] between different chipsets, in particular by reallocating costs from the MDM8200 chipset to the MDM8200A chipset, thereby increasing LRAIC for the MDM8200A chipset from USD [confidential] to USD [confidential]; in the absence of such manipulation, prices would not be below costs for the latter chipset. In essence, first, the applicant submits that it is common ground that Qualcomm's decision to develop the MDM8200A chipset post-dated, and was independent of, Qualcomm's decision to develop the MDM8200 chipset and that those two chips were not a joint project, as is apparent from the table set out in recital 880(a) of the contested decision.
- 466 Second, the applicant states that it developed numerous chipsets after the MDM8200 chipset and the MDM8200A chipset, which also supported the HSPA+ standard and more advanced standards. Moreover, there is nothing 'unique' in the relationship between the MDM8200 chipset and the MDM8200A chipset: the existence of a close technical relationship between two chipsets is nothing unique or even unusual.
- 467 Third, while it is true that until some point in time between 2013 and 2015, [confidential], that was the result purely of a simple clerical error which was not, at the time, especially problematic. The contested decision is, the applicant argues, also inconsistent in its treatment of, on the one hand,

the MDM8200 and MDM8200A chipsets and, on the other hand, the MDM6200 chipset, which is also alleged to be a ‘leading edge’ chipset closely related to other Qualcomm chipsets, in particular the QSC6295 chipset, which was developed before it.

- 468 Fourth, the Commission made no effort to investigate the technology and associated R&D effort in question or to tie back its manipulations to any specific entries or cost categories in the [confidential].
- 469 In the eighth place, the applicant complains that the Commission incorrectly allocated ‘incremental’ costs on the basis of revenue, rather than volume.
- 470 The methodology in question is, first of all, devoid of support from legal or economic literature. It also allocates additional costs to sales simply because prices in a given period are relatively high, which creates a strong bias towards finding predatory pricing where there is none. Finally, a genuine test of predation would involve ascertaining that the undertaking subsequently increased its prices (which the applicant did not do), which, according to that methodology, would mean that less R&D cost would be allocated to the allegedly predatory sales, due to the fact that they would instead be transferred over the recoupment period. That makes no sense as a matter of economics and is inconsistent with the concept of ‘recoupment’.
- 471 In the view of the applicant, the Commission also errs in defining the methodology in question as a ‘proxy for the price evolution of a chipset’, thereby failing to take into account that LRAIC is a cost measure and not a price proxy.
- 472 In addition, the applicant submits that the methodology at issue also results in a ‘moving target’, by virtue of which, if it had increased its prices in order to avoid alleged predation, that would at the same time have resulted in its revenues increasing, which would have led to higher R&D costs being allocated for each quarter, with the result that it would always have been guilty of predation. The applicant also criticises the ‘unpredictable and counter-intuitive results’ to which the methodology, as adapted by the Commission, gives rise. The applicant adds that adopting a volume-based allocation methodology results in almost no below-cost pricing.
- 473 The Commission and the intervener dispute the applicant’s arguments.
- 474 As regards the first complaint, alleging an error in the definition of LRAIC, it must be observed that, in the contested decision, the Commission acknowledged that spillovers were likely to occur in the chipset industry as the products improved. However, that does not prevent the applicant from bearing costs specifically for the development of a particular chipset or from being able to launch that chip on the market without bearing those costs. It follows that, even if there are spillovers, the Commission did not err in choosing to take account of the incremental development costs specifically linked to the product in question.
- 475 Moreover, by basing the measure of costs on the [confidential], the Commission, as is apparent from recital 835 of the contested decision, took into account only the costs which the applicant had directly or indirectly recorded against the development of the chipsets in question. Where there was specific evidence of spillovers, the Commission took that evidence into account, as is apparent, in relation to R&D cost spillovers between the MDM8200 chipset and the MDM8200A chipset, from Section 12.6.3.2 of that decision.

- 476 As regards possible spillovers more generally, in the absence of information which would have enabled the Commission to quantify those spillovers, as the Commission found in recital 783 of the contested decision, the most reasonable approach was to assume that the spillovers from which a particular chip benefited were roughly balanced by the spillovers generated by that particular chip for other chips. Accordingly, the development costs borne for that chip were not offset by the spillovers which it probably generated.
- 477 Consequently, the present complaint must be dismissed.
- 478 As regards the second complaint, which alleges an inconsistency between the justifications given by the Commission for its calculations in the SSO and those given for its calculations in the contested decision, it is sufficient to state that that complaint, even if it were well founded, could not in any way result in the methodology at issue being unlawful. Consequently, it must be rejected as being ineffective.
- 479 As regards the third complaint, alleging that the [confidential] is unsuitable for identifying its incremental R&D costs, it should be recalled that in that database the applicant records the costs, chipset by chipset, for internal management and accounting purposes. Given that cost allocation by chipset and the fact that that database is used internally by Qualcomm, the applicant fails to explain why it ought to be regarded as inappropriate for the Commission's cost reconstruction. Moreover, as stated in recital 845 of the contested decision, the applicant itself, in response to information requests relating to the quantification of costs, extracted information from that database.
- 480 In addition, as regards Qualcomm's assertion that none of the data in the [confidential] are designed to calculate LRAIC for the purposes of competition law, it is sufficient to note that that fact does not preclude the Commission from relying on such a database in so far as it contains information relevant to its investigation.
- 481 Lastly, even if the Commission had initially decided not to use the [confidential] in the SO and did not provide any explanation as to its change of opinion in that regard in the SSO, it is sufficient to state that, in the light of the case-law cited in paragraph 367 above, the applicant cannot properly rely on the fact that the Commission did not respond specifically in the contested decision to all the observations of fact and law which it raised during the administrative procedure. It follows that the present complaint must be rejected.
- 482 As regards the fourth complaint, alleging an error in treating certain costs recorded in the [confidential] as 'incremental' costs, it should be recalled, first of all, that Section 12.6.3.1 of the contested decision provides an explanation of the measure of the fixed part of the R&D costs incurred by Qualcomm for the production of each chipset which was taken into consideration for the calculation of LRAIC. Recital 835 of that decision lists the various R&D cost categories which, in that database, are allocated to each chip, or recorded directly against the development of a specific product, or are allocated 'ex post'.
- 483 Furthermore, as set out in paragraph 411 above, recitals 836 and 837 of the contested decision state that in its choice of the elements to be included as incremental costs in the cost analysis, the Commission was guided by the use of the term 'incremental' in the [confidential], in relation to which it requested Qualcomm, in question 8.3 of the request for information made by decision

dated 30 January 2017, to provide the same information on incremental R&D for the chipsets at issue as provided for the [confidential]. The information provided in response is set out in Annex A.15.1 to the application.

- 484 Lastly, the Commission reconstructed the incremental costs by adding together the [confidential] costs and [confidential] costs, that is to say, all the cost components in the database set out in Annex A.15.1 to the application, excluding those which were recorded as [confidential] costs, since the latter costs, although included in that database, had been subtracted by Qualcomm from the total ‘Incremental (i.e. following the same [methodology] of the [confidential])’ costs in that database.
- 485 It must be held, in that regard, that the elements which are included in the database extract criticised by the applicant are summarised in recital 835 of the contested decision and were identified by the Commission on the basis of information provided by Qualcomm.
- 486 Irrespective of whether that information ought to be classified in accordance with [confidential], the applicant always provided the same information in: (i) its response to the request for information of 10 July 2013, dating from December 2013, and, in particular, in its reply to question 19 concerning the main development stages of the first MDM chipsets and the associated costs; (ii) its response to questions 8 and 9 of the request for information of 13 October 2014 (Annex A.4.8.b to the application), to paragraph 38 et seq.; and (iii) its reply to question 8.3 of the request for information made by decision of 30 January 2017 (Annex A.4.10.b to the application).
- 487 In other words, in the applicant’s responses, the various cost categories are identified and allocated to a particular chipset in a regular manner and, in the absence of inconsistencies between the tables set out in the various responses (except for [confidential] costs), those categories can therefore be regarded as costs ‘incremental’ to such a chipset. The only difference between taking into account the methodology and not taking it into account is the inclusion or not of Hardware Tech Allocations, which, in any event, the Commission excluded from its calculations.
- 488 In those circumstances, it must be held that, in order for a certain cost to be included in the calculation of LRAIC, the simple use, or failure to use, the term ‘incremental’ in respect of a cost in the [confidential] cannot constitute the decisive criterion. Rather, it is the intrinsic nature of the cost itself (that is to say, whether it is apparent from one of the cost categories generally regarded as incremental costs), and the classification methodology used by the applicant itself in its responses, which must be taken into consideration.
- 489 Therefore, it must be held, on the basis of the responses and explanations provided by the applicant during the administrative procedure, that the contested decision correctly reconstructed the elements to be taken into account in calculating LRAIC. Furthermore, it should be noted that, in its response to question 19 of the request for information of 10 July 2013 (the first response which is relevant in that regard, dating from December 2013) (Annex A.4.3 to the application), the applicant made no reference to cost allocation or to the fact that, in practice, some of those costs were not attributable to specific chipsets.
- 490 Moreover, as regards software development costs, the applicant stated, in essence, in paragraphs 90 and 92 of the response to question 19 of the request for information of 10 July 2013 (Annex A.4.3 to the application), that the life of a piece of software was closely

linked to that of a particular chipset and that the related costs follow the commercial life of that chip, thereby supporting the conclusion in recital 860 of the contested decision that that part of the [confidential] is a solid basis for determining the R&D costs related to software development to be attributed to a specific chip. However, that does not preclude the possibility that part of a piece of software may then be used for subsequent chipsets.

- 491 In addition, it should be noted that the applicant's reservation concerning cost allocation was formulated relatively imprecisely during the administrative procedure and in the application.
- 492 That lack of precision in identifying non-incremental cost categories undermines the credibility of the applicant's arguments, especially since, if its reasoning were to be followed, almost no R&D costs could be attributed to a specific chipset.
- 493 As regards the probative value of the evidence used by the Commission, it must be recalled that the reliability and, thus, the probative value of a document depends on its origin, the circumstances in which it was drawn up, the person to whom it is addressed and its content (judgments of 15 March 2000, *Cimenteries CBR and Others v Commission*, T-25/95, T-26/95, T-30/95 to T-32/95, T-34/95 to T-39/95, T-42/95 to T-46/95, T-48/95, T-50/95 to T-65/95, T-68/95 to T-71/95, T-87/95, T-88/95, T-103/95 and T-104/95, EU:T:2000:77, paragraphs 1053 and 1838, and of 12 July 2011, *Hitachi and Others v Commission*, T-112/07, EU:T:2011:342, paragraph 70).
- 494 In the present case, the Commission relied, in its price reconstruction, on the tables and responses provided by the applicant itself, including figures taken from the [confidential] and, in addition, it simply applied classification criteria already used by the applicant. Given that those data come from the applicant itself, they must be regarded as sufficiently credible to support the Commission's price reconstruction.
- 495 In that context, it is not sufficient for the undertaking concerned to refer to a circumstance which might affect the probative value of that evidence. On the contrary, it is for the undertaking concerned to prove to the requisite legal standard, first, the existence of the circumstance relied on by it and, second, that that circumstance calls into question the probative value of the evidence relied on by the Commission (see, to that effect and by analogy, judgment of 26 September 2018, *Infineon Technologies v Commission*, C-99/17 P, EU:C:2018:773, paragraphs 65 to 67).
- 496 In the present case, the applicant simply reiterates the arguments submitted during the administrative procedure in its response to the request for information of 13 October 2014, insisting that the data provided cannot be used for the purposes of an antitrust analysis, without adding in support of its argument any document demonstrating how another classification methodology would have been more appropriate than that used by the Commission. In the absence of such evidence, it must be concluded that, for both direct and indirect recording, the costs which the applicant itself identified in response to the Commission's question are in principle to be regarded as incremental as regards each of the chipsets in question.
- 497 Furthermore, it must be pointed out, as the Commission did, that the choice of a specific recording method (direct or indirect, that is to say, by allocation) on the part of the dominant undertaking could affect the analysis of its costs. Even if a certain cost element followed in fact from an allocation, that could not, in itself, prevent it from being included in the calculation of LRAIC. If that were the case, a dominant undertaking could always frustrate any price-cost test

by claiming that it was impossible to make allocations to specific costs. In addition, in the present case, the allocations reflect the assessments made by the applicant itself of the costs to be linked to a specific chipset.

- 498 As regards the USD [confidential] of R&D costs, recorded against the MDM8200 chipset, but which actually relate to the [confidential], it should be noted that the applicant raised that aspect for the first time in its SSO response. Previously, the Commission had no reason to question the accuracy of the data received, especially since Article 18(4) of Regulation No 1/2003 imposes on the undertakings concerned an obligation to provide complete, correct and non-misleading information.
- 499 The fact that those costs had been recorded against the MDM8200 chipset is clear from the [confidential] and from the applicant's responses, which must be regarded as particularly reliable evidence in that they run counter to the interests of the declarant (see, to that effect, judgment of 3 March 2011, *Siemens v Commission*, T-110/07, EU:T:2011:68, paragraphs 54 and 75). In response to those elements, the only evidence adduced by the applicant is a document dated 9 July 2009 entitled [confidential] (Annex A.18.1 to the application), which contains footnote 20 concerning USD [confidential] having been excluded since it related to [confidential]. It should be noted, in that regard, that that document, as noted by the Commission in recital 851 of the contested decision, provides a table comparing the R&D costs for the MDM8200 chipset with those relating to the MDM8200A chipset, which was regarded as 'not cost competitive'. That table appears to demonstrate only that, for the purposes of comparing the costs of the two chipsets in the presentation, that [confidential] amount was not taken into consideration, and it does not demonstrate that, in calculating the costs relating to the MDM8200 chipset, those specific costs were not, or ought not to have been, taken into account. As to the remainder, the applicant's arguments are not supported by any documentation and, in themselves, cannot call into question the evidence previously provided by the applicant itself. In those circumstances, they must be rejected. It follows that the present complaint must be rejected.
- 500 As regards the fifth complaint, alleging an error in that the revenues obtained by Qualcomm through its patent licensing business were disregarded, it should be noted that, even if the applicant had changed its licensing policy, that does not mean that it did not grant licences relating to its entire patent portfolio during the relevant period. In any event, as is apparent from footnote 1238 to the contested decision, the applicant does not challenge the fact that [confidential].
- 501 Moreover, it should be noted that, first, the applicant maintains that it identified approximately [confidential] patents and patent applications of which 'many' are 'likely' to have been generated 'in whole or in part' by work which the Commission regards as specific to the chips at issue. Second, the applicant does not identify those patents or patent applications, nor does it quantify the revenue generated by them. Rather, it simply argues that, particularly as regards software-related patents, it is impossible to identify those linked to the chipsets in question. In those circumstances, the applicant's arguments are not sufficient to call into question the Commission's findings in that regard. It follows that the present complaint must be rejected.
- 502 As regards the sixth complaint, alleging, in essence, errors concerning the taking into account of R&D costs related to the development of Qualcomm's chipsets, it must be held, as is clear from the contested decision, in particular from recital 862 thereof, and more generally from Section 12.6.3 of the contested decision, that sales to Huawei and ZTE were fundamental for the recovery of R&D costs.

- 503 Moreover, as is indicated in recital 888 of the contested decision, it was appropriate to include the incremental costs incurred in R&D in the measure of costs in order to assess whether the sales to Huawei and ZTE had been made at prices below cost, as the forecasted sales to Huawei and ZTE accounted for a substantial part of the expected demand which justified developing those chips in the first place. Furthermore, contrary to the applicant's assertions, while the forecasted sales of units of the MDM8200, MDM6200 and MDM8200A chipsets to other customers also contributed to the recovery of the incremental development costs, those sales were of an order of magnitude which would not have justified developing those products. That conclusion is also borne out by the documents referred to in footnote 1277 to that decision.
- 504 Consequently, the present complaint must be dismissed.
- 505 As regards the seventh complaint, alleging post hoc manipulation carried out by the Commission in reallocating the costs recorded from the [confidential] between different chipsets, it must be observed that the applicant itself acknowledged that, until December 2013, the costs related to the software used for the MDM8200 and MDM8200A chipsets, as recorded in that [confidential], were not distinguished according to whether they related to one or other of those two chipsets (footnote 78 to the reply to the request for information of 13 October 2014).
- 506 It should also be noted that, in the table taken from the [confidential], contained in Annex A.15.1 to the application, although the development of the MDM8200A chipset commenced in April 2009, no costs are associated with it before the last quarter of 2009 and the costs associated with that chipset, even from the last quarter of 2009 onwards, remain low compared with those of the MDM8200 chipset and the MDM6200 chipset. That fact, in view of the technical similarity of the two chipsets and their joint commercialisation, supports the Commission's arguments in recital 880 of the contested decision, demonstrating that there was a unique relationship between the MDM8200 chipset and the MDM8200A chipset, which is not comparable to any relationship which might have existed between the MDM8200 chipset and any other chipset supporting HSPA+ technology.
- 507 The intervener also observes, correctly, that the contested decision contains a 'lifetime profitability analysis' which involved examining the profitability of all sales of the MDM8200 chipset and the MDM8200A chipset throughout their lifetime and in relation to all customers, and that it is apparent from that analysis that the lifetime revenues of those two chipsets were not sufficient to cover their R&D manufacturing and development costs. Therefore, Qualcomm's pricing for those two chipsets would never have allowed an equally efficient supplier to cover its costs for a competing chipset.
- 508 In those circumstances, the present complaint must be rejected.
- 509 As regards the eighth complaint, alleging that 'incremental' costs were incorrectly allocated on the basis of revenue, rather than volume of sales, first, it should be noted that, although the Commission cites only one source in favour of the methodology adopted, namely the Organisation for Economic Co-Operation and Development (OECD) Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations 2017 in footnote 1293 to the contested decision, the applicant does not refer to any study or principle supporting the substitute methodology it proposes. Furthermore, in so far as, by its argument that the methodology adopted by the Commission creates a strong bias towards finding predatory pricing where there is none, the applicant alleges that that methodology leads to predatory prices being identified artificially, it adduces no evidence to support its allegation.

- 510 Second, it is sufficient to note, as the Commission did, that the applicant's argument that the methodology adopted by the Commission resulted in lower R&D costs being attributed to the allegedly predatory sales due to the fact that they would instead be transferred over the recoupment period does not, however, mean that that methodology is unsuitable. It should be noted that the methodology adopted by the Commission results in those costs being allocated according to the fact that prices over a given period, in particular the first period of the commercialisation of chipsets, are relatively high, and therefore revenues are also high. The methodology proposed by the applicant, on the other hand, results in a uniform, pro rata allocation of costs so that each unit (regardless of when it is sold during the chipset's life cycle) has to recover the same amount of costs. As the Commission correctly states in recital 917 of the contested decision, given the evolution of chipset prices, such an approach was not suitable in the present case because it would have led to a large part of the development costs being shifted towards the end of the product's life cycle, where prices and margins tend to be low, thus generating a large number of false positives in the price-cost test.
- 511 Third, as regards the Commission's use of the expression 'proxy for the price evolution of a chipset' to define the methodology adopted, the applicant's argument that the Commission thereby failed to take into account that LRAIC was a measure of costs and not a price proxy cannot succeed, since that expression simply refers to the fact that that methodology seeks to take account of the price profile over time, with the result that periods during which chipsets are assumed to generate higher revenues also bear a greater share of the costs.
- 512 Fourth, as regards the applicant's argument that the methodology adopted by the Commission is a 'moving target', it must be stated that, as indicated in recital 935 of the contested decision, the methodology proposed by the applicant suffers from the same problem in that whenever prices increase in some or all quarters of the product's life cycle, the volumes sold of that product would drop, so that each unit sold would have to bear a larger share of the product's fixed development cost. Accordingly, higher prices might still not be sufficiently high to exceed the cost benchmark obtained through a volume-based allocation of development costs.
- 513 Fifth, the applicant's argument that adopting a volume-based allocation results in almost no below-cost pricing is unfounded. As the Commission points out, Table 13 in Annex A.2.4.5 to the application demonstrates that that is the case for the MDM8200A chipsets, but not for the MDM8200 or MDM6200 chipsets. Indeed, Qualcomm's predatory sales of MDM6200 chipsets to ZTE were priced so low, below AVC, that a simple allocation of costs based on volume rather than revenue would not change the fact that Qualcomm was still pricing below cost (recital 891 of the contested decision). The same applies to MDM8200 chipsets. The allocation of costs by volume rather than revenue does not produce significantly different results for Qualcomm. The present complaint must therefore be rejected.
- 514 In the light of all of the foregoing, the third part of the seventh plea must be rejected. Therefore, since the other parts of that plea have also been rejected (see paragraphs 424 and 444 above), that plea must be rejected in its entirety.

The ninth plea: 'manifest errors of law and of appraisal' as regards the finding that the prices charged by the applicant foreclosed Icera and caused consumer harm

- 515 The present plea comprises four parts. The first alleges that the Commission failed to conduct a so-called 'as-efficient' competitor analysis. The second part alleges a contradiction between the finding of foreclosure set out in the contested decision and Icera's actual performance during the

relevant period. The third alleges that there is no evidence of alleged financial predation, having regard to the fact that, during that period, Icera raised additional funds, was acquired by Nvidia and remained active on the market. The fourth alleges that the applicant could not have eliminated competition from Icera's technology.

- 516 Since the second, third and fourth parts all concern, in essence, the alleged lack of effects of the conduct at issue, they will be examined together.

The first part: the Commission failed to conduct a so-called 'as-efficient' competitor analysis

- 517 According to the applicant, the Commission failed to carry out a so-called 'as-efficient' competitor analysis both on the relevant market and in the leading edge segment of that market and, as a result, did not comply with the applicable legal standard, as is apparent from the arguments put forward in support of the third plea. In so doing, the Commission also failed to examine whether the share of the market covered by the conduct at issue was of sufficient magnitude to have anticompetitive effects, as the Court of Justice held in the judgment of 6 September 2017, *Intel v Commission* (C-413/14 P, EU:C:2017:632).
- 518 The applicant also believes that Icera was not in any event an 'as-efficient' competitor, since, being uncompetitive outside the leading edge segment of the UMTS chipsets market, Icera would not have been able to satisfy a significant share of demand on the relevant market. In its view, an 'as-efficient' competitor should, at the very least, be able to replicate the dominant undertaking's entire offering.
- 519 The Commission and the intervener dispute the applicant's arguments.
- 520 According to the case-law on predatory pricing, prices below AVC must be regarded as abusive, since a dominant undertaking has no interest in applying such prices except that of eliminating its competitors. Moreover, prices below ATC, but above AVC, must be regarded as abusive if they are determined as part of a plan for eliminating a competitor, given that such prices can drive from the market undertakings which are perhaps as efficient as the dominant undertaking but which, because of their smaller financial resources, are incapable of withstanding the competition waged against them (see, to that effect, judgment of 3 July 1991, *AKZO v Commission* (C-62/86, EU:C:1991:286, paragraphs 70 to 72).
- 521 It follows, first, that there is a presumption of abuse where an undertaking in a dominant position prices below AVC, there being no need for the Commission to undertake any analysis other than such a comparison of the prices charged by the dominant undertaking and of some of its costs. Second, where an undertaking in a dominant position prices below ATC but above AVC, the Commission is required, for the purposes of demonstrating that there is abuse, to compare the prices charged by the dominant undertaking and some of its costs and to prove that there is a plan to eliminate a competitor, given that such prices are, in essence, capable, as such, of driving equally efficient competitors from the market. The Commission is therefore under no obligation to carry out analyses other than such a demonstration, in order, in particular to adduce evidence of the anticompetitive effects of the contested practice.

- 522 Contrary to the applicant's assertions, the Commission is, consequently, not required, when examining whether an undertaking in a dominant position charged predatory prices, to examine whether the share of the market covered by the contested practice is of sufficient magnitude for that practice to have anticompetitive effects. In the present case, the Commission cannot therefore reasonably be criticised for having failed to undertake such an examination.
- 523 In that regard, it is also apparent from paragraphs 72 and 73 of the Communication regarding Guidance on the Commission's enforcement priorities in applying Article [102 TFEU] to abusive exclusionary conduct by dominant undertakings (OJ 2009 C 45, p. 7; 'the Enforcement Priorities Communication') that it may be easier for the dominant undertaking to engage in predatory conduct if it selectively targets specific customers with low prices, as that will limit the losses incurred by the dominant undertaking, and that it is less likely that it engages in predatory conduct if the conduct concerns a low price applied generally for a long period of time. It follows that, as regards predatory pricing, the share of the market covered by the conduct at issue is generally low and if penalties could be imposed in respect only of predatory conduct relating to a sufficiently large market share, any selective predatory practice could escape the prohibition laid down in Article 102 TFEU, even though it might lead to an as-efficient competitor being eliminated. It is clear from the case-law that it must be possible to impose penalties in respect of predatory pricing whenever there is a risk that competitors will be eliminated (see, to that effect, judgment of 14 November 1996, *Tetra Pak v Commission*, C-333/94 P, EU:C:1996:436, paragraph 44).
- 524 Furthermore, it is also apparent from the case-law that the application of the 'as-efficient' competitor test consists in examining whether the pricing practices of a dominant undertaking could drive an equally efficient competitor from the market and that that test is based on a comparison of the prices charged by a dominant undertaking and certain costs incurred by that undertaking as well as its strategy (judgments of 27 March 2012, *Post Danmark*, C-209/10, EU:C:2012:172, paragraph 28, and of 6 October 2015, *Post Danmark*, C-23/14, EU:C:2015:651, paragraphs 53 and 54).
- 525 It follows that, in the context of an investigation into potential predatory prices, the analysis by which the Commission compares the prices charged by an undertaking in a dominant position with some of its costs for the purposes of assessing whether that undertaking priced below ATC but above AVC already includes an 'as-efficient' competitor analysis.
- 526 In so far as an undertaking in a dominant position sets its prices below ATC but above AVC, a competitor as efficient as that undertaking will not, in principle, be able, because of its lesser financial resources, to compete with those prices without incurring losses which are unsustainable in the long term. Such prices are therefore capable of excluding an 'as-efficient' competitor, which corresponds to what the Commission must demonstrate when applying the 'as-efficient' competitor test in order to prove that an anticompetitive practice has foreclosure potential.
- 527 Therefore, where the Commission has validly proven, as in the present case, that the undertaking in a dominant position priced below ATC, but above AVC, accordingly, it has implicitly applied the 'as-efficient' competitor test, which is sufficient to reject the first part of the ninth plea.

The other parts: in essence, the conduct at issue had no effects

- 528 In support of the second part of the plea, the applicant argues that Icera actually prospered during the relevant period, which undermines the Commission's assertion that the conduct at issue resulted in Icera being prevented, at a crucial stage of its development, from gaining access to Huawei or ZTE, on which its prospects for growth in the leading edge segment of the UMTS chipsets market depended.
- 529 In support of the third part of the plea, the applicant submits that, during the relevant period, Icera raised additional funds, in particular as a result of its acquisition by Nvidia, which undermines the Commission's allegation that the conduct at issue resulted in Icera being required to make sales at a loss and to exhaust its venture capital funding.
- 530 In support of the fourth part of the plea, the applicant claims that the conduct at issue could not have resulted in competition from Icera's technology being eliminated. In the applicant's view, Icera's withdrawal from the market had a limited, or even no, impact on the prices which it charged for its 'leading edge' UMTS chipsets or for any other UMTS chipsets, in particular because Icera's technology and know-how were transferable, with the result that competition would not have been affected by Icera disappearing from the market.
- 531 The Commission and the intervener dispute the applicant's arguments.
- 532 It must be observed that, as the Commission states in its written pleadings, it was only for the sake of completeness that it, in Section 12.7.4 of the contested decision, demonstrated that the conduct at issue had had anticompetitive effects, which the applicant disputes in the context of those parts. It is settled case-law that complaints directed against grounds of a Commission decision included purely for the sake of completeness will be rejected outright since they cannot lead to that decision being set aside (judgments of 8 May 2003, *T. Port v Commission*, C-122/01 P, EU:C:2003:259, paragraph 17, and of 8 July 2004, *Dalmine v Commission*, T-50/00, EU:T:2004:220, paragraph 146), which, in any event, renders those parts ineffective (see, to that effect, judgment of 29 March 2012, *Telefónica and Telefónica de España v Commission*, T-336/07, EU:T:2012:172, paragraph 283).
- 533 It follows that the second to fourth parts of the applicant's ninth plea must be rejected. Therefore, since the first part of that plea has also been rejected (see paragraph 527 above), that plea must be rejected in its entirety.

The tenth plea: 'manifest errors of assessment', of fact and of law, failure to state reasons and infringement of the right to be heard and of the principle of sound administration, in that the Commission concluded that the applicant's pricing practices were the implementation of a plan to exclude Icera

- 534 The tenth plea comprises three parts. The first part alleges that the documents cited in the contested decision do not establish a coherent 'theory of harm' developed by the Commission. The second alleges misinterpretation and misrepresentation of certain internal documents on which the Commission relies in that decision for the purposes of demonstrating an intention to eliminate a competitor. The third part alleges that the Qualcomm employee who authored a number of internal documents quoted by the Commission for the purposes of demonstrating that there was a predatory strategy was a relatively low-level employee with no power to make pricing decisions.

- 535 The Commission and the intervener dispute the applicant's arguments.
- 536 In recital 1118 of the contested decision, the Commission stated that, in order to establish the applicant's intention to eliminate a competitor, it had relied not only on the documents expressly cited in the context of Section 12.8 of that decision, specifically relating to such an intention, but also on the other evidence set out in Section 12.4.2 of that decision and on the links it had been able to establish between that evidence and its price-cost test in the decision as regards the MDM8200 chipset (recitals 954 to 956 of the contested decision), as regards the MDM6200 chipset (recitals 968 to 971 of the contested decision) and as regards the MDM8200A chipset (recitals 977 to 978 of the contested decision). In that regard, it indicated, in recital 1118 of the contested decision, without being contradicted on that point by the applicant, that all of that evidence and those recitals formed an integral part of its analysis aimed at demonstrating the applicant's eliminatory intention.
- 537 The Commission then demonstrated there was intention on the part of the applicant to eliminate a competitor, which underpinned its predatory pricing towards Huawei and ZTE for the MDM8200, MDM6200 and MDM8200A chipsets, on the basis of direct evidence, namely internal Qualcomm documents (Section 12.8.1 of the contested decision) and indirect evidence, namely contextual elements (Section 12.8.2 of the contested decision).
- 538 As regards, in particular, the direct evidence, it is apparent from recital 1120 of the contested decision that the Commission selected, from the evidence summarised in Section 12.4.2 of that decision, nine exchanges of internal emails which, in its view, were particularly illustrative of there being a plan stemming from Qualcomm's senior management to eliminate Icera, which it set out in recitals 1121 to 1137 of that decision.
- 539 In particular, the following exchanges of emails are cited:
- an exchange of emails from December 2008, containing inter alia, the statements 'we should not give Icera any opportunity in Huawei strategically', 'in the case Icera gets ZTE, we can push ZTE back by working with Huawei in the market place' and 'please consider to give another 2-3% [price reduction] to make sure we have a 100% share in Huawei' (recital 1121 of the contested decision);
 - an exchange of emails from February 2009 referring to preventive action in order to prevent Icera from being able to achieve sufficient volumes, a price war, the threat posed by Icera and the fact that Icera ought not to make a breakthrough with any of the major original equipment manufacturers, and to 'crush Icera at ZTE' (recital 1122 of that decision);
 - an exchange of emails from December 2009 concerning a reduction in the price of the MDM6200 chipset for ZTE and the fact that the applicant could not allow Icera to gain a large amount of business, which would have helped it become stronger (recital 1124 of that decision);
 - an exchange of emails from December 2009 dealing with making price a non-issue to let the MDM8200 chipset 'fill the void' (recital 1125 of the contested decision);
 - an exchange of emails from January 2010 in which Icera's 8042 chipset is presented as the main threat to the applicant and proposing, inter alia, to work with Huawei to beat Icera with the MDM6200 chipset, to exhaust Icera's limited funds from venture capital and to squeeze ICE8042/ZTE market space (recital 1127 of the contested decision);

- an exchange of emails from January 2010, containing the statements ‘we have to protect our sockets at major accounts’, ‘ZTE and Huawei are the top priorities and the China team is working on issues at these accounts’ and, ‘for the short term, adjusting MDM6200 and MDM8200a pricing has to be done to contain volume growth at Icera in 2010’ as well as an attached presentation in which it is suggested that Icera should be squeezed for approximately six months to burn out its very limited venture capital funds (recital 1128 of the contested decision);
- an exchange of emails from June 2010, containing the statement ‘the strategy of squeezing [the] ICE8042 [chipset with] both MDM6200 chips and MDM8200A made effect’ (see recital 1132 of the contested decision);
- an exchange of emails from December 2010, relating to the MDM8200A chipset strategy with Huawei and ZTE, which includes Icera’s projected sales volumes to ZTE in the scenario where the applicant did nothing and did not grant ZTE special support other than normal pricing adjustments (recital 1134 of the contested decision);
- an exchange of emails from May 2011 in which a senior Qualcomm employee expresses his hesitation, in view of Icera’s difficult financial situation, to grant further price reductions for the MDM8200A chipset (recital 1136 of the contested decision).

540 As regards the indirect evidence, the Commission relied on the following five contextual elements, namely the highly targeted nature of the conduct at issue, the significant extent of the applicant’s sales at a loss in the strategically important leading edge segment of the UMTS chipset market, the fact that the conduct at issue continued without interruption during the relevant period, the two NRE payments intended to provide a disguised price reduction for the MDM8200 and MDM6200 chipsets, and the applicant’s financial sacrifices in the area of prices and supply terms. In that regard, the Commission stated, in recital 1138 of the contested decision, that that indirect evidence was, in itself, sufficient to demonstrate the existence of an intention on the part of the applicant to eliminate Icera from the relevant market.

541 According to settled case-law, in so far as certain grounds of a decision in themselves provide a sufficient legal basis for that decision, any errors in other grounds of the decision have no effect in any event on its operative part (judgments of 21 September 2005, *EDP v Commission*, T-87/05, EU:T:2005:333, paragraph 144, and of 29 March 2012, *Telefónica and Telefónica de España v Commission*, T-336/07, EU:T:2012:172, paragraph 283).

542 In the present case, it is therefore necessary to examine whether the present plea is effective in so far as the applicant argues that the Commission made errors when it concluded that the pricing practices were the implementation of a plan to eliminate Icera.

543 At the outset, it should be noted that, as regards direct evidence, the applicant expressly disputes, in the context of the second part of the present plea, only the Commission’s interpretation of four of the nine email exchanges considered in the contested decision to be particularly illustrative of there being an intention to eliminate Icera, namely the February 2009 exchange (the second item of direct evidence), the January 2010 exchanges (the fifth and sixth items of direct evidence) and the June 2010 exchange (the seventh item of direct evidence).

- 544 As regards the allegedly low-level employee referred to in the third part of the present plea, he was involved only in the February 2009 email exchanges (the second item of direct evidence), the second email exchange of December 2009 (the fourth item of direct evidence) and the two email exchanges of January 2010 (the fifth and sixth items of direct evidence), but was not involved in the email exchanges of December 2008 (the first item of direct evidence), the first email exchange of December 2009 (the third item of direct evidence), the email exchange of June 2010 (the seventh item of direct evidence), the email exchange of December 2010 (the eighth item of direct evidence) and the email exchange of May 2011 (the ninth item of direct evidence).
- 545 From that, it is apparent that, in the application, in support of the present plea, the applicant did not criticise the Commission's interpretation in the contested decision of the emails exchanged in December 2008 (the first item of direct evidence), the first email exchange of December 2009 (the third item of direct evidence), the email exchange of December 2010 (the eighth item of direct evidence) or the email exchange of May 2011 (the ninth item of direct evidence).
- 546 The email exchanges referred to in paragraph 548 above attest, in themselves, to there being a strategy on the part of the applicant seeking to eliminate Icera.
- 547 As is apparent from paragraph 539 above, the exchange of emails of December 2008 (the first item of direct evidence) refers to the fact of not allowing Icera any 'opportunity' with Huawei, of working with Huawei to push ZTE back if Icera were to win ZTE, and of granting Huawei an additional 2 or 3% price reduction to ensure that it would have a 100% share with that customer. It follows that Icera is clearly identified in that exchange, as is the need for the applicant to take action in respect of it, by collaborating with Huawei and granting Huawei an additional price reduction in order to allow Icera no 'opportunity' with that customer.
- 548 It should also be observed that the Commission was entitled to rely on the December 2008 email exchange even though it occurred a few months before the beginning of the relevant period. It is apparent from the case-law that the Commission may take account of evidence from outside the infringement period if that evidence forms part of the body of evidence relied on by the Commission in order to prove that infringement (see, to that effect, judgments of 2 February 2012, *Denki Kagaku Kogyo and Denka Chemicals v Commission*, T-83/08, not published, EU:T:2012:48, paragraph 193, and of 16 June 2015, *FSL and Others v Commission*, T-655/11, EU:T:2015:383, paragraph 178). Moreover, it seems entirely conceivable that the actual implementation of a strategy to eliminate a competitor may require some time and will, consequently, occur a few months after the strategy was developed.
- 549 The first email exchange of December 2009 (the third item of direct evidence) refers to a reduction in the price of the MDM6200 chipset for ZTE and to the fact that the applicant could not allow Icera to gain a large amount of business, which would help it become stronger. It follows that Icera is clearly identified in that exchange, as is the need for the applicant to take action in respect of Icera, by granting ZTE a price reduction to prevent Icera from becoming stronger by winning contracts from that customer in particular.
- 550 The email exchange of December 2010 (the eighth item of direct evidence) refers to special support to ZTE other than normal price adjustments. In the same vein, it follows from that exchange that Icera is clearly identified, as are Icera's projected shipments to ZTE if special support for ZTE other than normal price adjustments were not granted to ZTE.

- 551 The email exchange of May 2011 (the ninth item of direct evidence) refers to Icera's difficult financial situations which caused a senior Qualcomm employee doubts regarding granting additional price reductions for the MDM8200A chipset, demonstrating that Icera's financial situation had influenced the applicant's pricing policy during the relevant period.
- 552 The fact that the applicant does not call into question the Commission's interpretation in the contested decision of the email exchanges referred to in paragraph 545 above therefore renders the present plea ineffective in so far as the applicant relies on errors made by the Commission when it concluded that the pricing practices were the implementation of a plan to eliminate Icera. Even if the applicant's criticism of the Commission's interpretation of certain email exchanges on which the Commission relies as direct evidence were to be accepted, the fact remains that the evidence which it does not dispute constitutes, in itself, a demonstration of the applicant's intention to eliminate Icera.
- 553 In any event, the Commission also relied, in the contested decision, on items of indirect evidence in order to demonstrate the applicant's intention to eliminate a competitor.
- 554 As is apparent from recital 1138 of the contested decision, which is not disputed by the applicant, indirect evidence is sufficient to demonstrate the applicant's intent to eliminate Icera.
- 555 In addition, the applicant puts forward three parts in support of the present plea, none of which criticises the body of indirect evidence referred to in Section 12.8.2 of the contested decision, since the first relates to the Commission's 'theory of harm', the second calls into question the Commission's interpretation and presentation of certain items of direct evidence, namely certain internal Qualcomm documents, and the third concerns the fact that an employee who authored certain documents referred to by the Commission as items of direct evidence was a low-level employee.
- 556 Therefore, since the body of indirect evidence on which the Commission relies in Section 12.8.2 of the contested decision is sufficient, in itself, to demonstrate the existence of an intention on the part of the applicant to eliminate Icera, the fact that the applicant does not call that evidence into question in the context of the present plea renders that plea ineffective in so far as the applicant relies on errors made by the Commission when it concluded that the applicant's pricing practices were the implementation of a plan to eliminate Icera.
- 557 In any event, according to the case-law, where an undertaking in a dominant position prices below ATC, in order to demonstrate that there is abuse, the Commission must rely on a body of sound and consistent evidence making it possible to establish that undertaking's intention to eliminate a competitor (see, to that effect, judgments of 6 October 1994, *Tetra Pak v Commission*, T-83/91, EU:T:1994:246, paragraph 151, and of 30 January 2007, *France Télécom v Commission*, T-340/03, EU:T:2007:22, paragraph 197). That demonstration must be aimed at establishing, on the basis of specific, tangible points of analysis and evidence, that that conduct, at the very least, is capable of producing exclusionary effects (see judgment of 21 December 2023, *European Superleague Company*, C-333/21, EU:C:2023:1011, paragraph 130).
- 558 Faced with, *prima facie*, a sufficient body of evidence, it is for the applicant to put forward in the application another full and consistent explanation which might lend the various elements referred to in the contested decision a different significance (see, to that effect, judgment of 12 December 2012, *Almamet v Commission*, T-410/09, not published, EU:T:2012:676, paragraph 145).

- 559 In the present case, the Commission found, in particular, that the applicant priced below LRAIC but above AVC. In order to establish an infringement in the present case, the Commission was therefore required to provide, inter alia, sound evidence of the applicant's intention to eliminate Icera, which it did in Section 12.8 of the contested decision.
- 560 As is apparent from paragraph 538 above, in Section 12.8.1 of the contested decision, the Commission refers to a number of internal Qualcomm documents, namely nine email exchanges which, in its view, are particularly illustrative of the existence of a strategy to eliminate Icera from the relevant market.
- 561 As noted in paragraph 545 above, in support of the present plea, the applicant made no criticism at all of the Commission's interpretation in the contested decision of the emails exchanged in December 2008 (the first item of direct evidence), the first email exchange of December 2009 (the third item of direct evidence), the email exchange of December 2010 (the eighth item of direct evidence) and the email exchange of May 2011 (the ninth item of direct evidence). As has been held in paragraph 546 above, those email exchanges attest, in themselves, to there being a strategy to eliminate Icera, particularly in the light of the documents referred to in Section 12.4.2 of that decision.
- 562 The five other email exchanges – the Commission's interpretation of which is, on this occasion, expressly disputed in the application – constitute a body of sound and consistent evidence making it possible to establish the applicant's intention to eliminate Icera.
- 563 At the outset, it is important in that regard to recall that what the Commission sought to demonstrate by relying on that direct evidence in Section 12.8.1 of the contested decision, was the applicant's intention to eliminate Icera rather than the other constituent elements of the infringement, such as, in particular, whether the pricing of the three chipsets referred to was predatory, which are addressed in other parts of that decision. Therefore, what must be determined in the present case is whether the internal documents on which the Commission relies do constitute a body of sound and consistent evidence making it possible to establish, overall, the applicant's intention to eliminate Icera, all other considerations being irrelevant for that purpose.
- 564 In that regard, the terms used in each of those email exchanges are particularly indicative of the applicant's intention to eliminate Icera.
- 565 In the first place, the email exchange of February 2009 expressly describes Icera as a 'threat' and refers to preventive measures to be taken in order to prevent Icera from reaching sufficient volumes and from making a breakthrough with major original equipment manufacturers. Furthermore, it is suggested in that exchange of emails that Icera be 'crush[ed]' in relation to ZTE and that Icera should be allowed no 'opportunity' in relation to Huawei. It follows that Icera is clearly identified in that exchange, as is the need for the applicant to take measures to prevent it from attaining sufficient volumes and to eliminate Icera, in particular as regards two customers, Huawei and ZTE.
- 566 The applicant disputes the conclusions drawn by the Commission from the email exchange of February 2009, submitting that that exchange took place three months before the beginning of the infringement, that it contains no reference to the pricing of the three chips concerned, and that it undermines the 'theory of indirect predation'.

- 567 In that regard, it should be recalled that, as is apparent from the case-law cited in paragraph 548 above, the Commission may take account of evidence from outside the infringement period if that evidence forms part of the body of evidence relied on by the Commission to prove that infringement. In addition, the intention to eliminate a competitor may well be expressed some months before the actual implementation of the strategy aimed at such elimination. Furthermore, the fact that the email exchange of February 2009 contains no reference to the pricing of the three chipsets concerned or that it allegedly contradicts the ‘theory of indirect predation’ is irrelevant, since those elements are not capable of calling into question the existence of an intention on the part of the applicant to eliminate Icera. Moreover, even though that exchange does not set out the details of the measures which were to be taken against Icera, the fact remains that that exchange expressly suggests adopting preventive measures against Icera.
- 568 In the second place, the first email exchange of January 2010 (the fifth item of direct evidence) again identifies Icera, and more specifically its ICE8042 chipset, as the main threat to the applicant and also refers to actions to be taken by the applicant in order to eliminate Icera, namely working together with Huawei and exhausting Icera’s limited funds. It follows that Icera is clearly identified in that exchange, as is the need for the applicant to take action in order to eliminate it, in particular as regards Huawei.
- 569 The second exchange of emails in January 2010 (the sixth item of direct evidence) refers to measures to be taken to contain Icera’s growth in volume terms and to protect the applicant’s position with its major customers, Huawei and ZTE being described in that regard as ‘priority’ customers, including an adjustment to the price of MDM6200 and MDM8200A chipsets. Reference is also made, in a presentation attached to that exchange, to ‘squeeze[ing]’ Icera for six months to exhaust its limited funds. It follows that Icera is once more clearly identified in that exchange, as is the need for the applicant to take action for the purpose of eliminating it as regards Huawei and ZTE, in particular by means of a price adjustment for the MDM6200 and MDM8200A chipsets.
- 570 The applicant attempts to call into question the Commission’s conclusion regarding the email exchanges of January 2010, relying on a long series of different allegations, such as: (i) the Commission’s failure to take account of the competition provided by HiSilicon in the ‘theory of harm’ developed by it, whereas that is referenced in the email of 1 January 2010, (ii) the failure to mention the MDM8200 chipset at all and (iii) the fact that the main subject of those emails was competition from Vodafone. Such allegations must, however, be regarded as irrelevant since they are not capable of calling into question the existence of an intention on the part of the applicant to eliminate Icera.
- 571 In addition, the applicant does not dispute that the email exchanges of January 2010 refer to actions, in particular pricing actions, to be taken in relation to Huawei and ZTE in order to contain Icera’s growth and to oblige it to exhaust its limited funds. In that regard, although the applicant disputes the Commission’s interpretation of the word ‘squeeze’ which, in its view, does not mean ‘cut funding’, the fact remains that the sentence which includes that term, namely ‘squeeze Icera for approximately [six] months to burn out its very limited venture capital funds’ refers unequivocally to a strategy financially to exhaust Icera. It should also be noted that the applicant puts forward no other interpretation of that term ‘squeeze’ which would call into question the harmful nature of such a strategy in relation to Icera.

- 572 In the third place, the email exchange of June 2010 (the seventh item of direct evidence) expressly refers to the fact that the Icera ICE8042 chipset was losing momentum with Huawei and ZTE and to the fact that the ‘strategy of squeezing [the] ICE8042 [chipset] w[ith] both MDM6200 and MDM8200A [chipsets]’ had ‘made effect’. It follows that the applicant did indeed implement a strategy in relation to Huawei and ZTE, based on the MDM6200 and MDM8200A chipsets and targeting Icera.
- 573 In that regard, the applicant relies on a varied series of allegations which are irrelevant, since they do not call into question the existence, as such, of an intention on its part to eliminate Icera, such as the failure to mention the MDM8200 chipset at all, the agreement on non-recurring engineering expenses concluded with ZTE or the additional equity financing announced by Icera in May 2010. In those allegations, the applicant does not dispute that the email exchange of June 2010 refers to a strategy in relation to Huawei and ZTE against Icera, using the MDM6200 and MDM8200A chipsets, which was actually implemented, since it had effects.
- 574 In the fourth place, in support specifically of the third part of the present plea, the applicant claims that the Commission uses as its basis documents drafted by a low-level employee, who had no authority over or influence on prices and was therefore incapable of playing an essential role in implementing the strategy to eliminate Icera. In that regard, it is apparent from Section 12.8.1 of the contested decision that that employee was involved in the email exchanges of February 2009, December 2009 and January 2010.
- 575 As regards the email exchange of February 2009 (the second item of direct evidence), it is apparent from recital 1122 of the contested decision that the employee concerned sent his ‘analysis on Icera threat’ to a member of the applicant’s senior management, who agreed with that analysis and sent it to other members of senior management.
- 576 As regards the second email exchange of December 2009 (the fourth item of direct evidence), it is not disputed by the applicant that it was a member of its senior management who suggested making price a non-issue to leave the MDM8200 chipset to ‘fill the void’.
- 577 Lastly, as regards the January 2010 email exchanges (the fifth and sixth items of direct evidence), containing the suggestion by the employee concerned to ‘squeeze’ Icera in order to exhaust its limited funds, it is common ground that those emails were addressed to a number of members of the applicant’s senior management. In addition, that suggestion was also repeated in a presentation prepared by that employee attached to an ‘Icera analysis’ report, sent by a member of senior management to the applicant’s executive management.
- 578 It follows that members of the applicant’s senior management, with authority and influence over price, were indeed involved in those email exchanges from which an intention to eliminate Icera is clear.
- 579 It follows from the foregoing that the Commission established to the requisite legal standard, in Section 12.8.1 of the contested decision, by means of direct evidence constituting a body of sound and consistent evidence, the existence of an intention on the part of the applicant to eliminate Icera and, accordingly, that the Commission did not fail to fulfil its obligation to state reasons.

580 Lastly, it must be stated that the applicant has put forward no evidence whatsoever in order to demonstrate that the Commission infringed the right to be heard and the principle of sound administration when it concluded that the applicant's pricing practices were the implementation of a plan to eliminate Icera.

581 The present plea must therefore be rejected.

The eleventh plea: a 'manifest error of appraisal', of fact and of law, and failure to state reasons as regards the Commission's rejection of the objective justification put forward by the applicant

582 In support of the eleventh plea, the applicant puts forward the arguments set out below.

583 In the first place, the applicant's view is that the Commission failed to take account of the fact that (i) in granting the price reductions at issue, it was simply aligning with the 'aggressive' prices charged by its competitor Icera and (ii) the prices it charged were above its AVC and, therefore, were profit-maximising and rational. Referring to the fourth and eighth to tenth pleas, it reiterates that, in any event, it did not implement a 'plan' to eliminate Icera.

584 In the second place, the applicant maintains that the Commission ought to have taken into account the fact that the price reductions to Huawei for the MDM8200 chipset were granted in response to intense pressure from Huawei on it and were intended (i) to assist Huawei in depleting its order backlog and obsolete inventory and (ii) to compete on price terms with ZTE's devices incorporating an Icera chip.

585 In the third place, the applicant states that, during the administrative procedure, it provided the Commission with a detailed explanation that it regarded its own stocks of MDM8200 chipsets as excess and obsolete. According to the applicant, that was the reason why it reduced the price of that chipset for all its major customers, which placed Huawei at a disadvantage and ultimately resulted in it granting Huawei a price reduction for orders already placed. It argues that the fact that orders for those chipsets were placed in 2010 and 2011 in no way detracts from the objective justification for its decision to reduce the price of that chipset in order to stimulate new demand. Lastly, it states that, contrary to the Commission's allegations, it did grant price reductions to all its other significant customers, who actually benefited from prices consistent with the average sales prices granted to Huawei.

586 In the light of the foregoing, the applicant submits that the conduct at issue was objectively justified and that the Commission's conclusion to the contrary in the contested decision was incorrect and lacked a valid statement of reasons.

587 The Commission and the intervener dispute the applicant's arguments.

588 It is apparent, in essence, from Article 2 of Regulation No 1/2003 that, in all proceedings for the application of Articles 101 and 102 TFEU, the burden of proving an infringement of those provisions is to rest on the party or the authority alleging the infringement, but that it is, on the other hand, for the undertaking pleading an objective justification to bear the burden of proving it.

- 589 Furthermore, it is apparent, in essence, from recital 5 of Regulation No 1/2003 that, while it is for the party or the authority alleging an infringement of Article 101 or 102 TFEU to prove such an infringement, it is, by contrast, for the undertaking invoking the benefit of a defence against a finding of infringement to demonstrate to the required legal standard that the conditions for applying such defence are satisfied.
- 590 It follows that an undertaking, such as the applicant, which pleads an objective justification, including efficiencies, for conduct which is a priori contrary to Article 102 TFEU must itself demonstrate, to the required legal standard, such objective justification.
- 591 In the present case, it is therefore for the applicant to demonstrate to the requisite legal standard that such conduct must nevertheless be regarded as objectively justified.
- 592 In that regard, it is apparent from settled case-law that conduct is not abusive if it is justified by pro-competitive advantages or if it serves legitimate interests. In particular, the dominant undertaking may demonstrate, for that purpose, either that its conduct is objectively necessary or that the exclusionary effect produced may be counterbalanced, outweighed even, by advantages in terms of efficiency which also benefit consumers. To that end, it is for the dominant undertaking concerned to demonstrate (i) that its conduct can allow efficiency gains to be achieved, by establishing the actual existence and the extent of those gains, (ii) that such efficiency gains counteract any likely negative effects of that conduct on competition and consumer welfare on the market or markets concerned, (iii) that such conduct is necessary for the achievement of those gains in efficiency and (iv) that it does not eliminate effective competition, by removing all or most existing sources of actual or potential competition (see, to that effect, judgment of 27 March 2012, *Post Danmark*, C-209/10, EU:C:2012:172, paragraphs 40 to 42 and the case-law cited). The justifications put forward by the applicant must be assessed in the light of those principles.
- 593 At the outset, it should be noted that the applicant provides no explanation whatsoever of how the alleged predatory conduct was ‘objectively necessary’ or what advantages consumers could have obtained from it which were capable of counterbalancing the actual or potential effect of eliminating Icera from the market, or even that that conduct was ‘necessary’ for the purpose of achieving alleged efficiency gains for consumers, in accordance with the case-law cited in paragraph 592 above.
- 594 The three justifications put forward by the applicant for its predatory conduct, namely (i) alignment with Icera’s ‘aggressive’ prices and charging prices above AVC, (ii) price reductions for the MDM8200 chipset granted to Huawei for the purpose of assisting it in depleting its excess and obsolete stock of that chipset and (iii) reductions in the price of that chipset granted to Huawei for the purpose of depleting Qualcomm’s own excess and obsolete stock of that chipset, do not demonstrate either that the conduct at issue was objectively necessary or that the exclusionary effect it produces vis-à-vis Icera could be counterbalanced, outweighed even, by advantages in terms of efficiency which also benefit consumers.
- 595 When questioned in that regard at the hearing, the applicant simply referred to the pressure exerted by Huawei in order to obtain lower prices for the MDM8200 chipset and the risk that Huawei would cancel certain orders, if necessary by invoking contractual terms. In the light of the case-law cited in paragraph 592 above, such elements do not provide an objective justification for an abuse caught by the prohibition in Article 102 TFEU.

- 596 It follows that the applicant has not adduced sufficient evidence, in accordance with Article 2 of Regulation No 1/2003 and the case-law cited in paragraph 592 above, that the conduct at issue was objectively justified, which is sufficient to reject the eleventh plea, there being no need to examine whether the Commission made errors of fact, law and appraisal or breached its obligation to state reasons by rejecting the justifications put forward by the applicant during the administrative procedure.
- 597 In any event, the grounds set out in Section 12.9 of the contested decision are sufficiently reasoned and are not vitiated by errors of assessment or fact.
- 598 As regards alignment with Icera's 'aggressive' prices, it is sufficient to observe that the case-law does not recognise any absolute right of an undertaking in a dominant position to align its prices on those of its competitors, in particular where that right would in effect justify the use of predatory pricing otherwise prohibited under the Treaty (see, to that effect, judgment of 30 January 2007, *France Télécom v Commission*, T-340/03, EU:T:2007:22, paragraph 182).
- 599 Moreover, the fact that it was allegedly 'rational' for the applicant to align with Icera's prices does not mean that such conduct is objectively 'justified' as provided for in the case-law cited in paragraph 592 above, in that it produces efficiencies. The mere fact that conduct may be characterised as economically 'rational' in the eyes of the undertaking which implements it is not sufficient to justify it objectively for the purposes of competition law.
- 600 As regards charging prices above AVC, it should be recalled that, according to the case-law arising from the judgment of 3 July 1991, *AKZO v Commission* (C-62/86, EU:C:1991:286, paragraphs 71 and 72), an undertaking in a dominant position, even if it prices below ATC but above AVC, abuses a dominant position if it acts in that way as part of a plan for eliminating a competitor. Where there is such a strategy to eliminate, as in the present case, it is therefore irrelevant that the prices charged were allegedly 'profit-maximising and rational' in that they were above AVC.
- 601 As regards the price reductions for the MDM8200 chipset granted to Huawei for the purpose of assisting it in depleting its excess and obsolete stock of that chipset, it must be observed that those reductions concern only the prices offered to Huawei for the MDM8200 chipset. In the explanations put forward, the applicant therefore makes no attempt to justify the predatory prices granted to ZTE or the predatory prices granted for the MDM6200 and MDM8200A chipsets.
- 602 It should also be noted, as regards the price reductions for the MDM8200 chipset granted to Huawei for the purposes of assisting it in depleting its excess and obsolete stock of that chipset, that, as the Commission states in recital 1185 of the contested decision, Huawei submitted further orders for that chipset with Qualcomm in 2010 and 2011, which the applicant confirmed when questioned in that regard at the hearing. The Commission therefore did not err in finding that it was hardly credible that those price reductions could have been granted for the purposes of assisting Huawei to deplete its excess stock of an obsolete chipset.
- 603 Similarly, it is hardly credible that the purpose of the price reductions for the MDM8200 chipset granted to Huawei by the applicant was to deplete Huawei's own excess stock and obsolete stock of that chipset. As the Commission correctly points out, if that had been so, the applicant would have granted price reductions for that chipset to all of its customers. It is apparent from Table 74 in the contested decision that only Huawei benefited from such reductions and was offered prices substantially lower than those charged by the applicant to its other main customers. It is also

apparent from recital 1185 of that decision that in August 2010 the applicant had to produce new units of the MDM8200 chipset in order to satisfy Huawei's demand, which the applicant, when questioned in that regard at the hearing, also confirmed. Lastly, the applicant's argument that the price reductions granted to Huawei had also been made in order to compete with ZTE devices using an Icera chip simply confirms the indirect predation found by the Commission.

604 Consequently, the eleventh plea must in any event be rejected.

The third plea: a failure 'to apply the correct legal standard thereby committing manifest errors of law'

605 The third plea comprises three parts. The first alleges a 'manifest error of law' and an infringement of the principles of legal certainty and legitimate expectations, on account of the Commission's failure to apply the 'correct legal standard' as defined in the Enforcement Priorities Communication. The second alleges misapplication of the case-law on predatory pricing and on pricing practices more generally. The third part alleges infringement of the principles of legal certainty and foreseeability.

The first part: failure to apply the 'correct legal standard' as defined in the Enforcement Priorities Communication

606 According to the applicant, it is apparent from the Enforcement Priorities Communication that the relevant test when examining a potential eliminatory practice implemented by an undertaking in a dominant position is whether such a practice was likely to lead to the foreclosure of an 'as-efficient' competitor. In accordance with that notice, the Commission, when conducting such an examination, is also required to demonstrate that there is evidence, first, that the undertaking in a dominant position, in engaging in that practice, deliberately incurred losses or forewent profits in the short term and, second, that it could hope to recoup such losses after the presumed period of predation. Since the Commission publicly committed to follow the approach in that notice, it created legitimate expectations for the undertakings concerned.

607 Furthermore, the Enforcement Priorities Communication does not allow the Commission to penalise an undertaking which has acted in good faith in a way which, ultimately, has proved to be less profitable than it had initially envisaged. Lastly, in the applicant's view, it is apparent from point 66 of the Enforcement Priorities Communication that the Commission can rely only exceptionally on documentary evidence, provided that that evidence demonstrates with sufficient clarity the existence of a predatory strategy.

608 In the present case, the Commission did not apply the Enforcement Priorities Communication, as demonstrated by the absence of any reference to that document in either the SO, the SSO or the LoF. Referring to the fourth and eighth to tenth pleas, the applicant furthermore submits that the Commission has in no way demonstrated in the contested decision any profit sacrifice by the applicant, has failed to conduct an 'as-efficient' competitor test and has disregarded evidence showing that, in the absence of the conduct in question, Huawei and ZTE would not in any event have obtained supplies from Icera. Referring in addition to the eleventh plea, the applicant submits that the Commission made manifest errors of appraisal and of fact in rejecting the objective justification which it had put forward. Lastly, referring to the tenth and eleventh pleas in

law, it submits that the conduct at issue was implemented in good faith, since it could not have foreseen the methodology applied by the Commission to allocate R&D costs in that decision and that it could have reasonably expected its pricing practices to be profitable.

- 609 The applicant submits that, consequently, the Commission committed a ‘manifest error of law’ and infringed the principles of legal certainty and legitimate expectations, as well as the principle of sound administration and the obligation to state reasons.
- 610 The Commission disputes the arguments put forward by the applicant.
- 611 As a preliminary point, it should be noted that the Enforcement Priorities Communication merely sets out the Commission’s approach as to the choice of cases that it intends to pursue as a matter of priority; such that the administrative practice followed by the Commission is not binding on national competition authorities or courts (judgment of 6 October 2015, *Post Danmark*, C-23/14, EU:C:2015:651, paragraph 52), and is not intended to constitute a statement of the law (judgment of 13 December 2018, *Deutsche Telekom v Commission*, T-827/14, EU:T:2018:930, paragraph 114).
- 612 It follows that, like any other document which, although not binding, defines the general framework of analysis which the Commission employs in determining whether to intervene, the Enforcement Priorities Communication limits the Commission’s discretion. It follows that the Commission cannot, in a particular case, depart from it without providing reasons. In such a case, the Commission’s respect for the rights guaranteed by the EU legal order in administrative procedures, including the obligation to state reasons, is of even more fundamental importance (see, to that effect and by analogy, judgment of 10 November 2017, *Icap and Others v Commission*, T-180/15, EU:T:2017:795, paragraph 289 and the case-law cited).
- 613 It is therefore necessary to examine whether, as the applicant claims, in the present case the Commission departed, without justification, from the general framework of analysis set out in the Enforcement Priorities Communication.
- 614 As regards, in the first place, the applicant’s argument that, in essence, the Commission did not examine whether the practice at issue was likely to lead to the foreclosure of an ‘as-efficient’ competitor in accordance with the Enforcement Priorities Communication, it is apparent from the examination of the first part of the ninth plea, and in particular from paragraphs 524 to 527 above, that the analysis by which the Commission compares the prices charged by an undertaking in a dominant position with certain of its costs for the purposes of assessing whether that undertaking charged predatory prices, includes an ‘as-efficient’ competitor analysis and that, since the Commission has proven, as was done in the present case, that the dominant undertaking had charged such prices, it has therefore implicitly conducted such an analysis, which is sufficient to reject that argument.
- 615 Moreover, it is apparent from paragraph 26 of the Enforcement Priorities Communication that failure to cover LRAIC, which in the present case the Commission demonstrated in the contested decision, indicates that the dominant undertaking is not recovering all the (attributable) fixed costs of producing the good or service in question and that an as-efficient competitor could be foreclosed from the market, which confirms that, in comparing the dominant undertaking’s prices and costs, the Commission implicitly, but necessarily, carried out an ‘as-efficient’ competitor test.

- 616 As regards, in the second place, the applicant's argument that the Commission was required, pursuant to the Enforcement Priorities Communication, to adduce evidence that the undertaking in a dominant position had deliberately incurred losses or sacrificed profits in the short term, it is apparent from point 66 of that communication that it is possible in some cases for the Commission, in order to demonstrate the existence of such sacrifice, to rely on direct evidence consisting of documents from the dominant undertaking which clearly show a predatory strategy, such as a detailed plan, in particular, to sacrifice in order to exclude a competitor.
- 617 As is apparent from the examination of the tenth plea, the Commission did in fact rely, in Section 12.8.1 of the contested decision, on documents from the applicant clearly showing the existence of an intention on the part of the applicant to eliminate Icera, implemented via price reductions granted to Huawei and ZTE, which is sufficient to reject the present argument, which, in essence, alleges that there was no evidence of sacrifice in the contested decision. In that regard, contrary to the applicant's allegations, it is in no way apparent from paragraph 66 of the Enforcement Priorities Communication that the Commission can rely only exceptionally on documentary evidence demonstrating the existence of a predatory strategy. On the contrary, in that paragraph, the Commission uses the expression 'in some cases', and not the expression 'in some exceptional cases' or 'exceptionally', or even the expression 'in exceptional circumstances', used in footnote 50 to the Enforcement Priorities Communication. In footnote 44 to that communication, which relates to point 66 of that communication, the Commission refers, moreover, to two judgments in which the Court confirmed that the Commission was entitled to rely on such documentary evidence, namely the judgments of 6 October 1994, *Tetra Pak v Commission* (T-83/91, EU:T:1994:246, paragraphs 151 and 171), and of 30 January 2007, *France Télécom v Commission* (T-340/03, EU:T:2007:22, paragraphs 198 to 215).
- 618 As regards, in the third place, the applicant's argument that the Commission was required, pursuant to the Enforcement Priorities Communication, to adduce evidence that the undertaking in a dominant position could, after that period, hope to recoup the losses made during the period of predation, it is apparent solely from point 70 of that communication that the dominant undertaking can reasonably expect its market power after the predatory conduct comes to an end to be greater than it would have been had the undertaking not engaged in that conduct in the first place, and that it is therefore likely to be in a position to benefit from the sacrifice. Moreover, according to the case-law, conduct can constitute abuse, there being no need to demonstrate specifically that the undertaking in question had a reasonable prospect of recouping losses so incurred (see, to that effect, judgment of 6 October 1994, *Tetra Pak v Commission* T-83/91, EU:T:1994:246, paragraph 150), which is sufficient to dismiss the present argument.
- 619 As regards, in the fourth place, the applicant's argument that, since it could not have foreseen the methodology applied by the Commission to allocate R&D costs in the contested decision and, consequently, having acted in good faith, it cannot, in accordance with the Enforcement Priorities Communication, be penalised by the Commission, it should be noted that, in the examination of the tenth plea, it was found that the Commission did not err in concluding that the applicant's pricing practices were the implementation of a plan to eliminate Icera, which is sufficient to reject the present argument.
- 620 As regards, in the fifth place, the applicant's argument that the SO, the SSO and the LoF did not refer to the Enforcement Priorities Communication, the applicant provides no explanation whatsoever as to how that means that the Commission failed to have regard to the general framework of analysis set out in that communication used by it in determining whether to

intervene. Moreover, the Enforcement Priorities Communication in no way requires the Commission to make an express reference to it in its decisions on abuse of a dominant position. Consequently, the present argument must be rejected.

621 As regards, in the sixth place, the applicant's argument that the Commission did not take account of the fact that Huawei and ZTE would not, in any event, have obtained more supplies from Icera in the absence of the conduct at issue and that it erred in rejecting the objective reasons put forward in order to justify its conduct, it must be observed that the applicant does not explain how the Commission thereby failed to have regard to the general framework of analysis set out in the Enforcement Priorities Communication used by it in determining whether to intervene.

622 It follows from the foregoing that the first part of the third plea must be rejected.

The second part: misapplication of the case-law on predatory pricing and on pricing practices more generally

623 The applicant alleges that the Commission fails to have regard to the case-law on predatory pricing and on pricing practices more generally, that is to say the case-law establishing the applicable legal standard. In support of that allegation, it sets out a number of extracts from judgments which it regards as relevant and criticises the Commission for having failed to carry out, in the contested decision, an 'as-efficient' competitor analysis, even though that analysis is required by the case-law.

624 The Commission disputes the arguments put forward by the applicant.

625 It should be noted that the applicant simply set outs extracts from case-law, without explaining how the contested decision departs from the legal standard laid down in such case-law, except in relation to the 'as-efficient' competitor analysis in relation to which, after citing the judgment of 6 September 2017, *Intel v Commission* (C-413/14 P, EU:C:2017:632) it complains that in the present case, first, the Commission failed to carry out such an analysis and, second, that it failed to ascertain the size of the share of the market covered by the contested practice.

626 First, it is apparent from the examination of the first part of the ninth plea, and in particular from paragraphs 524 to 527 above, that the analysis by which the Commission compares the prices charged by an undertaking in a dominant position with certain of its costs for the purposes of assessing whether that undertaking charged predatory prices already includes an 'as-efficient' competitor analysis and that, since Commission has proven, in the present case, that the dominant undertaking had charged such prices and, therefore, implicitly conducted that analysis, that is sufficient to reject the applicant's complaint that the contested decision did not contain such an analysis.

627 Second, as is apparent from paragraphs 521 to 523 above, the Commission is not, in accordance with the case-law cited in paragraph 520 above, required, when examining whether an undertaking in a dominant position charged predatory prices, also to ascertain whether the share of the market covered by the contested practice is of sufficient magnitude for that practice to have anticompetitive effects, which is sufficient to reject the applicant's complaint alleging such failure to ascertain.

628 The second part of the third plea must therefore be rejected.

The third part: breach of the principles of legal certainty and foreseeability

- 629 Referring to the seventh and eighth pleas, the applicant submits that, in the contested decision, the Commission applied a contrived and novel price-cost test which differed from such test set out in the SO in relation to two of the chipsets concerned and was unforeseeable in respect of the third. According to the applicant, the Commission thereby infringed the principles of legal certainty and foreseeability.
- 630 The Commission disputes the arguments put forward by the applicant.
- 631 It must be stated that, in support of the present part of the plea, the applicant does no more than provide a general reiteration of the allegations made in the first part of the present plea and the seventh and eighth pleas, to which it makes express reference, without developing any specific argument.
- 632 Consequently, the third part of the third plea must be rejected as being inadmissible.
- 633 It follows from all of the foregoing that the third plea must be rejected.

The fourth plea: the “predation theory” is illogical and unsupported by evidence’

- 634 The fourth plea consists of 13 parts. The first part alleges that the Commission’s ‘predation theory’, which is ‘targeted and selective’, is disconnected from the market definition and was tailored to reach a predetermined conclusion. The second part alleges that that theory is inherently inconsistent and lacks adequate reasoning. The third alleges that the Commission failed to demonstrate that the applicant’s conduct was irrational and failed to establish the alleged predation strategy. The fourth alleges that the applicant’s prices were higher than those of Icera and, therefore, that there was no market foreclosure. The fifth alleges that the Commission disregarded crucial exculpatory evidence. The sixth alleges that the decision fails to show financial predation. The seventh alleges that the ‘predation theory’ is novel, flawed and unsupported. The eighth alleges ‘manifest errors of appraisal’ in relation to direct predation between the third quarter of 2010 and the second quarter of 2011. The ninth alleges that the Commission disregarded commercial reality regarding the MDM8200 chipset. The tenth alleges that that theory is contrary to logic and elementary economics. The eleventh alleges that the Commission failed to show recoupment of the losses sustained during the relevant period or explain when the alleged predation ended. The twelfth alleges failure to apply the ‘as-efficient’ competitor test and that Icera’s good performance during the relevant period disproves the predation theory. The thirteenth part alleges that the Commission erred in punishing genuine competition.

Preliminary observations

- 635 It should be observed that, in Section 12 of the contested decision, the Commission sets out its analysis of the abuse committed by the applicant.
- 636 In particular, in Section 12.1 of the contested decision, the Commission begins by recalling the applicable general principles, in particular in relation to predatory pricing. Next, in Section 12.2 of that decision, it summarises how it applied those general principles in Sections 12.3 to 12.11 of that decision, which the applicant describes as a ‘predation theory’.

637 In that context, the Commission explains in recital 334 of the contested decision that it reached the conclusion that from 1 July 2009 until 30 June 2011, the applicant supplied certain quantities of three of its UMTS chipsets, namely the MDM8200-, MDM6200- and MDM8200A-based chipsets, to two of its key customers, namely Huawei and ZTE, below cost, with the intention of eliminating Icera, its main competitor in the leading edge segment of the UMTS chipset market. According to the Commission, in so doing, the applicant intended to prevent Icera, a small, financially constrained start-up company, from gaining sufficient reputation and scale to be able to challenge its dominance on that market. The Commission states that it concluded, in the light of the applicant having put forward no valid objective justification for such conduct, that the applicant had, during that period, thereby committed abuse of a dominant position contrary to Article 102 TFEU and Article 54 of the EEA Agreement.

The first part: the Commission's 'predation theory', which is 'targeted and selective', is disconnected from the market definition and was tailored to reach a predetermined conclusion

638 The applicant, referring to the tenth plea, claims that the conduct at issue was neither targeted nor selective and that the Commission's 'predation theory' is disconnected from the definition of the relevant market, since, as it relates only to the leading edge segment of that market, which was, moreover, not defined, certain chipsets regarded by the applicant as 'leading edge' were excluded from that segment.

639 The applicant also claims that the 'predation theory' was developed by the Commission as a theory of convenience, since that theory is unconnected with the complaint. According to the applicant, the MDM8200 and MDM8200A chipsets were sold to customers other than Huawei and ZTE before and after the relevant period, at prices below the LRAIC calculated by the Commission, which calls that theory into question.

640 The Commission disputes the arguments put forward by the applicant.

641 First of all, as regards the applicant's allegation that the conduct at issue was neither targeted nor selective, it should be recalled that it is apparent from the direct evidence on which the Commission relied, which is examined in more detail in paragraphs 538 and 539 above in the context of the examination of the tenth plea, that the applicant granted price reductions to Huawei and to ZTE, which were clearly identified in those documents, in order to prevent Icera from gaining access to those two crucial customers and, in so doing, to eliminate it from the market. The applicant cannot therefore validly claim that its conduct was neither targeted nor selective.

642 Next, the applicant's allegation that the Commission's 'predation theory', which relates solely to the leading edge segment, is disconnected from the market definition also cannot succeed. It is apparent from point 64 of the Enforcement Priorities Communication that, as regards predation, conduct entails a sacrifice if the dominant undertaking charges a lower price for all or a particular part of its output. It follows that predatory conduct can involve a limited segment of the market concerned, and not the whole of that market. In that regard, it is clear from the case-law that predatory conduct can even take place on a market other than the market concerned, which has not been strictly defined (see, to that effect, judgment of 3 July 1991, *AKZO v Commission*, C-62/86, EU:C:1991:286, paragraphs 35 and 45).

- 643 It follows that the Commission was (i) entitled to penalise, in the contested decision, conduct limited to a segment of the relevant market and (ii) not required to define precisely the scope of that segment, as it is obliged to do for the relevant market for the purposes of ascertaining whether there is a dominant position.
- 644 In addition, as regards the alleged lack of connection between the Commission's 'predation theory' and the complaint, it must be noted that it is apparent from paragraph 55 of the Commission Notice on the handling of complaints by the Commission under Articles [101] and [102 TFEU] (OJ 2004 C 101, p. 65) that, during the first stage following the submission of the complaint, the Commission examines the complaint and may collect further information in order to decide what action it will take on the complaint, that that stage may include an informal exchange of views between the Commission and the complainant with a view to clarifying the factual and legal issues with which the complaint is concerned, and that the Commission may, in this stage, give an initial reaction to the complainant, allowing the complainant an opportunity to expand on its allegations in the light of that initial reaction.
- 645 In the present case, it is apparent from recitals 11 to 13 of the contested decision that, following the updating and revision of the complaint, a number of exchanges took place between Icera and the Commission, which ultimately led, in June 2012, to Icera making allegations of predation, which the applicant itself acknowledges. In the light of paragraph 55 of the Commission Notice on the handling of complaints by the Commission under Articles [101] and [102] TFEU, it must be held that it is standard practice for a complainant, as was so in the present case, to expand on the allegations made in the complaint in order to take account of the Commission's initial reaction. Furthermore, it follows from the need to ensure effective enforcement of the competition rules that the Commission cannot be bound by the outline and legal assessments made by a complainant. In any event, it must be observed that the applicant does not explain how the fact that Icera expanded its predation allegations only at a relatively late stage could call into question what it describes as a 'predation theory' in that decision, following a thorough investigation by the Commission.
- 646 Lastly, as regards the applicant's allegation that it charged prices below LRAIC for the MDM8200 and MDM8200A chipsets to customers other than Huawei and ZTE before and after the relevant period, it must be observed that the applicant provides no explanation whatsoever as to how that could call into question what it describes as a 'predation theory' in the contested decision. On the contrary, it rather appears that, if the Commission had discovered evidence of the applicant having charged predatory prices to other customers outside that period, it could have taken that into account in order to strengthen that theory or extend the time during which that theory applied.
- 647 It follows from the foregoing that the first part of the fourth plea must be rejected.

The second part: the Commission's 'predation theory' is inherently inconsistent and lacks adequate reasoning

- 648 The applicant alleges a number of contradictions and inconsistencies which vitiate the contested decision.
- 649 In the first place, the applicant's view is that the 'predation theory', which is also apparent from recital 993 of the contested decision, according to which the applicant first used the MDM8200 chipset to migrate its customers Huawei and ZTE from those chipsets to the more advanced

MDM6200 and MDM8200A chipsets and then focused its pricing strategy on the MDM8200A chipset, in view of the initial lack of success of the MDM6200 chipset, is not compatible with a predatory pricing ‘theory of harm’, since such a finding would merely reflect the existence of vigorous competition from the applicant by launching new products.

650 In the second place, the applicant states that the Commission criticises it in the contested decision for having implemented the conduct at issue in order to prevent Icera from gaining a reputation, even though it is apparent from an internal document, referred to in that decision, that it considered that, several months before the relevant period, Icera had managed to overcome the reputational barrier, which calls into question the Commission’s ‘predation theory’.

651 In the third place, the applicant maintains that the Commission could not, without contradicting itself, (i) state in recitals 411 to 419 of the contested decision that the MDM6200 chipset was not commercially successful during the relevant period and (ii) claim in recital 420 of that decision that the applicant relied on that chipset in its strategy towards ZTE. Similarly, it considers that the Commission cannot (i) claim, in recital 959 of that decision, that the MDM8200 chipset maintained its competitive significance even after the MDM8200A chipset had come commercially available and (ii) state in recital 420 of that decision that the MDM8200A chipset had become the crucial product on which it relied to implement its strategy in 2010 and 2011.

652 The Commission disputes the arguments put forward by the applicant.

653 It must be stated at the outset that the present part of the plea must be rejected as being ineffective, since, even if the three arguments put forward in support of that part of the plea were well founded, that would not affect the lawfulness of the contested decision.

654 The fact that the applicant allegedly competed vigorously by launching new products, that Icera succeeded in gaining a reputation, or that the applicant could not have applied its predatory strategy to the MDM6200 chipset because of its lack of commercial success or to the MDM8200 chipset after the launch of the MDM8200A chipset, does not refute the Commission’s finding that the applicant charged predatory prices with the intention of eliminating its competitor Icera, which is sufficient to demonstrate the existence of abuse by the applicant (judgment of 3 July 1991, *AKZO v Commission*, C-62/86, EU:C:1991:286, paragraphs 70 and 71).

655 The second part of the fourth plea must therefore be rejected.

The third part: the Commission failed to demonstrate that the applicant’s conduct was irrational and fails to establish the alleged predation strategy

656 The applicant submits that, in the contested decision, the Commission did not demonstrate that its conduct was irrational but for the intention to eliminate Icera, or that its prices were the implementation of a plan to exclude Icera. In its view, the selected documents on which the Commission relies when attempting to demonstrate the existence of such a plan were drafted by low-level employees with no power to make pricing decisions. It adds that the Commission has adduced no evidence of sacrifice on the part of the applicant, even though the Commission was required to demonstrate the existence of such sacrifice, in accordance with the Enforcement Priorities Communication.

657 The Commission disputes the arguments put forward by the applicant.

658 It should be observed that, in support of the present part of the plea, the applicant simply repeats arguments which it put forward in the context of the first part of the third plea, as regards the alleged lack of evidence of a sacrifice having occurred, or in the context of the tenth plea, concerning the alleged lack of evidence of there having been a strategy to eliminate Icera.

659 Those arguments, which were rejected in the context of the examination of the first part of the third plea and in the context of the tenth plea, must be rejected on the same grounds in so far as they are raised in support of the third part of the fourth plea, which is sufficient to reject the third part of the fourth plea.

The fourth part: the applicant's prices were higher than those of Icera

660 The applicant submits that, in the contested decision, the Commission acknowledges, first, that the applicant's prices were higher than Icera's prices and, second, that Icera's chips were of superior quality. In its view, if that were the case, it would therefore have been logical for it to reduce the price of its chipsets to compensate for the inferior quality of its products, which the Commission did not take into account.

661 The Commission disputes the arguments put forward by the applicant.

662 It should be recalled that an undertaking in a dominant position abuses that position if it charges prices below AVC, or prices below ATC but above AVC, where such prices are determined as part of a strategy to eliminate a competitor (judgment of 3 July 1991, *AKZO v Commission*, C-62/86, EU:C:1991:286, paragraphs 70 to 72).

663 In the present case, it is apparent from the examination of the fifth to eighth and tenth pleas that the Commission did duly demonstrate that the applicant had charged predatory prices with the intention of eliminating its competitor Icera, which is sufficient to demonstrate the existence of abuse of a dominant position by the applicant.

664 Furthermore, it is apparent from the examination of the eleventh plea that the Commission did not err and did not fail to fulfil its obligation to state reasons when it rejected the objective justifications put forward by the applicant, including the applicant's allegation that it had charged predatory prices in response to Icera's aggressive prices.

665 The Commission cannot therefore validly be criticised for having failed to take account of the fact that the predatory prices charged by the applicant had been justified by Icera's prices being lower or by the applicant's products being of inferior quality. Moreover, the benchmark for assessing whether the pricing practices were predatory is based not on the prices and costs of the undertaking against which such practices are put in place or on the quality of the products concerned, but rather on the prices and costs of the dominant undertaking.

666 The fourth part of the fourth plea must therefore be rejected.

The fifth part: the Commission disregarded crucial exculpatory evidence

667 The applicant claims that the Commission disregarded certain 'crucial' exculpatory evidence, namely, in the first place, the fact that Huawei and ZTE had stated that they would not have obtained more supplies from Icera, absent the alleged predation, in the second place, the fact that

Icera's chips were technically outperformed and that Icera would not in any event have been able to develop an LTE chip before it and, in the third place, the fact that Icera had not been foreclosed from the market during the relevant period, since Icera had succeeded in attracting significant external investments and had been acquired by Nvidia.

668 The Commission disputes the arguments put forward by the applicant.

669 It should be recalled that, according to the case-law, an undertaking in a dominant position abuses that position if it charges prices below AVC, or prices below ATC but above AVC, where such prices are determined as part of a strategy to eliminate a competitor (judgment of 3 July 1991, *AKZO v Commission*, C-62/86, EU:C:1991:286, paragraphs 70 to 72). In the present case, it is apparent in particular from the examination of the fifth to eighth and tenth pleas that the Commission did duly demonstrate that the applicant had charged such predatory prices with the intention of eliminating its competitor Icera, which is sufficient to demonstrate the existence of abuse of a dominant position by the applicant.

670 Therefore, the fact that the two customers concerned by the conduct at issue would not in any event have obtained more supplies from Icera in the absence of such conduct, that Icera's technology was technically outperformed or that Icera attracted external financing and was acquired during the relevant period, even if they were proven, could not have influenced the Commission's conclusion that there was abuse, based on the finding that the applicant priced below its costs with the intention of eliminating its competitor Icera. That is all the more true given that those three factors relied on by the applicant are factors external to the applicant, over which it had no influence and those factors cannot therefore mean that the applicant is exempt from any penalty for the infringement which it committed.

671 In any event, it must also be stated that the applicant does no more than describe the three elements in question as 'crucial' without explaining how they could, if the Commission had taken them into account, have called into question what it describes as a 'predation theory'.

672 The fifth part of the fourth plea must therefore be rejected.

The sixth part: the decision fails to show financial predation

673 The applicant maintains that the predation relied on in the contested decision is not supported by credible evidence and is contradicted by the fact that Icera was acquired by Nvidia during the relevant period. It adds that it disputed the existence of 'financial predation' during the administrative procedure, which led the Commission to abandon it in that decision and merely to rely on 'traditional predation'.

674 The Commission disputes the arguments put forward by the applicant.

675 It is sufficient, in order to reject the present part of the plea, to observe that, by the applicant's own admission, the Commission did not base the contested decision on a case of financial predation, but rather on traditional predation, that is to say, an undertaking in a dominant position charging prices below cost with the intention of eliminating a competitor.

676 Therefore, the applicant's argument alleging that there was no evidence of the existence of financial predation must be declared to be ineffective and the sixth part of the fourth plea must be rejected.

The seventh part: the ‘predation theory’ is novel, flawed and unsupported

- 677 The applicant explains that the Commission’s ‘predation theory’, according to which it provided Huawei with MDM8200 chipsets at predatory prices so that Huawei could persuade mobile network operators to favour devices incorporating the applicant’s chipsets, rather than ZTE devices incorporating Icera chips, is untenable.
- 678 According to the applicant, the Commission imagined the ‘predation theory’ solely because for the period from July 2009 to June 2010 it had discovered predatory pricing evidence regarding sales of MDM8200 chipsets only in relation to Huawei, but not in relation to ZTE.
- 679 The Commission disputes the applicant’s arguments.
- 680 It must be recalled that it is apparent in particular from the examination of the fifth to eighth and tenth pleas that the Commission did duly demonstrate that the applicant had charged predatory prices, in particular to Huawei for the MDM8200 chipset, with the intention of eliminating its competitor Icera, which the applicant does not dispute in the context of the present part of the plea.
- 681 Therefore, it is necessary to declare ineffective the applicant’s argument against the Commission’s finding that the applicant initially offered only predatory prices to Huawei and not, at that stage, to ZTE, so that Huawei’s devices incorporating one of the applicant’s chipsets would be favoured over ZTE devices incorporating an Icera chip, since that argument does not call into question what it describes as a ‘predation theory’.
- 682 The applicant also claims that the Commission developed the ‘predation theory’ because, for the period from July 2009 to June 2010, it had discovered predatory pricing evidence in relation to sales of MDM8200 chipsets only in relation to Huawei, but not in relation to ZTE. Evidence that the applicant charged predatory prices to Huawei with the intention of eliminating Icera was sufficient to demonstrate that there was abuse. The Commission was, consequently, under no obligation also to demonstrate predatory pricing in respect of ZTE in order to impose penalties on the applicant.
- 683 The seventh part of the fourth plea must therefore be rejected.

The eighth part: ‘manifest errors of appraisal’ in relation to direct predation between the third quarter of 2010 and the second quarter of 2011

- 684 Referring to the sixth and seventh pleas, the applicant argues that the Commission made three errors, two of which concern the allocation of R&D costs, with the remaining error concerning the allocation of the NRE payment to ZTE.
- 685 The Commission disputes the applicant’s arguments.
- 686 It must be recalled that those arguments were examined and rejected in the examination of the sixth and seventh pleas, which is sufficient to reject the eighth part of the fourth plea.

The ninth part: the Commission disregarded commercial reality regarding the MDM8200 chipset

687 The applicant submits that the MDM8200 chipset encountered technical issues, which resulted in Huawei accumulating excess inventories of that chipset, and that it was therefore entirely rational for it to grant price reductions for that chipset. In its view, such price reductions were not granted with an intention to predate.

688 The Commission disputes the applicant's arguments.

689 As is apparent in particular from the examination of the fifth to eighth and tenth pleas, the Commission did duly demonstrate that the applicant had charged predatory prices with the intention of eliminating its competitor Icera. In addition, as is apparent from the examination of the eleventh plea, the Commission did not err and did not fail to fulfil its obligation to state reasons when it rejected the objective justifications put forward by the applicant, including the applicant's allegation that its predatory prices had been charged in order to assist Huawei in depleting its excess stock of the MDM8200 chipset. In addition, as the Commission correctly points out in its pleadings, the fact that predatory conduct is potentially rational does not make it lawful.

690 Therefore, the Commission cannot validly be criticised for having failed to take account of commercial reality regarding the MDM8200 chipset, namely the technical issues which that product encountered.

691 The ninth part of the fourth plea must therefore be rejected.

The tenth part: the 'predation theory' is contrary to logic and elementary economics

692 In order to demonstrate that the 'predation theory' was illogical and contrary to the rules of economics, the applicant submits that its prices were higher than Icera's prices and that the volume of chipsets offered at predatory prices was, during the relevant period, negligible compared with the volume of chipsets sold on the relevant market and in the leading edge segment of that market.

693 The Commission disputes the applicant's arguments.

694 As is apparent in particular from the examination of the fifth to eighth and tenth pleas above, the Commission did duly demonstrate that the applicant had charged predatory prices as referred to in the judgment of 3 July 1991, *AKZO v Commission* (C-62/86, EU:C:1991:286), with the intention of eliminating its competitor Icera, which is sufficient to demonstrate the existence of abuse by the applicant. Therefore, as was stated in the examination of the fourth part of the present plea, the Commission cannot validly be criticised for having failed to take account of the fact that the predatory prices charged by the applicant were higher than Icera's prices.

695 Furthermore, as is apparent from the analysis of the first part of the ninth plea, and in particular from paragraphs 521 to 523 above, the Commission is not required, when examining whether an undertaking in a dominant position charged predatory prices, to ascertain whether the share of the market covered by the practice at issue is of sufficient magnitude for that practice to have anticompetitive effects.

696 Accordingly, the tenth part of the fourth plea must be rejected.

The eleventh part: the Commission failed to show recoupment of the losses sustained during the relevant period or explain when the alleged predation ended

697 Referring to the third plea, the applicant submits, in the first place, that the Commission has not adduced evidence that it recouped losses sustained during the period following the infringement period, even though the applicant was required to adduce such evidence, in accordance with the Enforcement Priorities Communication. In the second place, it criticises the Commission for not having adduced evidence, in the contested decision, of the date on which its allegedly predatory intention came to an end.

698 The Commission disputes the applicant's arguments.

699 As is apparent from the examination of the third plea, and in particular from paragraph 618 above, the Commission is not required, in accordance with, inter alia, the Enforcement Priorities Communication, to demonstrate that the undertaking in a dominant position recouped the losses suffered during the period of predation.

700 Furthermore, it is clear that there is nothing to oblige the Commission to identify a final stage marking the end of predation and that, the fact that, in the contested decision, the Commission does not go on to analyse the period after 30 June 2011, simply means that, from that date, it no longer identified sufficient evidence of the existence of predatory conduct on the part of the applicant.

701 The eleventh part of the fourth plea must, consequently, be rejected.

The twelfth part: failure to apply the 'as-efficient' competitor test and allegation that Icera's good performance during the relevant period disproves the 'predation theory'

702 Referring to the ninth plea, the applicant submits, first of all, that the Commission did not apply an 'as-efficient' competitor test. It then explains that the Commission did not take account of evidence demonstrating that Icera had not been foreclosed from the market during the relevant period and had even achieved very good results, which calls into question the 'predation theory'.

703 The Commission disputes the applicant's arguments.

704 It should be recalled, first of all, that it is apparent from the examination of the first part of the ninth plea, and in particular from paragraphs 524 to 527 above, that the analysis by which the Commission compares the prices charged by an undertaking in a dominant position with certain of its costs for the purposes of assessing whether that undertaking charged predatory prices includes an 'as-efficient' competitor analysis and that, since the Commission has proven, in the present case, that the dominant undertaking had charged such prices and, therefore, implicitly conducted such an analysis, that is sufficient to reject the applicant's complaint that the contested decision did not contain an 'as-efficient' competitor analysis.

705 Next, it should be recalled, as is apparent from paragraphs 520 and 521 above, that the Commission is not required to prove that predatory conduct had anticompetitive effects, which is sufficient to reject the complaint alleging that Icera was not actually eliminated during the relevant period.

706 The twelfth part of the fourth plea must therefore be rejected.

The thirteenth part: the Commission erred in punishing genuine competition

- 707 The applicant submits that it was merely engaged in vigorous, but unremarkable competition on the merits, and that charging low prices, which was penalised in the present case, is in fact pro-competitive. In its view, the present case would represent the first time that the Commission found predation due to a failure to recover R&D costs.
- 708 The Commission disputes the applicant's arguments.
- 709 As is apparent from the examination of the tenth plea, the Commission did duly demonstrate, in the contested decision, that the applicant had charged predatory prices to Huawei and ZTE for the MDM8200, MDM6200 and MDM8200A chipsets with the intention of eliminating Icera, relying both on direct evidence, namely internal Qualcomm documents, and on indirect evidence, namely contextual elements. It follows that the applicant cannot validly claim that, in fact, in so doing its actions were pro-competitive.
- 710 As regards, in addition, the applicant's allegation that in the present case the Commission finds, for the first time, predation due to the failure to cover R&D costs, it must be stated that such an argument was examined and rejected in the examination of the seventh plea and must be rejected for the same reasons in so far as it is raised in support of the present part of the present plea.
- 711 The thirteenth part of the fourth plea must, consequently, be rejected. Therefore, since the other 12 parts of the present plea have also been rejected, the fourth plea must be rejected in its entirety.

The eighth plea: the price-cost analysis is 'manifestly incorrect'

- 712 The eighth plea comprises three parts. The first relates to the starting period of the price-cost test. The second relates to the most fundamental errors made in the price-cost test. The third relates to the failure to correct those errors in the contested decision.
- 713 Given that the second and third parts of the present plea both concern, in essence, errors which the Commission allegedly made in the price-cost test, and which the Commission did not correct in the contested decision, they will be examined together.

Preliminary observations

- 714 In Section 12.7.1 of the contested decision, the Commission conducted a quarterly price-cost test for the three chipsets concerned and in respect of the two customers concerned, for the purposes of ascertaining whether the applicant had charged prices below AVC or LRAIC.
- 715 In Section 12.7.1.1 of the contested decision, the Commission began by explaining that, at the beginning of a chipset's commercial cycle, its AVC were unusually high and that it was only once it had reached large-scale production that such AVC stabilised. For that reason, the Commission then stated that it had not taken into account, in its price-cost test, quarters prior to the large-scale production stage and that such an approach was favourable to the applicant, since that test would otherwise have led, for those quarters, to a finding of predatory prices, in the light of those artificially high production costs at the beginning of the cycle (recital 940 of the contested decision). Lastly, it determined the quarter in which each of the three chipsets concerned had, in

its view, reached such large-scale production and which formed the starting point for its test, namely the third quarter of 2009 for the MDM8200 chipset and the third quarter of 2010 for the MDM6200 and MDM8200A chipsets (recitals 941 to 943 of the contested decision).

- 716 The Commission then conducted its price-cost test and concluded that the applicant had charged predatory prices for the three chipsets concerned and in relation to the two customers concerned between 1 July 2009 and 30 June 2011, as is apparent in particular from Tables 55 to 57 of the contested decision.

The first part: the starting period of the price-cost test

- 717 The applicant submits that the Commission incorrectly, and without providing adequate reasoning, determined the starting period of the price-cost test.
- 718 In particular, the applicant criticises the Commission for having concluded, in an arbitrary manner and without adequate reasoning, that a chipset reaches large-scale production at the time when a significant increase in its production volume is observed. In the applicant's view, the Commission ought rather to have taken account of the point at which a significant and lasting reduction of that chipset's AVC is observed, since it is only once the AVC has stabilised that that chipset reaches its full production capacity.
- 719 Under its approach based on a significant reduction in AVC, the applicant submits that the MDM8200 chipset reached large-scale production only in the second quarter of 2010, whereas the MDM8200A and MDM6200 chipsets reached large-scale production only in the first quarter of 2011.
- 720 The Commission disputes the applicant's arguments.
- 721 As a preliminary point, it should be noted that the parties do not dispute that a chipset's AVC is, in general, very high at the beginning of its commercial life cycle, that it then falls significantly as production increases and that it stabilises during the last part of its life cycle. However, the parties' views differ as to the point at which in the commercial life cycle of a chip the Commission can legitimately undertake its price-cost test for the purpose of ascertaining whether predatory prices have been charged.
- 722 In that regard, it must be stated that the applicant does no more than propose another approach, but does not explain how the approach taken by the Commission in the contested decision is incorrect, or why the starting point of the price-cost test ought to be the point at which a significant and sustained reduction of a chipset's AVC is observed. In addition, the fact that the approach adopted by the Commission is not more favourable to the applicant than the approach which the applicant proposes, or that the two approaches are not similar, does not mean that the Commission's findings are incorrect (see, to that effect, judgment of 29 March 2012, *Telefónica and Telefónica de España v Commission*, T-336/07, EU:T:2012:172, paragraph 225), which is sufficient to reject the first part of the eighth plea.
- 723 It follows from the foregoing that the first part of the eighth plea must be rejected.

The other parts: the most fundamental errors made in the price-cost test were not corrected in the contested decision

- 724 In support of the second part of the plea, the applicant claims that, if the most basic errors affecting it were corrected, the price-cost test would only lead to a finding of prices below LRAIC for the MDM8200 chipset over three quarters as regards sales to Huawei and over a single quarter as regards sales to ZTE. Referring to the fourth, sixth and seventh pleas respectively, it explains that those most basic errors concern the ‘theory of predation’, the calculation of prices and the calculation of costs.
- 725 In support of the third part of the eighth plea, the applicant submits that the Commission erred, and provided insufficient reasons, when it rejected the corrections which it proposed to make to those most basic errors affecting the price-cost test. In particular, referring (i) to the ninth plea, it criticises the Commission for having failed to conduct an ‘as-efficient’ competitor analysis, which, in its view, biased its price-cost test, and (ii) to the sixth and seventh pleas, it disputes the assertions made in recital 994 et seq. of the contested decision.
- 726 The Commission disputes the applicant’s arguments.
- 727 It must be stated that the applicant puts forward no new evidence in support of the second and third parts of the eighth plea, and simply refers, moreover, relatively vaguely, to certain other pleas, in particular as regards the existence of errors affecting the ‘theory of predation’ in the contested decision, the Commission’s calculation of prices and costs and the lack of an ‘as-efficient’ competitor analysis. Those elements have been rejected in the context of the examination of the fourth plea as regards the alleged errors affecting the ‘theory of predation’ in that decision, in the context of the examination of the sixth and seventh pleas as regards the alleged errors affecting the Commission’s calculation of prices and costs, and in the context of the first part of the ninth plea as regards the alleged lack of an ‘as-efficient’ competitor analysis, which is sufficient to reject the second and third parts of the eighth plea.
- 728 The second and third parts of the eighth plea must therefore be rejected. Therefore, since the first part of that plea has also been rejected (see paragraph 723 above), the eighth plea must be rejected in its entirety.

The twelfth plea: the contested decision is not adequately reasoned

- 729 The applicant alleges that Article 41 of the Charter and Article 296 TFEU have been infringed, on the ground that the contested decision’s statement of reasons is inadequate.
- 730 In particular, the applicant submits, in the first place, that the contested decision contains contradictions, incomplete assessments and vague statements, referring in that regard to Annex A.12 to the application, in which it drew up a list of those inconsistencies.
- 731 In the second place, the applicant claims that, in the contested decision, the Commission makes unsubstantiated assertions and uncritically repeats assertions made by the complainant.
- 732 In the third place, the applicant relies on instances in which the Commission failed to address, let alone seriously examine, certain arguments raised during the administrative procedure, namely (i) the argument relating to the unsuitability of the questions in the request for information to define the market concerned, (ii) the argument relating to the development costs of the chipsets in

question not being incremental to Huawei and ZTE, (iii) the argument relating to the fact that the documents used by the Commission to demonstrate the applicant's intention to eliminate contain no reference whatsoever to the MDM8200 chipset, (iv) the argument relating to indirect predation and (v) the argument that the applicant merely aligned its prices with those of Icera.

- 733 In the fourth place, the applicant asserts that the Commission did not mention the methodology for calculating a cost benchmark which it had proposed during the administrative procedure and, without explanation, failed to take that methodology into account in the contested decision.
- 734 The Commission disputes the applicant's arguments.
- 735 It should be stated that Article 41(1)(c) of the Charter imposes on the administration an obligation to give reasons for its decisions. Similarly, Article 296 TFEU provides that acts of the European Union must state the reasons on which they are based.
- 736 According to settled case-law, the statement of reasons required under Article 296 TFEU for measures adopted by EU institutions must be appropriate to the measure at issue and must disclose clearly and unequivocally the reasoning followed by the institution which adopted that measure in such a way as to enable the persons concerned to ascertain the reasons for it and to enable the competent court to review its legality. The requirements to be satisfied by the statement of reasons depend on all the circumstances of each case, in particular the content of the measure in question, the nature of the reasons given and the interest which the addressees of the measure, or other parties to whom it is of direct and individual concern, may have in obtaining explanations. It is not necessary for the reasoning to go into all the relevant facts and points of law, since the question whether the statement of reasons meets the requirements of Article 296 TFEU must be assessed with regard not only to its wording but also to its context and to all the legal rules governing the matter in question (see judgment of 10 March 2016, *HeidelbergCement v Commission*, C-247/14 P, EU:C:2016:149, paragraph 16 and the case-law cited).
- 737 It is also important to recall that the existence of a statement of reasons is distinct from the question whether those reasons given are correct. It follows that, in a plea alleging failure to state reasons or that the reasons stated are insufficient, objections and arguments which aim to challenge the merits of the contested decision are ineffective (see, to that effect, judgment of 12 July 2018, *Nexans France and Nexans v Commission*, T-449/14, EU:T:2018:456, paragraph 164).
- 738 As regards the first complaint, alleging contradictions, incomplete assessments and vague statements in the contested decision, it must be stated that, contrary to the applicant's allegations, the contested decision is not vitiated by any of the contradictions, incomplete assessments or vague statements listed in Annex A.12 to the application, which is sufficient to reject the present complaint.
- 739 As regards the second complaint, alleging unsubstantiated assertions and uncritical repetition of assertions of the complainant in the contested decision, it must be stated that that complaint seeks to challenge the substance of the contested decision and is therefore ineffective in the context of the present plea.
- 740 As regards the third complaint, alleging that the Commission failed to address in the contested decision certain arguments raised during the administrative procedure, it must be observed that the applicant raised, in the context of the second plea (as regards the questions in the requests

for information to define the market concerned), the fourth plea (as regards indirect predation), the seventh plea (as regards development costs); the tenth plea (as regards intention to eliminate) and the eleventh plea (as regards alignment with Icera's prices), each of those arguments which were specifically examined by the General Court in the examination of those pleas which led to their rejection, which is sufficient to reject the present complaint.

741 Furthermore, in so far as the applicant complains that the Commission failed to make a serious examination of the arguments in question, that criticism seeks to challenge the substance of the contested decision and is therefore ineffective in the context of the present plea.

742 As regards the fourth complaint, alleging that the Commission did not mention in the contested decision the methodology for calculating a cost benchmark which the Commission had proposed during the administrative procedure and that it failed to take that methodology into account, it must be stated that the Commission did not infringe its obligation to state reasons on the basis that, in the present case, it applied its own methodology for calculating the cost benchmark, without taking into account the methodology proposed by the applicant. It is also clear that, in the present case, the Commission gave a detailed, clear and unequivocal explanation in Section 12.6 of that decision of its methodology for calculating a cost benchmark, as well as the reasons why that methodology appeared to it to be the most appropriate. The present complaint must therefore be rejected.

743 Consequently, the twelfth plea must be rejected.

The thirteenth plea: 'manifest errors of assessment', lack of foundation and failure to state reasons in the contested decision as regards the duration of the infringement

744 In the context of the thirteenth plea, the applicant criticises both the start date of the infringement and the end date of the infringement as determined by the Commission.

745 As regards the start date of the infringement, referring to the arguments put forward in support of the eighth plea, the applicant submits that the Commission was not entitled to set that date at 1 July 2009, given that the MDM8200 chipset reached large-scale production only during the second quarter of 2010, and that the MDM6200 and MDM8200A chipsets reached large-scale production only during the first quarter of 2011.

746 As regards the end date of the infringement, referring to the arguments put forward in support of the fourth and tenth pleas, the applicant maintains that the Commission was not entitled to set that date at 30 June 2011.

747 The Commission disputes the applicant's arguments.

748 It must be observed that, in the context of the present plea, the applicant simply refers to arguments put forward in support of the fourth, eighth and tenth pleas. When questioned in that regard at the hearing, the applicant expressly confirmed that the present plea was not based on any specific argument which had not been put forward in support of another plea.

749 The arguments put forward in support of the fourth, eighth and tenth pleas to which the applicant refers in the context of the present plea have all been rejected, which is sufficient to reject the thirteenth plea.

The fourteenth plea: the contested decision ‘manifestly errs’ in the imposition and calculation of the fine

750 The present plea comprises seven parts. The first alleges that there was no intention or negligence in the commission of the infringement. The second alleges errors of assessment and of law, breach of the principle of legal certainty and failure to state reasons regarding the determination of the value of sales. The third alleges ‘manifest errors of law and of assessment’ relating to the failure to take into account the effects of the infringement. The fourth alleges errors of assessment and of law and breach of the obligation to state reasons as regards the gravity of the infringement. The fifth alleges ‘manifest errors of law and of assessment’ and breach of the obligation to state reasons as regards the additional amount of the infringement. The sixth alleges errors of assessment and of law regarding the absence of mitigating circumstances pursuant to the 2006 Guidelines and breach of the obligation to state reasons with regard to intention or negligence. The seventh alleges breach of the principle of proportionality.

Preliminary observations

- 751 In the contested decision, the Commission decided to impose a fine on the applicant, calculated on the basis of the principles set out in the 2006 Guidelines.
- 752 First of all, the Commission determined, on the basis of data provided by the applicant, the value of the applicant’s direct and indirect sales of UMTS chipsets, that is to say the goods concerned by the infringement, in the EEA. In that context, it took as a basis the actual value of affected sales, adding the value of the applicant’s sales of UMTS chipsets during the relevant period, namely the second quarter of 2009, the whole of 2010, and the first quarter of 2011. In order to arrive at the basic amount of the fine, it applied a gravity factor of [confidential], setting out in the contested decision the factors which it had taken into account to arrive at such a percentage.
- 753 Next, the Commission added to the basic amount of the fine an additional amount for deterrence set at [confidential] of the average value of the applicant’s sales of UMTS chipsets in the EEA during the relevant period, that is to say, [confidential] of half of the actual value of sales affected, as previously determined. It also set out, in recitals 1274 to 1278 of the contested decision, the factors taken into account in order to arrive at that percentage.
- 754 Lastly, the Commission concluded that, in the absence of any aggravating or mitigating circumstances, the amount of the fine was not to be adjusted.
- 755 In the light of those considerations, the Commission set the amount of the fine imposed on the applicant at EUR 242 042 000, stating that, in the light of the applicant’s turnover of EUR 19 105 million in the financial year preceding the adoption of the contested decision, that amount was below the 10% ceiling laid down in Article 23(2) of Regulation No 1/2003.
- 756 In the present case, the Court considers it appropriate to begin by examining the second part of the present plea.

The second part: errors of assessment and of law, breach of the principle of legal certainty and failure to state reasons regarding the determination of the value of sales

- 757 In support of the second part, the applicant puts forward three arguments. In the first place, it submits that the Commission, when assessing the value of its indirect sales of UMTS chipsets in the EEA, departed from point 15 of the 2006 Guidelines by using data relating to the calendar year, rather than data relating to the last tax year.
- 758 In the second place, the applicant claims that the Commission departed from points 13 and 24 of the 2006 Guidelines by using sales made throughout the whole of the relevant period, and not sales made during the last full business year, without the slightest explanation.
- 759 In the third place, the applicant complains that it did not have the opportunity to provide its comments to the Commission regarding the methodology for estimating the value of its sales intended to be applied by the Commission.
- 760 The Commission disputes the applicant's arguments. It counters, in the first place, that, in order to determine the value of the applicant's sales, it had to use the data for the calendar year provided by the applicant in 2015, that is to say, *in tempore non suspecto*, at a time when calculation of the fine was not being dealt with, rather than the data relating to the last tax year, which was provided by the applicant in 2019 and subsequently corrected a number of times because of multiple errors, and was therefore considered unreliable. It adds that it was unable to estimate the sales made during the last tax year on the basis of the data provided by calendar year, since the applicant never sent it a breakdown of those sales by quarter, which would have enabled it to do so.
- 761 In the second place, as regards the use of the value of sales relating to the whole of the relevant period, the Commission explained, in the rejoinder, that it was unable to base its calculations on the last full year of the infringement, because the market reconstruction data submitted by the applicant used figures aggregated for the calendar year. It adds in that regard that, since the first request for information of 5 February 2019, it had been asking the applicant to send to it the value of sales of UMTS chipsets for each full financial year, from 2009 to 2011, that is to say, for the whole of that period and that, consequently, the applicant ought to have understood that it intended to use the whole of that period and not only the last financial year.
- 762 In the third place, the Commission submits that the applicant had the opportunity to comment on the methodology to be applied by the Commission, since it informed the applicant thereof on 13 June 2019, with the result that the applicant was able to provide the Commission with its comments.
- 763 As regards the applicant's first argument, relating to the Commission's use of data relating to the calendar year rather than data relating to the last tax year, it is apparent from point 13 of the 2006 Guidelines that, in determining the basic amount of the fine to be imposed, the Commission will take the value of the undertaking's sales of goods or services to which the infringement directly or indirectly relates in the relevant geographic area within the EEA, and that the Commission will normally take the sales made by the undertaking during the last full business year of its participation in the infringement.

- 764 Point 15 of the 2006 Guidelines states that, in determining the value of sales by an undertaking, the Commission will take that undertaking's best available figures, and point 16 of those guidelines provides that, where the figures made available by an undertaking are incomplete or not reliable, the Commission may determine the value of its sales on the basis of the partial figures it has obtained or any other information which it regards as relevant and appropriate.
- 765 It follows that the Commission is not required to use the sales made during the last tax year, since to do so is simply a possibility for it; the use of the word 'normally' in point 13 of the 2006 Guidelines confirms that it is a possibility, not an obligation. Furthermore, if there are doubts regarding the reliability of the data provided by the undertaking concerned, point 16 of those guidelines allows the Commission to use any other information which it considers relevant and appropriate in order to determine the value of sales of the undertaking concerned.
- 766 In the present case, it is common ground that, in order to calculate the basic amount of the fine, the Commission used the applicant's sales data per calendar year, rather than the sales data for each tax year, and that it provided a detailed explanation in recitals 1246 to 1266 of the contested decision of the reasons which had caused it to do so, namely, in particular, a problem with the reliability of the data provided by the applicant relating to its sales by tax year.
- 767 It should also be observed that, when the Commission informed the applicant, on 13 June 2019, that it intended to use the sales data for each calendar year, the applicant could very well have provided the Commission with sales data for each calendar year, broken down by quarter, which would have allowed the Commission to calculate, on the basis of that information, the value of sales made by the applicant during the 2010 tax year. The applicant failed to do so and therefore it cannot validly complain that the Commission failed to use data which were not available to it.
- 768 Therefore, the Commission did not infringe its obligation to state reasons and did not err when it decided to use the data provided by the applicant relating to the value of its sales presented by calendar year and not by tax year.
- 769 As regards the applicant's second argument, relating to the Commission's use of sales made throughout the duration of the infringement, rather than sales made during the last tax year, it is apparent from point 24 of the 2006 Guidelines that, in order to take fully into account the duration of the participation of each undertaking in the infringement, the amount determined on the basis of the value of sales will be multiplied by the number of years of participation in the infringement.
- 770 In the present case, it is not disputed that the Commission calculated the basic amount of the fine by adding together the value of sales made by the applicant during the relevant period, that is to say during the second half of 2009, in 2010, and in the first half of 2011, instead of multiplying the value of sales made during the last calendar year by the number of years of participation in the infringement, namely two years.
- 771 However, unlike point 13 of the guidelines, which allows the Commission to use a value of sales other than that relating to the last tax year, point 24 of those guidelines does not provide for a possible departure therefrom.
- 772 While it is true that point 37 of the 2006 Guidelines allows the Commission, in general terms, to depart from the methodology laid down by those guidelines, the fact remains that, in such a case, the Commission is required to state in particular the reasons which prompted it to depart from that methodology.

- 773 It is apparent from the case-law, first, that when the Commission decides to depart from the general methodology set out in the 2006 Guidelines, by which it limited the discretion it may itself exercise in setting the amount of fines, and relies on point 37 of those guidelines, that requirement relating to the duty to state reasons must be complied with all the more rigorously and, second, that the guidelines lay down a rule of conduct indicating the approach to be adopted from which the Commission cannot depart, in an individual case, without giving reasons which are compatible with, *inter alia*, the principle of equal treatment. Those reasons must be all the more specific because point 37 of the guidelines simply makes a vague reference to ‘the particularities of a given case’ and thus leaves the Commission a broad discretion where it decides to make an exceptional adjustment of the basic amount of the fines to be imposed on the undertakings concerned. In such a case, the Commission’s respect for the rights guaranteed by the EU legal order in administrative procedures, including the obligation to state reasons, is of even more fundamental importance (see judgment of 13 December 2016, *Printeos and Others v Commission*, T-95/15, EU:T:2016:722, paragraph 48 and the case-law cited).
- 774 However, while the Commission does explain why it used the value of sales relating to the calendar year 2010 rather than those relating to the last tax year, it fails to justify why it used the value of sales relating to the total duration of the infringement (rather than sales made during the last year of the infringement, subsequently multiplied by two, given the two-year infringement period), since it simply submits that it could not have based its calculations on the last full year of the infringement because only aggregated figures for the calendar year were available to it. The Commission could therefore very well have used the value of sales made during the last calendar year of the infringement, which was available to it and which it regarded as reliable, and multiplied that value by the duration of the infringement in years, that is to say, by two.
- 775 Furthermore, it is clear from the case-law that the statement of reasons must, in principle, be notified to the person concerned at the same time as the decision adversely affecting him or her. The absence of reasoning cannot be legitimised by the fact that the person concerned becomes aware of the reasons for the decision during the procedure before the Courts of the European Union (judgments of 29 September 2011, *Elf Aquitaine v Commission*, C-521/09 P, EU:C:2011:620, paragraph 149; of 19 July 2012, *Alliance One International and Standard Commercial Tobacco v Commission* and *Commission v Alliance One International and Others*, C-628/10 P and C-14/11 P, EU:C:2012:479, paragraph 74; and of 13 December 2016, *Printeos and Others v Commission*, T-95/15, EU:T:2016:722, paragraph 46). It follows that the explanation provided by the Commission, in the context of the present proceedings, and in particular at the stage of the rejoinder, as to the reasons which resulted in it departing from point 24 of the 2006 Guidelines, even if it were convincing, could, in any event, not make up for the lack of reasoning in that regard in the contested decision.
- 776 It follows that, in the contested decision, the Commission departed, without justification, from the method laid down by the 2006 Guidelines by, in the present proceedings and at the stage of the rejoinder, taking an insufficient justification as a basis.
- 777 As regards the applicant’s third argument, concerning the lack of opportunity to make known its views on the methodology which the Commission intended to apply in order to set the basic amount of the fine, it is common ground that the applicant was informed on 13 June 2019 of that methodology, and in particular of the fact that the Commission intended to use sales data for each calendar year. The applicant therefore did have the opportunity to submit any comments it might have in that regard.

778 However, contrary to the Commission's assertions, the applicant could not reasonably expect the Commission to calculate the basic amount of the fine on the basis of the value of sales made during the whole of the relevant period, simply because the Commission had requested the applicant to provide it with the value of sales of UMTS chipsets for each full year, from 2009 to 2011, that is to say, for the whole of that period.

779 It follows from the foregoing that the present part and, consequently, the fourteenth plea, must be upheld in part. Therefore, Article 2 of the contested decision must be annulled, there being no need to examine the other parts of the present plea, all of which seek to have that provision annulled.

The fifteenth plea: 'manifest errors of law, fact and assessment' and failure to state reasons in the contested decision, in establishing the Commission's jurisdiction and the effect on trade

780 The present plea comprises two parts. The first alleges that the Commission lacked jurisdiction to apply Article 102 TFEU. The second concerns the existence of effects on trade between Member States caused by the conduct at issue.

The first part: the Commission lacked jurisdiction to apply Article 102 TFEU

781 The applicant submits that the Commission erred in finding that it had jurisdiction to apply Article 102 TFEU in the contested decision, for the reasons set out below.

782 In the first place, the conduct at issue was not implemented in the EEA because there were no direct sales of the chipsets concerned in or into the EEA.

783 In the second place, for the reasons set out in support of the ninth plea, the conduct at issue was not liable to have anticompetitive foreclosure effects within the EEA. And even if that conduct were to have been so liable, those effects would not in any event have been substantial, immediate and foreseeable.

784 The Commission disputes the applicant's arguments.

785 It should be recalled that, as regards conduct adopted outside the territory of the EEA, the Commission's jurisdiction under public international law to find and punish an infringement of Article 102 TFEU may be established on the basis of either the implementation test or the qualified effects test (see, to that effect, judgment of 6 September 2017, *Intel v Commission*, C-413/14 P, EU:C:2017:632, paragraphs 40 to 47; see also, to that effect and by analogy, judgment of 12 July 2018, *Brugg Kabel and Kabelwerke Brugg v Commission*, T-441/14, EU:T:2018:453, paragraphs 95 to 97).

786 In that regard, it must also be pointed out that the implementation test and the qualified effects test are alternatives and are not cumulative (see, to that effect, judgments of 6 September 2017, *Intel v Commission*, C-413/14 P, EU:C:2017:632, paragraphs 62 to 64, and of 12 July 2018, *Brugg Kabel and Kabelwerke Brugg v Commission*, T-441/14, EU:T:2018:453, paragraph 98).

- 787 In the present case, it must be stated that, in Section 13 of the contested decision, in order to establish its jurisdiction under public international law to find and punish an infringement of Article 102 TFEU, the Commission relied both on the implementation test (recital 1203 of the contested decision) and on the qualified effects test (recitals 1204 to 1210 of the contested decision).
- 788 The Commission explained in recital 1203 of the contested decision that the implementation test was satisfied, given that the applicant knew or could not have been unaware that the devices assembled by Huawei and ZTE incorporating one of Qualcomm's baseband chipsets would also be sold in the EEA, as evidenced by a number of items of evidence contemporaneous with the facts in question, in particular a reply by the applicant made during the administrative procedure, as well as by a number of internal Qualcomm documents.
- 789 The applicant in no way disputes the fact that Huawei and ZTE, to which it sold chips at predatory prices, incorporated them into devices sold in the EEA, or the fact that it knew or could not have been unaware that that was the reason why the Commission concluded, in the contested decision, that the implementation test was satisfied.
- 790 In addition, the applicant cannot reasonably rely on there being no direct sales in the EEA, since the Commission does not rely on that factor in the contested decision for the purposes of demonstrating that the implementation test is satisfied.
- 791 Therefore, the Commission did not err in concluding that the implementation test was satisfied in the present case.
- 792 Furthermore, in the light of the fact that the implementation test and the qualified effects test are alternatives, as is apparent from the case-law cited in paragraph 786 above, since the applicant has not succeeded in refuting the Commission's conclusion that the implementation test was satisfied, it is not necessary to examine whether the Commission correctly concluded that the other test, namely the qualified effects test, was also satisfied since the implementation test, in itself, provides a basis for the Commission's jurisdiction to apply Article 102 TFEU.
- 793 It follows from the foregoing that the first part of the fifteenth plea must be rejected.

The second part: the existence of effects on trade between Member States caused by the conduct at issue

- 794 The applicant submits, referring to its arguments in support of the ninth plea, that the Commission erred in concluding in recital 1216 of the contested decision that the conduct at issue had had an appreciable effect on trade between Member States.
- 795 The Commission disputes the applicant's arguments.
- 796 It must be borne in mind that, according to settled case-law, in order to determine whether trade between Member States is capable of being affected by the abuse of a dominant position, account must be taken of the consequences for the effective competitive structure in the internal market (see judgment of 4 May 1988, *Bodson*, 30/87, EU:C:1988:225, paragraph 24 and the case-law cited).

- 797 Consequently, practices whose objective is to eliminate from the market their main established competitor in the internal market are inherently capable of affecting the structure of competition in that market and thereby of affecting trade between Member States within the meaning of Article 102 TFEU (judgment of 8 October 1996, *Compagnie maritime belge transports and Others v Commission*, T-24/93 to T-26/93 and T-28/93, EU:T:1996:139, paragraph 203).
- 798 It is also apparent from the case-law that an anticompetitive practice relating to an intermediate product is capable of affecting trade within the internal market, even if there is no trade in that intermediate product between the Member States, where the product constitutes the raw material for another product marketed elsewhere in the European Union (see, to that effect, judgment of 30 January 1985, *Clair*, 123/83, EU:C:1985:33, paragraph 29).
- 799 In the present case, it is apparent from the examination of the tenth plea that the Commission has demonstrated to the requisite legal standard that the conduct at issue had the objective of eliminating Icera, the applicant's main competitor, established at the material time within the European Union, which the intervener expressly confirmed at the hearing. In addition, that conduct concerned UMTS chipsets, that is to say, intermediate products, intended for MBB devices sold, in particular, in the European Union, which the applicant does not legitimately dispute.
- 800 Consequently, the Commission did not infringe its obligation to state reasons and did not err when it concluded, in the contested decision, that the conduct at issue was capable of affecting trade between Member States. The second part of the fifteenth plea must therefore be rejected.
- 801 It follows from all of the foregoing that the fifteenth plea must be rejected.

The request to annul or reduce the amount of the fine

- 802 Unlimited jurisdiction empowers the General Court, in addition to carrying out a mere review of the lawfulness of the penalty, which merely permits dismissal of the action for annulment or annulment of the contested measure, to substitute its own appraisal for the Commission's and, therefore, to vary the contested measure, even without annulling it, by taking account of all the factual circumstances, so as, in particular, to amend the amount of the fine, to reduce that amount as well as to increase it (see, to that effect, judgments of 8 February 2007, *Groupe Danone v Commission*, C-3/06 P, EU:C:2007:88, paragraphs 61 and 62, and of 3 September 2009, *Prym and Prym Consumer v Commission*, C-534/07 P, EU:C:2009:505, paragraph 86).
- 803 In the exercise of its unlimited jurisdiction, it is for the Court to determine the amount of the fine, taking into account all of the circumstances of the present case. That exercise involves, in accordance with Article 23(3) of Regulation No 1/2003, taking into consideration the seriousness and duration of the infringement committed, in compliance with the principles of, inter alia, proportionality and the individualisation of penalties (see judgment of 21 January 2016, *Galp Energía España and Others v Commission*, C-603/13 P, EU:C:2016:38, paragraph 90 and the case-law cited).
- 804 In the context of its obligation to state reasons, the Court is also required to set out in detail the factors which it took into account when setting the amount of the fine (see, to that effect, judgment of 14 September 2016, *Trafilerie Meridionali v Commission*, C-519/15 P, EU:C:2016:682, paragraph 52).

805 In the present case, in order to determine the amount of the fine intended to penalise the applicant for having implemented selective predatory pricing for two years in order to eliminate its main competitor, the Court considers it appropriate, in order to take account of its examination of the second part of the fourteenth plea, to proceed in the manner set out below.

Preliminary observation

806 While it is not bound by the Commission's guidelines on setting the amount of fines (see, to that effect, judgment of 14 September 2016, *Trafilerie Meridionali v Commission*, C-519/15 P, EU:C:2016:682, paragraphs 52 to 55), the Court considers it appropriate in the present case to apply the methodology laid down by the 2006 Guidelines, which the applicant does not dispute.

Determination of the basic amount of the fine

807 In the light of the fact that point 13 of the 2006 Guidelines does not lay down any obligation to use the value of sales made during the last business year, as is apparent from paragraphs 763 to 765 above, account is to be taken in the present case of the value of the applicant's sales in the EEA for UMTS chipsets during the last calendar year of the infringement, that is to say, the calendar year 2010. That choice is justified by the fact that, in the present case, the data submitted by the applicant for each business year are not reliable, for the reasons set out in recitals 1246 to 1266 of the contested decision.

808 In that regard, it is apparent from Table 75 of the contested decision, which the parties do not dispute, that, during the calendar year 2010, the value of UMTS chipsets sales made in the EEA by the applicant was [confidential].

Degree of gravity of the infringement

809 As regards the proportion of the value of sales to be taken into consideration, all the relevant circumstances of the case must be taken into consideration and, in particular, the economic importance of the worldwide market for UMTS chipsets, the nature of the infringement committed by the applicant, the fact that the only competitor capable of challenging the applicant in the leading edge segment of that market was the subject of the practice at issue, the fact that that conduct might also have deterred other potential entrants, and the geographic scale of the infringement, which was worldwide and included the whole of the EEA.

810 Consequently, it is appropriate to apply a gravity factor of 11%, which gives an amount of [confidential].

Number of years of infringement

811 It is apparent from point 24 of the 2006 Guidelines that, in order to take fully into account the duration of the participation of each undertaking in the infringement, the amount determined on the basis of the value of sales will be multiplied by the number of years of participation in the infringement.

812 In the present case, since the infringement lasted two years (recital 1295 of the contested decision), the amount determined on the basis of the value of sales must be multiplied by two, which gives an amount of [confidential].

Additional amount

813 It is apparent from point 25 of the 2006 Guidelines that, in order to deter undertakings of the same size and having the same resources from engaging in anticompetitive practices similar to those made the subject of penalties in the present case, a sum of between 15% and 25% of the value of sales may be included in the basic amount of the fine.

814 In the present case, the Court considers that the objective of deterrence may be guaranteed by applying a rate lower than the purely indicative rate set out in point 25 of the 2006 Guidelines.

815 For those reasons, it is appropriate to include in the basic amount of the fine a sum corresponding to 11% of the value of the applicant's sales of UMTS chipsets in the EEA during the calendar year 2010, as found in Table 75 of the contested decision, which is not disputed by the parties, which gives an amount of [confidential].

Mitigating or aggravating circumstances

816 In the present case, none of the factors to which the applicant makes general references can lead to a reduction in the amount of the fine by virtue of point 29 of those guidelines and, in the light of all the relevant circumstances, no adjustment to the basic amount of the fine is appropriate.

817 The Court also considers, as did the Commission in the contested decision, that it is not appropriate in the present case to increase the amount of the fine on account of aggravating circumstances.

818 It follows that the amount of the fine is not to be adjusted on account of mitigating or aggravating circumstances.

Conclusion as regards the amount of the fine

819 It follows from the foregoing that the amount of the fine imposed on the applicant is set at EUR 238 732 659.33.

Costs

820 Under Article 134(1) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Furthermore, under Article 134(3) of the Rules of Procedure, where each party succeeds on some and fails on other heads, the parties are to bear their own costs. However, if it appears justified in the circumstances of the case, the Court may order that one party, in addition to bearing its own costs, pay a proportion of the costs of the other party.

821 In the present case, both the applicant and the Commission have been partially unsuccessful.

- 822 In those circumstances, the applicant must be ordered to bear nine tenths of its own costs and to pay nine tenths of the Commission's costs and all of the intervener's costs. The Commission is to bear one tenth of its own costs and to pay one tenth of the applicant's costs.

On those grounds,

THE GENERAL COURT (First Chamber, Extended Composition)

hereby:

- 1. Annuls Article 2 of Commission Decision C(2019) 5361 final of 18 July 2019 relating to a proceeding under Article 102 TFEU and Article 54 of the EEA Agreement (Case AT.39711 – Qualcomm (predation));**
- 2. Sets the amount of the fine imposed on Qualcomm Inc. in Article 2 of that decision, for the infringement it committed, as results from Article 1 of that decision, at EUR 238 732 659.33;**
- 3. Dismisses the action as to the remainder;**
- 4. Orders Qualcomm to bear nine tenths of its own costs and to pay nine tenths of the European Commission's costs and to pay all the costs of Nvidia Corp;**
- 5. Orders the Commission to bear one tenth of its own costs and to pay one tenth of Qualcomm's costs.**

Spielmann

Mastroianni

Gâlea

Delivered in open court in Luxembourg on 18 September 2024.

V. Di Bucci
Registrar

M. van der Woude
President

Table of contents

Background to the dispute	2
Context of the case	2
Administrative procedure	4
Content of the contested decision	6
Products concerned	6
Relevant market	7
Dominant position	7
Abuse of dominant position	7
– Lack of justification	8
– Single and continuous infringement	8
– The Commission’s jurisdiction	8
– Penalty	8
Procedure and forms of order sought	9
Procedure	9
Forms of order sought	11
Law	12
The first plea: procedural irregularities	14
The first part: breach of the principle of sound administration	14
– Preliminary observations	14
– The first complaint: the duration of the investigation was excessive	15
– The second complaint: the case file was not sufficiently complete and accurate	18
– The third complaint: the investigation was biased	20
The second part: infringement of the rights of the defence and of the principle of equality of arms	23
– Preliminary observations	23

– The first complaint: inadequate access to the file	24
– The second complaint: the content of the file submitted was insufficient	24
The second plea: ‘manifest errors of assessment’, of fact and of law, and failure to state adequate reasons as regards the definition of the relevant market and the applicant’s dominant position during the relevant period	28
The first part: shortcomings in the contested decision as regards the definition of the relevant market	28
Preliminary observations	28
– The first complaint: manifest errors of assessment and of law in that the Commission relied on a selection of vague answers to unclear questions	29
– The second complaint: manifest errors of assessment and of law in that the Commission failed to examine whether a chain of substitution exists	31
– The third complaint: manifest errors of assessment and of law in that the Commission concluded that it was not required to apply the SSNIP test	32
The second part: the competitive constraints exerted directly by captive supply on the merchant market	34
The third part: the competitive constraints exerted indirectly by captive supply on the merchant market	37
The fourth part: the applicant’s dominant position during the relevant period	41
The fifth part: the definition of the leading edge segment of the UMTS chipset market on which the Commission based its analysis	43
The fifth plea: ‘manifest errors of assessment’ and failure to state reasons as regards the reconstruction of alleged ‘effectively paid’ prices.	44
The first part: the ‘price restatement’ conducted in the contested decision was unnecessary	44
The second part: errors in the contested decision regarding the ‘restatement’ conducted	48
The sixth plea: incorrect ‘allocation of non-recurring engineering expenses’	50
The first part: the NRE payment to ZTE	51
The second part: the NRE payment to Huawei	56
The seventh plea: failure ‘to establish an appropriate cost benchmark’	57
Preliminary observations	58
The first part: infringement of the principle of legal certainty and the principle in dubio pro reo	59
The second part: LRAIC is not the appropriate cost benchmark	61

The third part: LRAIC calculated by the Commission is not ‘true’ LRAIC	64
The ninth plea: ‘manifest errors of law and of appraisal’ as regards the finding that the prices charged by the applicant foreclosed Icera and caused consumer harm	73
The first part: the Commission failed to conduct a so-called ‘as-efficient’ competitor analysis	74
The other parts: in essence, the conduct at issue had no effects	76
The tenth plea: ‘manifest errors of assessment’, of fact and of law, failure to state reasons and infringement of the right to be heard and of the principle of sound administration, in that the Commission concluded that the applicant’s pricing practices were the implementation of a plan to exclude Icera	76
The eleventh plea: a ‘manifest error of appraisal’, of fact and of law, and failure to state reasons as regards the Commission’s rejection of the objective justification put forward by the applicant	84
The third plea: a failure ‘to apply the correct legal standard thereby committing manifest errors of law’	87
The first part: failure to apply the ‘correct legal standard’ as defined in the Enforcement Priorities Communication	87
The second part: misapplication of the case-law on predatory pricing and on pricing practices more generally	90
The third part: breach of the principles of legal certainty and foreseeability	91
The fourth plea: the “predation theory” is illogical and unsupported by evidence’	91
Preliminary observations	91
The first part: the Commission’s ‘predation theory’, which is ‘targeted and selective’, is disconnected from the market definition and was tailored to reach a predetermined conclusion	92
The second part: the Commission’s ‘predation theory’ is inherently inconsistent and lacks adequate reasoning	93
The third part: the Commission failed to demonstrate that the applicant’s conduct was irrational and fails to establish the alleged predation strategy	94
The fourth part: the applicant’s prices were higher than those of Icera	95
The fifth part: the Commission disregarded crucial exculpatory evidence	95
The sixth part: the decision fails to show financial predation	96
The seventh part: the ‘predation theory’ is novel, flawed and unsupported	97
The eighth part: ‘manifest errors of appraisal’ in relation to direct predation between the third quarter of 2010 and the second quarter of 2011	97

The ninth part: the Commission disregarded commercial reality regarding the MDM8200 chipset	98
The tenth part: the ‘predation theory’ is contrary to logic and elementary economics	98
The eleventh part: the Commission failed to show recoupment of the losses sustained during the relevant period or explain when the alleged predation ended	99
The twelfth part: failure to apply the ‘as-efficient’ competitor test and allegation that Icera’s good performance during the relevant period disproves the ‘predation theory’	99
The thirteenth part: the Commission erred in punishing genuine competition	100
The eighth plea: the price-cost analysis is ‘manifestly incorrect’	100
Preliminary observations	100
The first part: the starting period of the price-cost test	101
The other parts: the most fundamental errors made in the price-cost test were not corrected in the contested decision	102
The twelfth plea: the contested decision is not adequately reasoned	102
The thirteenth plea: ‘manifest errors of assessment’, lack of foundation and failure to state reasons in the contested decision as regards the duration of the infringement	104
The fourteenth plea: the contested decision ‘manifestly errs’ in the imposition and calculation of the fine	105
Preliminary observations	105
The second part: errors of assessment and of law, breach of the principle of legal certainty and failure to state reasons regarding the determination of the value of sales	106
The fifteenth plea: ‘manifest errors of law, fact and assessment’ and failure to state reasons in the contested decision, in establishing the Commission’s jurisdiction and the effect on trade	109
The first part: the Commission lacked jurisdiction to apply Article 102 TFEU	109
The second part: the existence of effects on trade between Member States caused by the conduct at issue	110
The request to annul or reduce the amount of the fine	111
Preliminary observation	112
Determination of the basic amount of the fine	112
Degree of gravity of the infringement	112
Number of years of infringement	112

Additional amount 113

Mitigating or aggravating circumstances 113

Conclusion as regards the amount of the fine 113

Costs 113

Francis Anthonimuthu Appulonappa
Appellant

v.

Her Majesty The Queen *Respondent*

- and -

Hamalraj Handasamy *Appellant*

v.

Her Majesty The Queen *Respondent*

- and -

Jeyachandran Kanagarajah *Appellant*

v.

Her Majesty The Queen *Respondent*

- and -

Vignarajah Thevarajah *Appellant*

v.

Her Majesty The Queen *Respondent*

and

**Attorney General of Ontario,
Amnesty International
(Canadian Section, English Branch),
British Columbia Civil Liberties Association,
Canadian Civil Liberties Association,
Canadian Council for Refugees and
Canadian Association of
Refugee Lawyers** *Interveners*

INDEXED AS: **R. v. APPULONAPPA**
2015 SCC 59

Francis Anthonimuthu Appulonappa
Appelant

c.

Sa Majesté la Reine *Intimée*

- et -

Hamalraj Handasamy *Appelant*

c.

Sa Majesté la Reine *Intimée*

- et -

Jeyachandran Kanagarajah *Appellant*

c.

Sa Majesté la Reine *Intimée*

- et -

Vignarajah Thevarajah *Appelant*

c.

Sa Majesté la Reine *Intimée*

et

**Procureur général de l'Ontario,
Amnesty International
(Canadian Section, English Branch),
Association des libertés civiles de
la Colombie-Britannique,
Association canadienne des libertés civiles,
Conseil canadien pour les réfugiés et
Association canadienne des avocats et
avocates en droit des réfugiés** *Intervenants*

RÉPERTORIÉ : **R. c. APPULONAPPA**
2015 CSC 59

File No.: 35958.

2015: February 17; 2015: November 27.

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

ON APPEAL FROM THE COURT OF APPEAL FOR
BRITISH COLUMBIA

Constitutional law — Charter of Rights — Right to liberty — Fundamental justice — Overbreadth — People smuggling — Migrants seeking refugee status in Canada charged with offence of organizing, inducing, aiding or abetting persons coming into Canada without valid documentation — Trial judge finding that offence provision overbroad and therefore unconstitutional because it criminalizes not only organized people smuggling, but helping close family members to come to Canada and humanitarian assistance to refugees — Whether offence provision infringes s. 7 of Canadian Charter of Rights and Freedoms — If so, whether infringement justifiable under s. 1 of Charter — If no, what is appropriate remedy for constitutional infirmity — Immigration and Refugee Protection Act, S.C. 2001, c. 27, s. 117.

Immigration — Offences — People smuggling — Migrants seeking refugee status in Canada charged with offence of organizing, inducing, aiding or abetting persons coming into Canada without valid documentation — Whether offence provision unconstitutional — Immigration and Refugee Protection Act, S.C. 2001, c. 27, s. 117.

In 2009, a vessel was apprehended off the west coast of Vancouver Island, in British Columbia. Seventy-six people, among them A, H, K and T (the “migrants”) were aboard. All were Tamils from Sri Lanka. They claimed to have fled Sri Lanka because their lives were endangered. They asked for refugee status in Canada. None had the required legal documentation. The migrants are alleged to have been the point persons for a transnational for-profit operation to smuggle undocumented migrants from Southeast Asia to Canada. The majority of passengers each paid, or promised to pay, \$30,000 to \$40,000 for the voyage. The migrants are said to have been responsible for organizing the asylum-seekers in Indonesia and Thailand prior to boarding the freighter, and serving as the chief crew of the ship on the voyage to Canada — H

N° du greffe : 35958.

2015 : 17 février; 2015 : 27 novembre.

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

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

Droit constitutionnel — Charte des droits — Droit à la liberté — Justice fondamentale — Portée excessive — Passage de clandestins — Migrants demandant l’asile au Canada accusés de l’infraction d’avoir organisé l’entrée au Canada de personnes non munies de documents valides ou d’avoir incité, aidé ou encouragé de telles personnes à entrer au Canada — Le juge du procès a conclu que la disposition créant l’infraction avait une portée excessive et était donc inconstitutionnelle parce qu’elle criminalisait non seulement le passage organisé de clandestins, mais également le fait d’aider un proche parent à entrer au Canada ainsi que le fait de fournir de l’aide humanitaire à des demandeurs d’asile — La disposition créant l’infraction viole-t-elle l’art. 7 de la Charte canadienne des droits et libertés? — Dans l’affirmative, cette violation peut-elle être justifiée au regard de l’article premier de la Charte? — Si elle ne peut l’être, quelle est la réparation convenable à l’égard de l’inconstitutionnalité? — Loi sur l’immigration et la protection des réfugiés, L.C. 2001, c. 27, art. 117.

Immigration — Infractions — Passage de clandestins — Migrants demandant l’asile au Canada accusés de l’infraction d’avoir organisé l’entrée au Canada de personnes non munies de documents valides ou d’avoir incité, aidé ou encouragé de telles personnes à entrer au Canada — La disposition créant l’infraction est-elle inconstitutionnelle? — Loi sur l’immigration et la protection des réfugiés, L.C. 2001, c. 27, art. 117.

En 2009, un navire a été intercepté au large de la côte ouest de l’île de Vancouver, en Colombie-Britannique. Ce navire avait à son bord 76 personnes, dont A, H, K et T (les « migrants »). Tous des Tamouls du Sri Lanka, ils ont affirmé avoir fui leur pays parce que leur vie était en danger. Ils ont demandé l’asile au Canada. Aucun d’eux n’était muni des documents juridiques requis. Les migrants auraient été les hommes de terrain d’une opération transnationale à but lucratif visant à faire passer des sans-papiers de l’Asie du Sud-Est au Canada. La majorité des passagers avait payé, ou promis de payer, entre 30 000 \$ et 40 000 \$ chacun pour la traversée. Les migrants auraient organisé les demandeurs d’asile en Indonésie et en Thaïlande avant leur embarquement et auraient constitué les membres d’équipage principaux du

as captain, T as chief engineer, and K and A as key crew members.

The migrants were charged under s. 117 of the *Immigration and Refugee Protection Act* (“IRPA”), which makes it an offence to “organize, induce, aid or abet” the coming into Canada of people in contravention of the IRPA. Consequences of conviction could include lengthy imprisonment and disqualification from consideration as a refugee. Before their trial, the migrants challenged the constitutionality of s. 117 of the IRPA, on the ground that it infringes the right to life, liberty and security of the person enshrined in s. 7 of the *Canadian Charter of Rights and Freedoms*. The trial judge ruled the provision was unconstitutional. The Court of Appeal reversed that decision, found the provision to be constitutional and remitted the matter for trial. Section 117 as it was at the time of the alleged offences is no longer in force and the constitutionality of the current s. 117 is not before the Court.

Held: The appeals are allowed and the charges are remitted for trial. Section 117 is unconstitutional insofar as it permits prosecution for humanitarian aid to undocumented entrants, mutual assistance amongst asylum-seekers or assistance to family members.

Participating in the unauthorized entry of other people into Canada may result in prosecution and imprisonment and/or substantial fines upon conviction under s. 117 of the IRPA. The migrants contend that s. 117 violates s. 7 of the *Charter* because the provision catches two categories of people outside its purpose — people who assist close family members to come to Canada and humanitarians who assist those fleeing persecution to come to Canada, in each case without required documents. They say that s. 117 is therefore overbroad. They also argue that s. 117 offends the principles of fundamental justice because its impact on liberty is grossly disproportionate to the conduct it targets, because it is unconstitutionally vague, and because it perpetuates inequality.

Insofar as s. 117 permits prosecution for humanitarian aid to undocumented entrants, mutual assistance amongst

navire pendant la traversée vers le Canada — H à titre de capitaine, T à titre de chef mécanicien et K et A à titre de membres clés de l’équipage.

Les migrants ont été accusés en vertu de l’art. 117 de la *Loi sur l’immigration et la protection des réfugiés* (« LIPR »), selon lequel commet une infraction quiconque « organise » l’entrée au Canada d’une personne en contravention à la LIPR « ou incite, aide ou encourage » une telle personne à entrer au Canada. Un verdict de culpabilité peut, entre autres conséquences, emporter une longue peine d’emprisonnement et faire obstacle à une demande d’asile. Avant leur procès, les migrants ont contesté la constitutionnalité de l’art. 117 de la LIPR, au motif qu’il viole le droit à la vie, à la liberté et à la sécurité de la personne garanti par l’art. 7 de la *Charte canadienne des droits et libertés*. Le juge du procès a déclaré l’art. 117 inconstitutionnel. La Cour d’appel a infirmé cette décision, a déclaré que la disposition était constitutionnelle et a renvoyé l’affaire pour qu’elle soit jugée en première instance. L’article 117, tel qu’il était à l’époque des infractions en cause, n’est plus en vigueur et la Cour n’est pas saisie de la question de la constitutionnalité de l’art. 117 actuel.

Arrêt : Les pourvois sont accueillis et les accusations sont renvoyées au tribunal de première instance pour être jugées. L’article 117 est inconstitutionnel dans la mesure où il permet que soient intentées des poursuites reprochant des actes d’aide humanitaire à des sans-papiers, d’assistance mutuelle entre demandeurs d’asile ou d’aide fournie par une personne à des membres de sa famille.

Participer à l’entrée non autorisée d’autres personnes au Canada peut entraîner des poursuites en vertu de l’art. 117 de la LIPR, et une déclaration de culpabilité risque de se traduire par une peine d’emprisonnement, des amendes substantielles ou les deux. Les migrants font valoir que l’art. 117 viole l’art. 7 de la *Charte* parce qu’il fait entrer dans son champ d’application deux catégories de personnes qui ne sont pas visées par son objet — les personnes qui assistent des parents proches à entrer au Canada et les travailleurs humanitaires qui aident des personnes fuyant la persécution à entrer au Canada, dans les deux cas sans les documents requis. Ils affirment que l’art. 117 a donc une portée excessive. Ils affirment également que la disposition enfreint les principes de justice fondamentale parce que son effet sur la liberté est exagérément disproportionné par rapport à la conduite qu’elle sanctionne, parce qu’elle est inconstitutionnelle pour cause d’imprécision et parce qu’elle perpétue l’inégalité.

Dans la mesure où l’art. 117 permet que soient intentées des poursuites reprochant des actes d’aide humanitaire

asylum-seekers or assistance to family members, it is unconstitutional. The purpose of s. 117 is to criminalize the smuggling of people into Canada in the context of organized crime, and does not extend to permitting prosecution for simply assisting family or providing humanitarian or mutual aid to undocumented entrants to Canada. A broad punitive goal that would prosecute persons with no connection to and no furtherance of organized crime is not consistent with Parliament's purpose as evinced by the text of s. 117 read together with Canada's international commitments, s. 117's role within the *IRPA*, the *IRPA*'s objects, the history of s. 117, and the parliamentary debates.

The scope of s. 117 is overbroad and interferes with conduct that bears no connection to its objective. The overbreadth problem cannot be avoided by interpreting s. 117(1) as not permitting prosecution of persons providing humanitarian, mutual or family assistance. Such an interpretation would require the Court to ignore the ordinary meaning of the words of s. 117(1), which unambiguously make it an offence to "organize, induce, aid or abet" the undocumented entry. To adopt this interpretation would violate the rule of statutory interpretation that the meaning of the words of the provision should be read in their grammatical and ordinary sense. It would also require statements from the legislative debate record suggesting Parliament knew in advance that the provision was overbroad to be ignored.

Parliament itself understood when it enacted s. 117 that the provision's reach exceeded its purpose by catching those who provide humanitarian, mutual and family assistance to asylum-seekers coming to Canada, but argued that this overbreadth was not a problem because the Attorney General of Canada would not permit the prosecution of such people. Section 117(4), which requires the Attorney General to authorize prosecutions, does not cure the overbreadth problem created by s. 117(1). Ministerial discretion, whether conscientiously exercised or not, does not negate the fact that s. 117(1) criminalizes conduct beyond Parliament's object, and that people whom Parliament did not intend to prosecute are therefore at risk of prosecution, conviction and imprisonment. So long as the provision is on the books, and so long as it is not impossible that the Attorney General could consent to prosecute,

à des sans-papiers, d'assistance mutuelle entre demandeurs d'asile ou d'aide fournie par une personne à des membres de sa famille, il est inconstitutionnel. L'article 117 a pour objet de criminaliser le passage de clandestins au Canada lié à la criminalité organisée, et non des actes constituant simplement de l'entraide familiale, de l'assistance mutuelle entre sans-papiers qui entrent au Canada ou encore de l'aide humanitaire à de telles personnes. Un objectif punitif général qui permettrait que soient poursuivies des personnes qui sont dépourvues de lien avec le crime organisé et ne font rien pour favoriser le crime organisé est contredit par l'intention du législateur qui se dégage du libellé de l'art. 117, interprétée à la lumière des engagements internationaux du Canada, du rôle de l'art. 117 au sein de la *LIPR*, des objets de la *LIPR*, de l'historique de l'art. 117 et des débats parlementaires.

La portée de l'art. 117 est excessive et empiète sur un comportement sans lien avec son objectif. Il n'est pas possible de contourner le problème de la portée excessive en donnant au par. 117(1) une interprétation qui soustrairait de son champ d'application les personnes qui fournissent de l'aide humanitaire, s'assistent mutuellement ou aident des membres de leur famille. Une telle interprétation obligerait la Cour à faire fi du sens ordinaire des mots employés au par. 117(1), qui prévoit sans la moindre ambiguïté que commet une infraction quiconque « organise [...] ou incite, aide ou encourage » des sans-papiers à entrer au Canada. Faire droit à cette proposition contreviendrait à la règle d'interprétation des lois portant que les termes employés dans la disposition doivent être interprétés en suivant leur sens grammatical et ordinaire. Il faudrait également ne pas tenir compte des déclarations tenues lors des débats législatifs, qui tendaient à indiquer que le législateur savait que la disposition avait une portée excessive.

Le législateur savait, lorsqu'il a promulgué l'art. 117, que la portée de cette disposition excédait son objet parce qu'elle faisait entrer dans son champ d'application les personnes qui accomplissent des actes d'aide humanitaire, d'assistance mutuelle ou d'entraide familiale en faveur de demandeurs d'asile entrant au Canada. Il a affirmé que cette portée excessive ne posait aucun problème parce que le procureur général du Canada n'autoriserait pas la poursuite de ces personnes. Le paragraphe 117(4), qui exige que le procureur général autorise des poursuites, ne règle pas le problème de portée excessive que crée le par. 117(1). Le pouvoir discrétionnaire du ministre, qu'il soit exercé consciencieusement ou non, n'empêche pas que le par. 117(1) criminalise un comportement que le législateur ne visait pas, ni que des personnes que le législateur ne voulait pas poursuivre risquent d'être poursuivies,

a person who assists a family member or who provides mutual or humanitarian assistance to an asylum-seeker entering Canada faces a possibility of imprisonment.

Section 117 of the *IRPA* is overbroad and this overbreadth cannot be justified under s. 1 of the *Charter*. While the objective of s. 117 is clearly pressing and substantial and some applications of s. 117 are rationally connected to the legislative object, the provision fails the minimal impairment branch of the s. 1 analysis. It follows that s. 117 is of no force or effect to the extent of its inconsistency with the *Charter*. The extent of the inconsistency that has been proven is the overbreadth of s. 117 in relation to three categories of conduct: (1) humanitarian aid to undocumented entrants, (2) mutual aid amongst asylum-seekers, and (3) assistance to family entering without the required documents. In this case, the preferable remedy is to read down s. 117 of the *IRPA*, as it was at the time of the alleged offences, as not applying to persons providing humanitarian aid to asylum-seekers or to asylum-seekers who provide each other mutual aid (including aid to family members), to bring it in conformity with the *Charter*. This remedy reconciles the former s. 117 with the requirements of the *Charter* while leaving the prohibition on human smuggling for the relevant period in place.

In view of the conclusion that s. 117 is overbroad, it is unnecessary to consider the argument that s. 117 offends s. 7 of the *Charter* by depriving persons of liberty in a manner that violates the principles of fundamental justice against gross disproportionality and vagueness.

Cases Cited

Referred to: *B010 v. Canada (Citizenship and Immigration)*, 2015 SCC 58, [2015] 3 S.C.R. 704; *Singh v. Minister of Employment and Immigration*, [1985] 1 S.C.R. 177; *Re B.C. Motor Vehicle Act*, [1985] 2 S.C.R. 486; *Canada (Attorney General) v. Bedford*, 2013 SCC 72, [2013] 3 S.C.R. 1101; *Carter v. Canada (Attorney General)*, 2015 SCC 5, [2015] 1 S.C.R. 331; *R. v. Nur*, 2015 SCC 15, [2015] 1 S.C.R. 773; *R. v. Chartrand*, [1994] 2 S.C.R. 864;

déclarées coupables et emprisonnées. Dans la mesure où cette disposition est encore susceptible d'application, et dans la mesure où il n'est pas impossible que le procureur général consente à intenter des poursuites, les personnes qui aident un membre de leur famille, celles qui fournissent de l'aide humanitaire à un demandeur d'asile entrant au Canada ou encore les demandeurs d'asile qui s'assistent mutuellement risquent l'emprisonnement.

L'article 117 de la *LIPR* a une portée excessive et cette portée excessive n'est pas justifiée au regard de l'article premier de la *Charte*. Bien que l'objectif de l'art. 117 soit clairement urgent et réel et qu'il existe un lien rationnel entre l'objectif poursuivi par le législateur et certaines applications de cette disposition, celle-ci ne satisfait pas au volet de l'atteinte minimale de l'analyse fondée sur l'article premier. Par conséquent, l'art. 117 est inopérant dans la mesure de son incompatibilité avec la *Charte*. L'incompatibilité qui a été démontrée concerne la portée excessive de l'art. 117 relativement à trois catégories d'actes, soit (1) l'aide humanitaire à des sans-papiers, (2) l'assistance mutuelle entre demandeurs d'asile et (3) l'aide fournie par une personne à un membre de sa famille qui entre au Canada sans être muni des documents requis. En l'espèce, il est préférable de donner à l'art. 117 de la *LIPR* — tel qu'il était libellé au moment des infractions reprochées — une interprétation atténuée qui exclut de son champ d'application les personnes qui fournissent de l'aide humanitaire à des demandeurs d'asile ou les demandeurs d'asile qui s'assistent mutuellement (y compris en aidant des membres de leur famille), en vue d'assurer la conformité de la disposition avec la *Charte*. Cette réparation permet de concilier l'ancien art. 117 avec les impératifs de la *Charte* et de conserver, pendant la période pertinente, l'interdiction applicable au passage de clandestins.

Compte tenu de la conclusion selon laquelle l'art. 117 a une portée excessive, il est inutile d'examiner l'argument voulant que l'art. 117 contrevienne à l'art. 7 de la *Charte* parce qu'il prive des personnes de leur liberté d'une manière qui viole les principes de justice fondamentale interdisant le caractère totalement disproportionné et l'imprécision.

Jurisprudence

Arrêts mentionnés : *B010 c. Canada (Citoyenneté et Immigration)*, 2015 CSC 58, [2015] 3 R.C.S. 704; *Singh c. Ministre de l'Emploi et de l'Immigration*, [1985] 1 R.C.S. 177; *Renvoi sur la Motor Vehicle Act (C.-B.)*, [1985] 2 R.C.S. 486; *Canada (Procureur général) c. Bedford*, 2013 CSC 72, [2013] 3 R.C.S. 1101; *Carter c. Canada (Procureur général)*, 2015 CSC 5, [2015] 1 R.C.S. 331; *R. c. Nur*, 2015 CSC 15, [2015] 1 R.C.S. 773; *R. c. Chartrand*,

R. v. Heywood, [1994] 3 S.C.R. 761; *R. v. Hape*, 2007 SCC 26, [2007] 2 S.C.R. 292; *Németh v. Canada (Justice)*, 2010 SCC 56, [2010] 3 S.C.R. 281; *Febles v. Canada (Citizenship and Immigration)*, 2014 SCC 68, [2014] 3 S.C.R. 431; *Application under s. 83.28 of the Criminal Code (Re)*, 2004 SCC 42, [2004] 2 S.C.R. 248; *Global Securities Corp. v. British Columbia (Securities Commission)*, 2000 SCC 21, [2000] 1 S.C.R. 494; *R. v. Gladue*, [1999] 1 S.C.R. 688; *Reference re Firearms Act (Can.)*, 2000 SCC 31, [2000] 1 S.C.R. 783; *R. v. Anderson*, 2014 SCC 41, [2014] 2 S.C.R. 167; *R. v. Oakes*, [1986] 1 S.C.R. 103; *R. v. Edwards Books and Art Ltd.*, [1986] 2 S.C.R. 713; *Schachter v. Canada*, [1992] 2 S.C.R. 679.

Statutes and Regulations Cited

Act to amend the Immigration Act, S.C. 1902, c. 14, s. 2.
Act to amend The Immigration Act, S.C. 1919, c. 25, s. 12(4).
Act to amend the Immigration Act and the Criminal Code in consequence thereof, R.S.C. 1985, c. 29 (4th Supp.), ss. 1, 9.
Canadian Charter of Rights and Freedoms, ss. 1, 7.
Constitution Act, 1982, s. 52.
Crimes Against Humanity and War Crimes Act, S.C. 2000, c. 24.
Foreign Extraterritorial Measures Act, R.S.C. 1985, c. F-29.
Freezing Assets of Corrupt Foreign Officials Act, S.C. 2011, c. 10.
Geneva Conventions Act, R.S.C. 1985, c. G-3.
Immigration Act, R.S.C. 1906, c. 93, ss. 65, 66.
Immigration and Refugee Protection Act, S.C. 2001, c. 27, ss. 3, 37(1)(b), Part 3, 117 [am. 2012, c. 17, s. 41], 118, 121, 133.
Protecting Canada's Immigration System Act, S.C. 2012, c. 17, s. 41(1), (4).
Special Economic Measures Act, S.C. 1992, c. 17.

Treaties and Other International Instruments

Convention relating to the Status of Refugees, 189 U.N.T.S. 150, arts. 31(1), 33.
Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention against Transnational Organized Crime, 2241 U.N.T.S. 480, arts. 2, 3(a), 6(1), (3), (4), 19(1).
Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing

[1994] 2 R.C.S. 864; R. c. Heywood, [1994] 3 R.C.S. 761; *R. c. Hape*, 2007 CSC 26, [2007] 2 R.C.S. 292; *Németh c. Canada (Justice)*, 2010 CSC 56, [2010] 3 R.C.S. 281; *Febles c. Canada (Citoyenneté et Immigration)*, 2014 CSC 68, [2014] 3 R.C.S. 431; *Demande fondée sur l'art. 83.28 du Code criminel (Re)*, 2004 CSC 42, [2004] 2 R.C.S. 248; *Global Securities Corp. c. Colombie-Britannique (Securities Commission)*, 2000 CSC 21, [2000] 1 R.C.S. 494; *R. c. Gladue*, [1999] 1 R.C.S. 688; *Renvoi relatif à la Loi sur les armes à feu (Can.)*, 2000 CSC 31, [2000] 1 R.C.S. 783; *R. c. Anderson*, 2014 CSC 41, [2014] 2 R.C.S. 167; *R. c. Oakes*, [1986] 1 R.C.S. 103; *R. c. Edwards Books and Art Ltd.*, [1986] 2 R.C.S. 713; *Schachter c. Canada*, [1992] 2 R.C.S. 679.

Lois et règlements cités

Acte modifiant l'Acte d'immigration, S.C. 1902, c. 14, art. 2.
Charte canadienne des droits et libertés, art. 1, 7.
Loi constitutionnelle de 1982, art. 52.
Loi de l'immigration, S.R.C. 1906, c. 93, art. 65, 66.
Loi modifiant la Loi de l'Immigration, S.C. 1919, c. 25, art. 12(4).
Loi modifiant la Loi sur l'immigration et apportant des modifications corrélatives au Code criminel, L.R.C. 1985, c. 29 (4^e suppl.), art. 1, 9.
Loi sur l'immigration et la protection des réfugiés, L.C. 2001, c. 27, art. 3, 37(1)b), partie 3, 117 [mod. 2012, c. 17, art. 41], 118, 121, 133.
Loi sur le blocage des biens de dirigeants étrangers corrompus, L.C. 2011, c. 10.
Loi sur les conventions de Genève, L.R.C. 1985, c. G-3.
Loi sur les crimes contre l'humanité et les crimes de guerre, L.C. 2000, c. 24.
Loi sur les mesures économiques spéciales, L.C. 1992, c. 17.
Loi sur les mesures extraterritoriales étrangères, L.R.C. 1985, c. F-29.
Loi visant à protéger le système d'immigration du Canada, L.C. 2012, c. 17, art. 41(1), (4).

Traité et autres instruments internationaux

Convention des Nations Unies contre la criminalité transnationale organisée, 2225 R.T.N.U. 209, art. 1, 5, 34.
Convention relative au statut des réfugiés, 189 R.T.N.U. 150, art. 31(1), 33.
Protocole additionnel à la Convention des Nations Unies contre la criminalité transnationale organisée visant à prévenir, réprimer et punir la traite des personnes, en particulier des femmes et des enfants, 2237 R.T.N.U. 319.

the United Nations Convention against Transnational Organized Crime, 2237 U.N.T.S. 319.

United Nations Convention against Transnational Organized Crime, 2225 U.N.T.S. 209, arts. 1, 5, 34.

Authors Cited

Canada. House of Commons. *House of Commons Debates*, vol. VII, 2nd Sess., 33rd Parl., August 12, 1987, p. 8002.

Canada. House of Commons. *Minutes of Proceedings and Evidence of the Legislative Committee on Bill C-84: An Act to amend the Immigration Act, 1976 and the Criminal Code in consequence thereof*, No. 9, 2nd Sess., 33rd Parl., August 25, 1987, p. 24.

Canada. House of Commons. Standing Committee on Citizenship and Immigration. *Evidence*, No. 27, 1st Sess., 37th Parl., May 17, 2001 (online: <http://www.parl.gc.ca/HousePublications/Publication.aspx?Language=E&Mode=1&Parl=37&Ses=1&DocId=1040838&File=0>), 10:35.

Sullivan, Ruth. *Sullivan on the Construction of Statutes*, 6th ed. Markham, Ont.: LexisNexis, 2014.

APPEALS from a judgment of the British Columbia Court of Appeal (Neilson, Bennett and Hinkson J.J.A.), 2014 BCCA 163, 355 B.C.A.C. 98, 607 W.A.C. 98, 373 D.L.R. (4th) 1, 310 C.C.C. (3d) 193, 11 C.R. (7th) 154, 308 C.R.R. (2d) 293, 25 Imm. L.R. (4th) 1, [2014] B.C.J. No. 762 (QL), 2014 CarswellBC 1135 (WL Can.), setting aside the orders of Silverman J. and directing a new trial, 2013 BCSC 31, 358 D.L.R. (4th) 666, 275 C.R.R. (2d) 1, 99 C.R. (6th) 245, 13 Imm. L.R. (4th) 207, [2013] B.C.J. No. 35 (QL), 2013 CarswellBC 15 (WL Can.); and 2013 BCSC 198, [2013] B.C.J. No. 217 (QL), 2013 CarswellBC 299 (WL Can.). Appeals allowed and charges remitted for trial.

Fiona Begg and Maria Sokolova, for the appellant Francis Anthonimuthu Appulonappa.

Peter H. Edelmann and Jennifer Ellis, for the appellant Hamalraj Handasamy.

Micah B. Rankin and Phillip C. Rankin, for the appellant Jeyachandran Kanagarajah.

Gregory P. DelBigio, Q.C., and *Lisa Sturgess*, for the appellant Vignarajah Thevarajah.

Protocole contre le trafic illicite de migrants par terre, air et mer, additionnel à la Convention des Nations Unies contre la criminalité transnationale organisée, 2241 R.T.N.U. 480, art. 2, 3a), 6(1), (3), (4), 19(1).

Doctrine et autres documents cités

Canada. Chambre des communes. Comité permanent de la citoyenneté et de l'immigration. *Témoignages*, n° 27, 1^{re} sess., 37^e lég., 17 mai 2001 (en ligne : <http://www.parl.gc.ca/HousePublications/Publication.aspx?Mode=1&Parl=37&Ses=1&DocId=1040838&File=0&Language=F>), 10 h 35.

Canada. Chambre des communes. *Débats de la Chambre des communes*, vol. VII, 2^e sess., 33^e lég., 12 août 1987, p. 8002.

Canada. Chambre des communes. *Procès-verbaux et témoignages du Comité législatif sur le projet de loi C-84 : Loi modifiant la Loi sur l'Immigration de 1976 et apportant des modifications corrélatives au Code criminel*, n° 9, 2^e sess., 33^e lég., 25 août 1987, p. 24.

Sullivan, Ruth. *Sullivan on the Construction of Statutes*, 6th ed., Markham (Ont.), LexisNexis, 2014.

POURVOIS contre un arrêt de la Cour d'appel de la Colombie-Britannique (les juges Neilson, Bennett et Hinkson), 2014 BCCA 163, 355 B.C.A.C. 98, 607 W.A.C. 98, 373 D.L.R. (4th) 1, 310 C.C.C. (3d) 193, 11 C.R. (7th) 154, 308 C.R.R. (2d) 293, 25 Imm. L.R. (4th) 1, [2014] B.C.J. No. 762 (QL), 2014 CarswellBC 1135 (WL Can.), qui a annulé les ordonnances du juge Silverman et ordonné la tenue d'un nouveau procès, 2013 BCSC 31, 358 D.L.R. (4th) 666, 275 C.R.R. (2d) 1, 99 C.R. (6th) 245, 13 Imm. L.R. (4th) 207, [2013] B.C.J. No. 35 (QL), 2013 CarswellBC 15 (WL Can.); et 2013 BCSC 198, [2013] B.C.J. No. 217 (QL), 2013 CarswellBC 299 (WL Can.). Pourvois accueillis et accusations renvoyées au tribunal de première instance pour être jugées.

Fiona Begg et Maria Sokolova, pour l'appellant Francis Anthonimuthu Appulonappa.

Peter H. Edelmann et Jennifer Ellis, pour l'appellant Hamalraj Handasamy.

Micah B. Rankin et Phillip C. Rankin, pour l'appellant Jeyachandran Kanagarajah.

Gregory P. DelBigio, c.r., et *Lisa Sturgess*, pour l'appellant Vignarajah Thevarajah.

W. Paul Riley, Q.C., and Banafsheh Sokhansanj, for the respondent.

Hart Schwartz and Padraic Ryan, for the intervener the Attorney General of Ontario.

Chantal Tie, Laïla Demirdache and Michael Bossin, for the intervener Amnesty International (Canadian Section, English Branch).

Marlys A. Edwardh and Daniel Sheppard, for the intervener the British Columbia Civil Liberties Association.

Andrew I. Nathanson and Gavin Cameron, for the intervener the Canadian Civil Liberties Association.

Angus Grant, Catherine Bruce, Laura Best and Fadi Yachoua, for the intervener the Canadian Council for Refugees.

Andrew J. Brouwer, Jennifer Bond and Erin Bobkin, for the intervener the Canadian Association of Refugee Lawyers.

The judgment of the Court was delivered by

THE CHIEF JUSTICE —

I. Introduction

[1] On October 17, 2009, a vessel called the *Ocean Lady* was apprehended off the west coast of Vancouver Island, in British Columbia. Seventy-six people, among them the appellants, were aboard. All were Tamils from Sri Lanka. They claimed to have fled Sri Lanka because their lives were endangered in the aftermath of the civil war in that country. They asked for refugee status in Canada. None had the required legal documentation.

[2] The Crown claims that the four appellants — the captain and chief crew of the vessel — were the organizers of the venture. The Crown alleges that the majority of passengers each paid, or promised to pay, \$30,000 to \$40,000 for the voyage.

W. Paul Riley, c.r., et Banafsheh Sokhansanj, pour l'intimée.

Hart Schwartz et Padraic Ryan, pour l'intervenant le procureur général de l'Ontario.

Chantal Tie, Laïla Demirdache et Michael Bossin, pour l'intervenante Amnesty International (Canadian Section, English Branch).

Marlys A. Edwardh et Daniel Sheppard, pour l'intervenante l'Association des libertés civiles de la Colombie-Britannique.

Andrew I. Nathanson et Gavin Cameron, pour l'intervenante l'Association canadienne des libertés civiles.

Angus Grant, Catherine Bruce, Laura Best et Fadi Yachoua, pour l'intervenant le Conseil canadien pour les réfugiés.

Andrew J. Brouwer, Jennifer Bond et Erin Bobkin, pour l'intervenante l'Association canadienne des avocats et avocates en droit des réfugiés.

Version française du jugement de la Cour rendu par

LA JUGE EN CHEF —

I. Introduction

[1] Le 17 octobre 2009, l'*Ocean Lady* a été intercepté au large de la côte ouest de l'île de Vancouver, en Colombie-Britannique, avec à son bord 76 personnes, dont les appelants. Tous des Tamouls du Sri Lanka, ils ont affirmé avoir fui leur pays parce que leur vie était en danger au lendemain de la guerre civile. Ils ont demandé l'asile au Canada. Aucun d'eux n'était muni des documents juridiques requis.

[2] Selon le ministère public, les quatre appelants — le capitaine et les principaux membres de l'équipage du bateau — avaient organisé l'affaire. Le ministère public fait valoir que la majorité des passagers avait payé, ou promis de payer, entre 30 000 \$ et 40 000 \$ chacun pour la traversée.

[3] The appellants were charged under s. 117 of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (“*IRPA*”), which makes it an offence to “organize, induce, aid or abet” the coming into Canada of people in contravention of the *IRPA*. Consequences of conviction could include lengthy imprisonment and disqualification from consideration as a refugee.

[4] Before their trial, the appellants challenged the constitutionality of s. 117 of the *IRPA*, on the ground that it infringes the right to life, liberty and security of the person enshrined in s. 7 of the *Canadian Charter of Rights and Freedoms*. The trial judge ruled that the provision was unconstitutional because it criminalized not only organized people smuggling, but helping close family members to come to Canada and humanitarian assistance to refugees. The British Columbia Court of Appeal reversed that decision, and found the provision to be constitutional.

[5] For the reasons that follow, I conclude that, insofar as s. 117 permits prosecution for humanitarian aid to undocumented entrants, mutual assistance amongst asylum-seekers or assistance to family members, it is unconstitutional.

II. Facts and Judicial History

A. *Facts*

[6] Canadian authorities intercepted the freighter ship *Ocean Lady* offshore of Vancouver Island. They found 76 passengers aboard; all were Tamil asylum-seekers from Sri Lanka who had boarded the ship in Southeast Asia: 24 boarded the ship in Indonesia between June and August 2009, and 52 in Thailand in September 2009. None of the 76 migrants had the proper documentation to enter Canada. Most had agreed to pay a sum of between \$30,000 and \$40,000 to come to Canada. Typically, down payments of \$5,000 were exacted prior to

[3] Les appelants ont été accusés en vertu de l’art. 117 de la *Loi sur l’immigration et la protection des réfugiés*, L.C. 2001, c. 27 (« *LIPR* »), selon lequel commet une infraction quiconque « organise » l’entrée au Canada d’une personne en contravention à la *LIPR* « ou incite, aide ou encourage » une telle personne à entrer au Canada. Un verdict de culpabilité peut, entre autres conséquences, emporter une longue peine d’emprisonnement et faire obstacle à une demande d’asile.

[4] Avant leur procès, les appelants ont contesté la constitutionnalité de l’art. 117 de la *LIPR*, au motif qu’il viole le droit à la vie, à la liberté et à la sécurité de la personne garanti par l’art. 7 de la *Charte canadienne des droits et libertés*. Selon le juge du procès, l’art. 117 est inconstitutionnel parce qu’il criminalise non seulement le passage organisé de clandestins, mais également le fait d’aider un proche parent à entrer au Canada ainsi que le fait de fournir de l’aide humanitaire à des demandeurs d’asile. La Cour d’appel de la Colombie-Britannique a infirmé cette décision, jugeant la disposition constitutionnelle.

[5] Pour les motifs qui suivent, je conclus que, dans la mesure où l’art. 117 permet que soient intentées des poursuites reprochant des actes d’aide humanitaire en faveur de sans-papiers, d’assistance mutuelle entre demandeurs d’asile ou d’aide fournie par une personne à des membres de sa famille, il est inconstitutionnel.

II. Les faits et les décisions des tribunaux inférieurs

A. *Les faits*

[6] Les autorités canadiennes ont intercepté l’*Ocean Lady*, un cargo, au large des côtes de l’île de Vancouver. Elles y ont trouvé 76 passagers; tous étaient des demandeurs d’asile tamouls du Sri Lanka qui avaient embarqué en Asie du Sud-Est : 24 en Indonésie entre juin et août 2009 et 52 en Thaïlande en septembre 2009. Aucun n’était muni des documents requis pour entrer au Canada. La plupart avaient accepté de payer entre 30 000 \$ et 40 000 \$ pour venir au Canada. Généralement, un versement initial de 5 000 \$ avait été exigé avant l’embarquement, ainsi

boarding, together with undertaking a debt of another \$25,000 to \$35,000 to be paid subsequent to arrival in Canada.

[7] The four appellants, Francis Anthonimuthu Appulonappa, Hamalraj Handasamy, Jeyachandran Kanagarajah and Vignarajah Thevarajah, are alleged to have been the point persons for a transnational for-profit operation to smuggle undocumented migrants from Southeast Asia to Canada. They are said to have been responsible for organizing the asylum-seekers in Indonesia and Thailand prior to boarding the freighter, and serving as the chief crew of the ship on the voyage to Canada — Mr. Handasamy as captain, Mr. Thevarajah as chief engineer, and Mr. Kanagarajah and Mr. Appulonappa as key crew members.

[8] The appellants were charged with the offence of “Organizing entry into Canada” found in s. 117 of the *IRPA*, which, at the relevant time, provided:

117. (1) No person shall knowingly organize, induce, aid or abet the coming into Canada of one or more persons who are not in possession of a visa, passport or other document required by this Act.

[9] The *IRPA* was amended by the *Protecting Canada’s Immigration System Act*, S.C. 2012, c. 17, ss. 41(1) and 41(4), whereby s. 117(1) was replaced by a new subsection and two subsections were added, which came into force on December 15, 2012. Section 117 as it was at the time of the alleged offences of the appellants is therefore no longer in force. The constitutionality of the current s. 117 is not before us.

B. *British Columbia Supreme Court, 2013 BCSC 31, 358 D.L.R. (4th) 666*

[10] The appellants brought an application before Silverman J. on a *voir dire* for a declaration that s. 117 of the *IRPA* is unconstitutionally overbroad. They did not contend that s. 117 is unconstitutional as it applies to the allegations against them, which are that they were part of a for-profit smuggling operation. However, they argued that s. 117 is

qu’un engagement pour le paiement d’une dette de 25 000 \$ à 35 000 \$ dont les passagers devaient s’acquitter après leur arrivée au Canada.

[7] Les quatre appelants, Francis Anthonimuthu Appulonappa, Hamalraj Handasamy, Jeyachandran Kanagarajah et Vignarajah Thevarajah, auraient été les hommes de terrain d’une opération transnationale à but lucratif visant à faire passer des sans-papiers de l’Asie du Sud-Est au Canada. Ils auraient organisé les demandeurs d’asile en Indonésie et en Thaïlande avant leur embarquement et auraient constitué les membres d’équipage principaux du navire pendant la traversée vers le Canada — M. Handasamy à titre de capitaine, M. Thevarajah à titre de chef mécanicien et MM. Kanagarajah et Appulonappa à titre de membres clés de l’équipage.

[8] Les appelants ont été accusés d’« entrée illégale » en vertu de l’art. 117 de la *LIPR*, lequel disposait, à la date pertinente :

117. (1) Commet une infraction quiconque sciemment organise l’entrée au Canada d’une ou plusieurs personnes non munies des documents — passeport, visa ou autre — requis par la présente loi ou incite, aide ou encourage une telle personne à entrer au Canada.

[9] La *LIPR* a été modifiée par la *Loi visant à protéger le système d’immigration du Canada*, L.C. 2012, c. 17, par. 41(1) et (4), en vertu desquels le par. 117(1) a été remplacé et deux autres paragraphes ont été ajoutés à cet article. Ces dispositions sont entrées en vigueur le 15 décembre 2012. L’article 117, tel qu’il était à l’époque des infractions que l’on reproche aux appelants, n’est donc plus en vigueur. La question de la constitutionnalité de l’art. 117 actuel ne nous a pas été soumise.

B. *Cour suprême de la Colombie-Britannique, 2013 BCSC 31, 358 D.L.R. (4th) 666*

[10] Dans le cadre d’un voir-dire, les appelants ont demandé au juge Silverman de déclarer que l’art. 117 de la *LIPR* était inconstitutionnel en raison de sa portée excessive. Ils n’ont pas fait valoir que cette disposition était inconstitutionnelle dans la mesure où elle s’appliquait aux faits qui leur sont reprochés, à savoir qu’ils faisaient partie d’une

unconstitutional because it may lead to the conviction of humanitarian workers or family members assisting asylum-seekers for altruistic reasons. They argued that convicting people in these categories exceeds the legislative intent of s. 117 and infringes the guarantee of liberty contrary to the principle of fundamental justice against overbreadth. This violation of the liberty guarantee in s. 7 of the *Charter* was not justified under s. 1 of the *Charter*, they submitted.

[11] The Crown accepted that the purpose of s. 117 was not to convict persons helping close family members come to Canada or persons providing legitimate humanitarian aid to people coming to Canada. However, it argued that this did not render s. 117 overbroad because s. 117(4) of the *IRPA* required that the Attorney General of Canada authorize prosecution, which would allow him to screen out people in these categories.

[12] Silverman J. concluded that, as the Crown contended, the purpose of s. 117 does not extend to prosecution of genuine humanitarian aid workers or family members. Because s. 117 permits the prosecution of such persons, it violates the s. 7 guarantee of liberty in a way that is overbroad, and hence not in accord with the principles of fundamental justice. Silverman J. held that s. 117 could not be interpreted or “read down” to make it *Charter* compliant and that the prior consent to prosecution required by s. 117(4) does not save s. 117 from being unconstitutionally overbroad. Nor, in his view, was the overbreadth justified under s. 1 of the *Charter*. Silverman J. therefore declared s. 117 of the *IRPA* to be inconsistent with s. 7 of the *Charter* and hence of no force or effect under s. 52 of the *Constitution Act, 1982*. He ordered that the indictments of the appellants be quashed: 2013 BCSC 198.

opération de passage de clandestins à des fins lucratives. Ils ont plutôt avancé que l’art. 117 était inconstitutionnel parce qu’il pouvait entraîner la condamnation de travailleurs humanitaires ayant aidé par altruisme des demandeurs d’asile ou de personnes ayant fait de même pour des membres de leur famille. À leur avis, incriminer de telles personnes outrepassait l’intention du législateur relativement à l’art. 117 et viole la garantie de liberté en contrevenant au principe de justice fondamentale qui interdit la portée excessive. Cette atteinte à la liberté garantie par l’art. 7 de la *Charte* n’était pas, affirment-ils, justifiée au regard de l’article premier.

[11] Le ministère public a convenu que l’objet de l’art. 117 ne consistait pas à condamner des personnes qui aident des proches parents à entrer au Canada ou qui fournissent légitimement de l’aide humanitaire à des gens qui entrent au Canada. Il a cependant affirmé que l’art. 117 n’avait pas une portée excessive pour autant, étant donné que le par. 117(4) de la *LIPR* exige que le procureur général du Canada autorise les poursuites, ce qui permet d’écarter les personnes qui appartiennent à ces catégories.

[12] Le juge Silverman a conclu, comme le soutenait le ministère public, que l’objet de l’art. 117 ne s’étendait pas à la poursuite de véritables travailleurs humanitaires ou de membres d’une famille qui s’entraident. Or, puisque l’art. 117 permet que ces personnes soient poursuivies, il viole la liberté garantie par l’art. 7 d’une manière excessive et, par conséquent, contraire aux principes de justice fondamentale. Le juge Silverman a estimé qu’on ne pouvait donner à l’art. 117 une interprétation atténuée qui serait conforme à la *Charte* et que le consentement préalable du procureur général prévu au par. 117(4) et auquel toute poursuite est subordonnée n’empêchait pas l’art. 117 d’être inconstitutionnel pour cause de portée excessive. Cette portée excessive n’était pas non plus, à son avis, justifiée au regard de l’article premier de la *Charte*. Le juge Silverman a donc déclaré l’art. 117 de la *LIPR* incompatible avec l’art. 7 de la *Charte* et inopérant en vertu de l’art. 52 de la *Loi constitutionnelle de 1982*. Il a ordonné l’annulation des actes d’accusation formulés contre les appelants (2013 BCSC 198).

C. *British Columbia Court of Appeal, 2014 BCCA 163, 355 B.C.A.C. 98*

[13] Before the Court of Appeal, the Crown changed its submission on the purpose of s. 117 of the *IRPA*. It submitted that s. 117 was enacted to prevent all organizing or assisting of unlawful entry of others into Canada, including assistance to close family members and humanitarian assistance. This, the Crown said, was required to further Canada's goals of (1) controlling who enters its territory; (2) protecting the health, safety, and security of Canadians; (3) preserving the integrity and efficacy of Canada's lawful immigration and refugee claims regimes; and (4) promoting international justice and cooperation with other states on matters of security.

[14] The Court of Appeal accepted this revised submission as the purpose of s. 117 of the *IRPA* and on that basis held it to be constitutional. Neilson J.A. (Bennett and Hinkson JJ.A. concurring) concluded that Canadian laws criminalizing assistance to undocumented migrants have not historically allowed exceptions based on the offender's motive or other characteristics. When the provision at issue was enacted in 1988, the question of whether humanitarian workers should be exempted received attention, but Parliament, concerned about "definitional difficulties" and "loopholes", rejected creating an exception for these groups: para. 107. The purpose of s. 117 therefore aligned with its reach, and the provision was not overbroad.

[15] The court added that the s. 117(4) requirement of the Attorney General's consent to prosecute would guard against improper prosecutions on humanitarian grounds, family grounds or other grounds. If the Attorney General were to authorize prosecution of people assisting close family members or providing humanitarian assistance, the vice would not be overbreadth of s. 117(1), but the

C. *Cour d'appel de la Colombie-Britannique, 2014 BCCA 163, 355 B.C.A.C. 98*

[13] Devant la Cour d'appel, le ministère public a modifié son argument concernant l'objet de l'art. 117 de la *LIPR*. Il a fait valoir que cette disposition avait été adoptée afin d'interdire toute organisation d'entrée illégale au Canada et toute aide à l'entrée illégale au Canada, y compris l'aide humanitaire et l'assistance fournie par une personne à de proches parents, ce qui, selon le ministère public, permettait de favoriser la réalisation des objectifs suivants du Canada : (1) le droit de regard sur les entrées sur son territoire; (2) la protection de la santé des Canadiens et la garantie de leur sécurité; (3) le maintien de l'intégrité et de l'efficacité des régimes légitimes d'immigration et d'asile du Canada et (4) la promotion de la justice et de la coopération à l'échelle internationale relativement aux questions de sécurité.

[14] La Cour d'appel a accepté cet argument modifié concernant l'objet de l'art. 117 de la *LIPR* et, sur ce fondement, a conclu à la constitutionnalité de la disposition. Selon la juge Neilson (avec l'accord des juges Bennett et Hinkson), historiquement, les lois canadiennes qui ont criminalisé l'aide aux sans-papiers n'ont jamais prévu d'exception fondée sur le mobile du contrevenant ou d'autres caractéristiques. En 1988, à l'époque de l'adoption de la disposition en cause, la création d'une exception visant les travailleurs humanitaires a été envisagée, mais le législateur, soucieux [TRADUCTION] « des difficultés que présentent les définitions » et des « failles », l'a rejetée (par. 107). La cour estimait que l'objet de l'art. 117 s'accordait avec sa portée, et que cette disposition n'avait pas une portée excessive.

[15] La cour a ajouté que le consentement du procureur général exigé au par. 117(4) préalablement à une poursuite permettait d'éviter des poursuites injustifiées contre des personnes ayant agi pour des raisons d'ordre humanitaire, familial ou autre. Si le procureur général autorisait la poursuite de quiconque a aidé des parents proches ou fourni de l'aide humanitaire, le défaut serait attribuable, non

improper exercise of ministerial discretion under s. 117(4).

[16] In the result, the Court of Appeal allowed the appeal, overturned the declaration of invalidity, set aside the acquittals and remitted the matter for trial.

III. The Statutory Scheme

[17] The *IRPA* (relevant provisions set out in Appendix A) is a complex statute dealing with the entry into Canada of foreign nationals through two processes — the immigration process and the refugee protection process. We are here concerned primarily with the refugee protection process. The *IRPA* aims to establish “fair and efficient [refugee] procedures that will maintain the integrity of the Canadian refugee protection system, while upholding Canada’s respect for the human rights and fundamental freedoms of all human beings”: s. 3(2)(e). Both goals are underpinned by Canada’s adhesion to international conventions and protocols, discussed more fully below.

[18] A significant concern for the integrity of Canada’s refugee protection system is the threat posed to it by the entry to Canada of unauthorized persons outside the lawful refugee regime. As part of combating this threat, the *IRPA* contains two provisions which sanction individuals for helping others to enter Canada without the documents required by border authorities.

[19] Section 37(1)(b) of the *IRPA* renders a person inadmissible to Canada where the person has “engag[ed], in the context of transnational crime”, in people smuggling, and, in effect, prevents that person’s refugee claim from being determined on its merits. Section 117, under the marginal note “Organizing entry into Canada”, creates an offence. At the relevant time, it read:

117. (1) No person shall knowingly organize, induce, aid or abet the coming into Canada of one or more persons

pas à la portée excessive du par. 117(1), mais à l’exercice irrégulier du pouvoir discrétionnaire que le par. 117(4) accorde au ministre.

[16] En conséquence, la Cour d’appel a accueilli l’appel, infirmé la déclaration d’invalidité, annulé les acquittements et renvoyé l’affaire pour qu’elle soit jugée en première instance.

III. Le régime législatif

[17] La *LIPR* (dont les dispositions pertinentes figurent à l’annexe A) est un instrument complexe qui encadre l’entrée au Canada de ressortissants étrangers par deux filières : celle de l’immigration et celle de la protection des réfugiés. Le présent pourvoi porte principalement sur la seconde. La *LIPR* vise à mettre en place à l’intention des réfugiés « une procédure équitable et efficace qui soit respectueuse, d’une part, de l’intégrité du processus canadien d’asile et, d’autre part, des droits et des libertés fondamentales reconnus à tout être humain » (al. 3(2)e)). Ces deux objectifs reposent sur l’adhésion du Canada à des conventions et protocoles internationaux que nous examinerons davantage plus loin.

[18] Un important risque pour l’intégrité du processus canadien de protection des réfugiés est l’entrée au Canada de personnes non autorisées qui contournent ce régime légitime. Pour lutter contre une telle menace, la *LIPR* prévoit deux dispositions qui sanctionnent les personnes qui en aident d’autres à entrer au Canada sans être munies des documents requis par les autorités frontalières.

[19] L’alinéa 37(1)b) de la *LIPR* a pour effet d’interdire une personne de territoire si elle s’est livrée, « dans le cadre de la criminalité transnationale », au passage de clandestins et fait obstacle à l’examen au fond de sa demande d’asile. L’article 117, placé sous la note marginale « Entrée illégale », crée une infraction. Il était ainsi rédigé à la date pertinente :

117. (1) Commet une infraction quiconque sciemment organise l’entrée au Canada d’une ou plusieurs

who are not in possession of a visa, passport or other document required by this Act.¹

[20] Sections 117(2) and 117(3) provide penalties of imprisonment and fines. At the time of the charges at issue in this case, s. 121(1)(c) of the *IRPA* under the marginal note “Aggravating factors”, stipulated that committing the offence for profit was a fact to be considered in sentencing under s. 117.²

[21] Subsection (4) provides a screening mechanism for instituting proceedings under s. 117 — prosecutions can proceed only with the consent of the Attorney General.

[22] In summary, participating in the unauthorized entry of other people into Canada may have two consequences under the *IRPA*. First, it may result in prosecution and imprisonment and/or substantial fines upon conviction under s. 117. Second, it may render a person who engages in certain proscribed activities inadmissible to Canada under s. 37(1)(b). The first consequence — prosecution under s. 117 — is the subject of this appeal. The second consequence — inadmissibility to Canada — is the subject of the companion appeals in *B010 v. Canada (Citizenship and Immigration)*, 2015 SCC 58, [2015] 3 S.C.R. 704.

IV. The Issues

[23] The *Charter* applies to foreign nationals entering Canada without the required documentation: *Singh v. Minister of Employment and Immigration*, [1985] 1 S.C.R. 177. Section 7 of the *Charter* provides:

1 The current version reads: “No person shall organize, induce, aid or abet the coming into Canada of one or more persons knowing that, or being reckless as to whether, their coming into Canada is or would be in contravention of this Act.”

2 In the current version of the *IRPA*, the content of this provision, as amended, is now contained in s. 117 itself.

personnes non munies des documents — passeport, visa ou autre — requis par la présente loi ou incite, aide ou encourage une telle personne à entrer au Canada¹.

[20] Les paragraphes 117(2) et (3) prévoient des peines d’emprisonnement et des amendes. À l’époque des accusations, aux termes de l’al. 121(1)c) de la *LIPR*, dont la note marginale indiquait « Infliction de la peine », le tribunal devait tenir compte, pour la détermination de la peine visée à l’art. 117, du fait que l’infraction avait été perpétrée en vue d’en tirer un profit².

[21] Le paragraphe 117(4) prévoit un mécanisme de filtrage : les poursuites sont subordonnées au consentement du procureur général.

[22] Bref, participer à l’entrée non autorisée d’autres personnes au Canada peut entraîner deux conséquences sous le régime de la *LIPR*. Premièrement, l’acte est susceptible de mener à des poursuites, et une déclaration de culpabilité sur le fondement de l’art. 117 risque de se traduire par une peine d’emprisonnement ou des amendes substantielles ou les deux. Deuxièmement, la personne qui se livre à certaines activités prohibées risque d’être interdite de territoire au Canada en vertu de l’al. 37(1)b). La première conséquence — les poursuites intentées en vertu de l’art. 117 — est l’objet du présent pourvoi. La deuxième conséquence — l’interdiction de territoire au Canada — est l’objet des pourvois connexes *B010 c. Canada (Citoyenneté et Immigration)*, 2015 CSC 58, [2015] 3 R.C.S. 704.

IV. Les questions en litige

[23] La *Charte* s’applique aux ressortissants étrangers qui entrent au Canada sans documents (*Singh c. Ministre de l’Emploi et de l’Immigration*, [1985] 1 R.C.S. 177). L’article 7 de la *Charte* dispose :

1 Le libellé de la version actuelle est le suivant : « Il est interdit à quiconque d’organiser l’entrée au Canada d’une ou de plusieurs personnes ou de les inciter, aider ou encourager à y entrer en sachant que leur entrée est ou serait en contravention avec la présente loi ou en ne se souciant pas de ce fait. »

2 Dans la version actuelle de la *LIPR*, cette disposition et ses modifications sont intégrées à l’art. 117.

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.

As a penal provision with potential sentences up to life imprisonment, it is clear that s. 117 of the *IRPA* threatens liberty and hence engages s. 7 of the *Charter*: *Re B.C. Motor Vehicle Act*, [1985] 2 S.C.R. 486, at p. 492.

[24] The main issue before us is whether s. 117 of the *IRPA* threatens liberty, protected by s. 7 of the *Charter*, in a manner contrary to the principles of fundamental justice. If the answer is yes, a second question arises: Is the infringement justified under s. 1 of the *Charter*? If the answer to this second question is no, a final question arises: What is the appropriate remedy for the constitutional infirmity in s. 117?

[25] The appellants contend that s. 117 violates s. 7 of the *Charter* because the provision catches two categories of people outside its purpose — people who assist close family members to come to Canada and humanitarians who assist those fleeing persecution to come to Canada, in each case without required documents. The appellants say that s. 117 is therefore overbroad, contrary to the principles of fundamental justice. They also argue that s. 117 offends the principles of fundamental justice because its impact on liberty is grossly disproportionate to the conduct it targets, because it is unconstitutionally vague, and because it perpetuates inequality.

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.

Comme l'art. 117 de la *LIPR* prévoit des peines pouvant aller jusqu'à l'emprisonnement à perpétuité, il constitue une menace à la liberté qui fait manifestement entrer en jeu l'art. 7 de la *Charte* (*Renvoi sur la Motor Vehicle Act (C.-B.)*, [1985] 2 R.C.S. 486, p. 492).

[24] La principale question dont nous sommes saisis est de savoir si l'art. 117 de la *LIPR* menace la liberté garantie par l'art. 7 de la *Charte* d'une manière qui est contraire aux principes de justice fondamentale. Dans l'affirmative, une deuxième question se pose : cette atteinte est-elle justifiée au regard de l'article premier de la *Charte*? Si la réponse à cette deuxième question est négative, une dernière question se pose : quelle est la réparation qu'il convient d'appliquer à l'égard de l'inconstitutionnalité de l'art. 117?

[25] Les appelants font valoir que l'art. 117 viole l'art. 7 de la *Charte* parce qu'il fait entrer dans son champ d'application deux catégories de personnes qui ne sont pas visées par son objet — les personnes qui assistent des parents proches à entrer au Canada et les travailleurs humanitaires qui aident des personnes fuyant la persécution à entrer au Canada, dans les deux cas sans les documents requis. Selon les appelants, l'art. 117 a donc une portée excessive, ce qui est contraire aux principes de justice fondamentale. Ils affirment également que la disposition enfreint les principes de justice fondamentale parce que son effet sur la liberté est exagérément disproportionné par rapport à la conduite qu'elle sanctionne, parce qu'elle est inconstitutionnelle pour cause d'imprécision et parce qu'elle perpétue l'inégalité.

V. DiscussionA. *Does Section 117 of the IRPA Violate Section 7 of the Charter?*(1) Overbreadth

[26] A law is said to violate our basic values by being overbroad when “the law goes too far and interferes with some conduct that bears no connection to its objective”: *Canada (Attorney General) v. Bedford*, 2013 SCC 72, [2013] 3 S.C.R. 1101, at para. 101. As stated in *Bedford*, “[o]verbreadth allows courts to recognize that the law is rational in some cases, but that it overreaches in its effect in others”: para. 113; see also *Carter v. Canada (Attorney General)*, 2015 SCC 5, [2015] 1 S.C.R. 331, at para. 85.

[27] The first step in the overbreadth inquiry is to determine the object of the impugned law. The second step is to determine whether the law deprives individuals of life, liberty or security of the person in cases that do not further that object. To the extent the law does this, it deprives people of s. 7 rights in a manner that infringes the principles of fundamental justice.

[28] The appellants argue that s. 117 is overbroad, not as it applies to the conduct alleged against them, but as it applies to other reasonably foreseeable situations. It is indeed established that a court may consider “reasonable hypotheticals” to determine whether a law is consistent with the *Charter*: see *R. v. Nur*, 2015 SCC 15, [2015] 1 S.C.R. 773.

[29] The first scenario the appellants ask us to consider is the situation of a person assisting a close family member to flee to Canada. The appellants cite as examples a mother carrying her small child, or the father of a household taking his family dependants with him aboard a boat. This scenario could also encompass cases of mutual assistance

V. DiscussionA. *L'article 117 de la LIPR enfreint-il l'art. 7 de la Charte?*(1) La portée excessive

[26] On dira d'une loi qu'elle viole nos valeurs fondamentales du fait de sa portée excessive lorsqu'elle « va trop loin et empiète sur un comportement sans lien avec son objectif » (*Canada (Procureur général) c. Bedford*, 2013 CSC 72, [2013] 3 R.C.S. 1101, par. 101). Comme la Cour l'indique dans l'arrêt *Bedford*, « [l']application de la notion de portée excessive permet au tribunal de reconnaître qu'une disposition est rationnelle sous certains rapports, mais que sa portée est trop grande sous d'autres » (par. 113; voir également *Carter c. Canada (Procureur général)*, 2015 CSC 5, [2015] 1 R.C.S. 331, par. 85).

[27] Dans l'analyse de la portée excessive, le premier volet sert à définir l'objet de la loi attaquée. Le deuxième vise à déterminer si la loi prive une personne de son droit à la vie, à la liberté ou à la sécurité de sa personne dans les cas où la réalisation de cet objet n'est pas favorisée. Dans la mesure où c'est le cas, la loi prive alors la personne de ses droits garantis par l'art. 7 d'une manière qui porte atteinte aux principes de justice fondamentale.

[28] Les appelants affirment que la portée de l'art. 117 est excessive, non pas dans son application à la conduite qui leur est reprochée, mais parce qu'il peut s'appliquer à d'autres situations raisonnablement prévisibles. Selon un principe bien établi, le tribunal peut tenir compte de « situations hypothétiques raisonnables » afin de déterminer si une loi est conforme à la *Charte* (voir *R. c. Nur*, 2015 CSC 15, [2015] 1 R.C.S. 773).

[29] Le premier scénario que les appelants nous demandent d'examiner est celui d'une personne qui aide un proche parent à se réfugier au Canada. Les appelants donnent l'exemple d'une mère qui porte son jeune enfant dans ses bras et celui d'un père de famille qui fait monter les personnes à sa charge avec lui à bord d'un bateau. Ce scénario pourrait

among unrelated asylum-seekers. Indeed, refugees mutually assisting one another in their collective flight to safety is not meaningfully different from family members assisting one another and, as showed by the companion case *B010*, is a reasonably foreseeable situation.

[30] The second scenario advanced by the appellants is the case of a person who, for humanitarian motives, helps people to flee from persecution. History is replete with examples of people who have aided others to flee persecution for humanitarian reasons. Sometimes the person is acting as an individual. Sometimes the person is a member of an organization devoted to helping people flee lands where they face threats and persecution. Church groups may help undocumented people find refugee protection in Canada: *House of Commons Debates*, vol. VII, 2nd Sess., 33rd Parl., August 12, 1987, at p. 8002 (Hon. Gerry Weiner, Minister of State (Immigration)). Humanitarian aid to fleeing people is not merely hypothetical; it is a past and current reality.

(a) *The Object of Section 117 of the IRPA*

[31] As discussed, overbreadth analysis turns on whether the reach of the law exceeds its object. The first step is therefore to determine the object of s. 117.

[32] The Crown argues that the purpose of s. 117 is to catch all acts that in any way assist the entry of undocumented migrants. On this interpretation, s. 117 cannot be overbroad. The appellants, by contrast, submit that the offence of “human smuggling” has a narrower purpose than the Crown asserts, making it overbroad in catching all acts of assistance.

[33] As with statutory interpretation, determining legislative purpose requires us to consider statements of legislative purpose together with the words of the provision, the legislative context, and other

s’étendre aussi aux demandeurs d’asile sans lien de parenté qui s’assistent mutuellement. En effet, la situation de demandeurs d’asile qui s’entraident au cours de leur fuite collective vers la sécurité ne diffère pas de manière significative de celle de membres d’une famille qui s’aident l’un l’autre et, comme le démontre l’arrêt connexe *B010*, c’est une situation raisonnablement prévisible.

[30] Le second scénario mis de l’avant par les appelants est celui d’une personne qui, pour des raisons d’ordre humanitaire, en aide d’autres à fuir la persécution. L’histoire regorge d’exemples de ce genre. Il arrive qu’une telle personne agisse en son nom propre. Il arrive aussi qu’elle soit membre d’une organisation qui se charge d’aider des gens à fuir des pays où ils sont exposés à des menaces et à la persécution. Il arrive que des congrégations aident des sans-papiers à obtenir l’asile au Canada (*Débats de la Chambre des communes*, vol. VII, 2^e sess., 33^e lég., 12 août 1987, p. 8002 (l’hon. Gerry Weiner, ministre d’État (Immigration))). L’aide humanitaire aux personnes qui fuient la persécution n’appartient pas à l’hypothétique; il s’agit d’une réalité tant historique que contemporaine.

a) *L’objet de l’art. 117 de la LIPR*

[31] Comme nous l’avons vu, l’analyse de la portée excessive cherche à déterminer si la portée de la loi dépasse son objet. La première étape consiste donc à circonscrire l’objet de l’art. 117.

[32] Le ministère public prétend que l’objet de l’art. 117 consiste à faire tomber sous le coup de la loi tout acte qui aide de quelque façon que ce soit des sans-papiers à entrer au Canada. Selon cette interprétation, la portée de l’art. 117 ne peut être excessive. Les appelants, en revanche, affirment que l’infraction de passage de clandestins a un objet plus restreint que celui qu’avance le ministère public, ce qui signifie que la disposition a une portée excessive du fait qu’elle criminalise tous les actes d’aide.

[33] Tout comme en matière d’interprétation législative, pour déterminer l’objet d’une loi, on doit tenir compte des énoncés faits quant à son objet, de son libellé, du contexte législatif et d’autres

relevant factors: R. Sullivan, *Sullivan on the Construction of Statutes* (6th ed. 2014), at pp. 268-87; *R. v. Chartrand*, [1994] 2 S.C.R. 864, at pp. 879-82. Where legislation is enacted in the context of international commitments, international law may also be of assistance.

[34] For the reasons that follow, I agree with the appellants that the purpose of s. 117 is narrower than that asserted by the Crown. The text of s. 117 is admittedly broad. However, a narrow purpose emerges from (1) the international instruments to which Canada has subscribed; (2) the role of s. 117 in relation to the statute as a whole, in particular s. 37(1); (3) the *IRPA*'s statements of legislative purpose; (4) the evolution of s. 117; and (5) the parliamentary debates. Considering these indicia of purpose, it becomes evident that the true purpose of s. 117 is to combat people smuggling. The meaning of "people smuggling", a term found in s. 37(1)(b) of the *IRPA*, is the subject of the companion case *B010*, and excludes mere humanitarian conduct, mutual assistance or aid to family members. I conclude that s. 117 violates the *Charter* by catching these categories of conduct outside the provision's purpose.

(i) The Text of the Provision

[35] At the relevant time, the text of s. 117 read as follows:

117. (1) [Organizing entry into Canada] No person shall knowingly organize, induce, aid or abet the coming into Canada of one or more persons who are not in possession of a visa, passport or other document required by this Act.

(2) [Penalties — fewer than 10 persons] A person who contravenes subsection (1) with respect to fewer than 10 persons is guilty of an offence and liable

(a) on conviction on indictment

(i) for a first offence, to a fine of not more than \$500,000 or to a term of imprisonment of not more than 10 years, or to both, or

facteurs pertinents (R. Sullivan, *Sullivan on the Construction of Statutes* (6^e éd. 2014), p. 268-287; *R. c. Chartrand*, [1994] 2 R.C.S. 864, p. 879-882). Il peut également être utile de consulter le droit international dans les cas où la loi est adoptée à la suite d'engagements internationaux.

[34] Pour les motifs qui suivent, je suis d'accord avec les appelants pour dire que l'objet de l'art. 117 est plus restreint que ne l'entend le ministère public. Certes, le libellé de l'art. 117 ratisse large. Or, on peut dégager un objet restreint des éléments suivants : (1) les instruments internationaux auxquels est partie le Canada; (2) le rôle de l'art. 117 à la lumière de la loi dans son ensemble et, plus particulièrement, du par. 37(1); (3) les énoncés quant à l'objet de la *LIPR*; (4) l'évolution de l'art. 117 et (5) les débats parlementaires. Il ressort de ces indices que l'objet véritable de l'art. 117 constitue la lutte contre le passage de clandestins. Le sens du terme « passage de clandestins », qui figure à l'al. 37(1)(b) de la *LIPR*, est le sujet de l'affaire connexe *B010*. Il ne vise pas de simples actes humanitaires, ni l'assistance mutuelle ou l'aide fournie par une personne à des membres de sa famille. Je conclus que l'art. 117 contrevient à la *Charte* parce qu'il fait entrer dans son champ d'application ces catégories d'actes qui outrepassent son objet.

(i) Le libellé de la disposition

[35] À l'époque pertinente, l'art. 117 était ainsi libellé :

117. (1) [Entrée illégale] Commet une infraction qui-conque sciemment organise l'entrée au Canada d'une ou plusieurs personnes non munies des documents — passeport, visa ou autre — requis par la présente loi ou incite, aide ou encourage une telle personne à entrer au Canada.

(2) [Peines] L'auteur de l'infraction visant moins de dix personnes est passible, sur déclaration de culpabilité :

a) par mise en accusation :

(i) pour une première infraction, d'une amende maximale de cinq cent mille dollars et d'un emprisonnement maximal de dix ans, ou de l'une de ces peines,

(ii) for a subsequent offence, to a fine of not more than \$1,000,000 or to a term of imprisonment of not more than 14 years, or to both; and

(b) on summary conviction, to a fine of not more than \$100,000 or to a term of imprisonment of not more than two years, or to both.

(3) [Penalty — 10 persons or more] A person who contravenes subsection (1) with respect to a group of 10 persons or more is guilty of an offence and liable on conviction by way of indictment to a fine of not more than \$1,000,000 or to life imprisonment, or to both.

(4) [No proceedings without consent] No proceedings for an offence under this section may be instituted except by or with the consent of the Attorney General of Canada.

[36] All agree that the text of s. 117(1) is broad enough to catch assistance to close family members and humanitarian assistance. It may be argued that since Parliament used these words, that is what it intended. However, the doctrine of overbreadth recognizes that sometimes “the State, in pursuing a legitimate objective, uses means which are broader than is necessary to accomplish that objective”: *R. v. Heywood*, [1994] 3 S.C.R. 761, at p. 792; *Bedford*, at para. 101; *Carter*, at para. 85. The potential for “failures of instrumental rationality”, in which a given law is not a rational means to achieve a legislative objective, requires courts to go further than the text alone, and ask whether other considerations suggest Parliament’s purpose was narrower: *Bedford*, at para. 107.

[37] Before leaving the text, it may be noted that despite the broad wording of the subsection that provides the elements of the offence (s. 117(1)), other portions of the text of s. 117 support the view that Parliament’s purpose was *not* to criminalize family or humanitarian assistance. The marginal note of s. 117, “Organizing entry into Canada”, read with the subheading “Human Smuggling and Trafficking”, while not to be accorded great weight (see Sullivan, at pp. 465-68), suggests that the provision

(ii) en cas de récidive, d’une amende maximale de un million de dollars et d’un emprisonnement maximal de quatorze ans, ou de l’une de ces peines;

b) par procédure sommaire, d’une amende maximale de cent mille dollars et d’un emprisonnement maximal de deux ans, ou de l’une de ces peines.

(3) [Peines] L’auteur de l’infraction visant un groupe de dix personnes et plus est passible, sur déclaration de culpabilité par mise en accusation, d’une amende maximale de un million de dollars et de l’emprisonnement à perpétuité, ou de l’une de ces peines.

(4) [Consentement du procureur général du Canada] Il n’est engagé aucune poursuite pour une infraction prévue au présent article sans le consentement du procureur général du Canada.

[36] Tous conviennent que le par. 117(1) est libellé en termes suffisamment larges pour s’appliquer à l’aide humanitaire ainsi qu’à l’assistance fournie par une personne à des parents proches. On pourrait faire valoir que le législateur l’entendait ainsi puisqu’il a choisi cette formulation. Or, suivant la doctrine de la portée excessive, il se peut que « dans un but légitime, l’État utilise des moyens excessifs pour atteindre cet objectif » (*R. c. Heywood*, [1994] 3 R.C.S. 761, p. 792; *Bedford*, par. 101; *Carter*, par. 85). La possibilité d’un « manque de logique fonctionnelle », soit qu’une disposition donnée ne permette pas logiquement de réaliser l’objet de la loi, commande aux tribunaux de ne pas s’en tenir uniquement au libellé et de se demander si d’autres considérations donnent à penser que l’intention du législateur était plus restreinte (*Bedford*, par. 107).

[37] Avant de conclure mes observations concernant le libellé, je signale que, malgré les termes généraux du paragraphe qui prévoit les éléments de l’infraction (par. 117(1)), d’autres parties de l’art. 117 étayent le point de vue selon lequel l’intention du législateur n’était *pas* de criminaliser l’entraide familiale ou l’aide humanitaire. La note marginale de l’art. 117, « Entrée illégale », envisagée à la lumière de la rubrique intitulée « Organisation d’entrée illégale au Canada », bien qu’il

is aimed at activity in connection with the smuggling of persons in the context of organized crime, as contrasted with providing humanitarian assistance or aiding close family members to enter a country without the required documents.³

[38] Sections 117(2) and 117(3) also support the view that Parliament's intent was to catch smuggling activity in the context of organized crime, rather than humanitarian, mutual or family assistance. These subsections provide for significantly increased sanctions based on the number of persons brought in. This suggests a heightened focus on large-scale smuggling operations.

[39] Finally, the requirement in s. 117(4) that no prosecution occur without the Attorney General's consent suggests that s. 117 was not intended to convict everyone who falls within s. 117(1)'s broad ambit, as discussed more fully below.

(ii) Canada's International Obligations

[40] As a matter of statutory interpretation, legislation is presumed to comply with Canada's international obligations, and courts should avoid

3 While the French subheading — "*Organisation d'entrée illégale au Canada*" — does not refer to smuggling or other criminality, it matches the marginal note of the English version, which falls underneath the subheading "Human Smuggling and Trafficking". Accordingly, the shared meaning rule of statutory interpretation in the case of bilingual legislation (Sullivan, at pp. 118-19) dictates that the activity of organizing illegal entry is a subset of human smuggling and trafficking. The broadest potential interpretation would therefore be that it covers either of smuggling or trafficking. More plausibly, since it is undisputed that s. 118 deals with trafficking, that leaves s. 117 as the provision that concerns smuggling.

ne faille pas y accorder beaucoup de poids (voir Sullivan, p. 465-468), donne à penser que la disposition vise les activités liées au passage de clandestins dans le contexte du crime organisé, plutôt que l'aide humanitaire apportée à quelqu'un cherchant à entrer au pays sans être muni des documents requis ou l'assistance fournie par une personne dans ce but à des parents proches³.

[38] Les paragraphes 117(2) et (3) étayaient également le point de vue selon lequel le législateur entendait que la disposition s'applique au passage de clandestins dans le contexte du crime organisé, et non à des actes d'aide humanitaire, d'assistance mutuelle ou d'entraide familiale. En effet, ces dispositions prévoient des peines alourdies pour l'auteur de l'infraction qui a fait entrer au Canada plus d'un certain nombre de personnes, ce qui suggère que l'infraction qui intéressait particulièrement le législateur était le passage organisé de clandestins à grande échelle.

[39] Enfin, le fait que le par. 117(4) subordonne toute poursuite au consentement du procureur général laisse entendre que l'art. 117 n'est pas censé donner lieu à la condamnation de tous ceux à qui les termes très généraux de son par. (1) s'appliquent, ainsi que nous le verrons plus en détail.

(ii) Les obligations internationales du Canada

[40] Suivant les règles d'interprétation des lois, la loi est présumée respecter les obligations internationales du Canada, et les tribunaux devraient éviter

3 Bien que la rubrique du texte français — « Organisation d'entrée illégale au Canada » — ne renvoie ni au passage de clandestins ni à une autre activité criminelle, elle traduit la même notion que la note marginale de la version anglaise « *Organizing entry into Canada* », qui figure sous la rubrique « *Human Smuggling and Trafficking* ». Par conséquent, la règle d'interprétation des lois selon laquelle une loi bilingue exige la recherche du sens commun aux deux versions (Sullivan, p. 118-119) commande que l'organisation d'entrée illégale soit une composante du passage de clandestins et du trafic de personnes. L'interprétation la plus large de la disposition serait qu'elle s'applique soit au passage de clandestins, soit au trafic de personnes. Vu qu'il est acquis aux débats que l'art. 118 s'applique au trafic de personnes, l'art. 117 est vraisemblablement la disposition qui s'applique au passage de clandestins.

interpretations that would violate those obligations. Courts must also interpret legislation in a way that reflects the values and principles of customary and conventional international law: *R. v. Hape*, 2007 SCC 26, [2007] 2 S.C.R. 292, at para. 53; *Németh v. Canada (Justice)*, 2010 SCC 56, [2010] 3 S.C.R. 281, at para. 34. Section 3 of the *IRPA* also requires that the *IRPA* be interpreted in a manner that complies with Canada's international obligations, including "international human rights instruments to which Canada is signatory": s. 3(3)(f); see also s. 3(2)(b). The relevant international instruments to which Canada has subscribed should therefore shed light on the parliamentary purpose behind s. 117 of the *IRPA*.

[41] The provisions of the *IRPA* relating to the fight against the assisting of unauthorized entry of persons to Canada respond to Canada's international commitments related to these matters in the *Convention relating to the Status of Refugees*, 189 U.N.T.S. 150 ("Refugee Convention"), the *United Nations Convention against Transnational Organized Crime*, 2225 U.N.T.S. 209, the *Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention against Transnational Organized Crime*, 2241 U.N.T.S. 480 ("Smuggling Protocol"), and the *Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime*, 2237 U.N.T.S. 319.

[42] The *Refugee Convention* reflects humanitarian concerns. It provides that states must not impose penalties for illegal entry on refugees who come directly from territories in which their lives or freedom are threatened and who are present on the territory of the foreign state without authorization, "provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence": art. 31(1).

les interprétations inconciliables avec celles-ci. Les tribunaux doivent également interpréter la loi d'une manière qui reflète les valeurs et les principes du droit international coutumier et conventionnel (*R. c. Hape*, 2007 CSC 26, [2007] 2 R.C.S. 292, par. 53; *Németh c. Canada (Justice)*, 2010 CSC 56, [2010] 3 R.C.S. 281, par. 34). L'article 3 de la *LIPR* exige en outre que l'interprétation de cette loi ait pour effet de respecter les obligations internationales du Canada, notamment les « instruments internationaux portant sur les droits de l'homme dont le Canada est signataire » (al. 3(3)f); voir également l'al. 3(2)b)). Les instruments internationaux pertinents auxquels le Canada est partie devraient donc faire la lumière sur l'intention du législateur lorsqu'il a adopté l'art. 117 de la *LIPR*.

[41] Les dispositions de la *LIPR* qui concernent la lutte contre l'aide à l'entrée non autorisée au Canada font écho aux engagements internationaux que le Canada a pris à cet égard en adhérant à la *Convention relative au statut des réfugiés*, 189 R.T.N.U. 150 (« *Convention relative aux réfugiés* »), la *Convention des Nations Unies contre la criminalité transnationale organisée*, 2225 R.T.N.U. 209, le *Protocole contre le trafic illicite de migrants par terre, air et mer, additionnel à la Convention des Nations Unies contre la criminalité transnationale organisée*, 2241 R.T.N.U. 480 (« *Protocole contre le trafic illicite* »), et le *Protocole additionnel à la Convention des Nations Unies contre la criminalité transnationale organisée visant à prévenir, réprimer et punir la traite des personnes, en particulier des femmes et des enfants*, 2237 R.T.N.U. 319.

[42] La *Convention relative aux réfugiés* répond à des préoccupations d'ordre humanitaire. Elle précise que les États ne doivent pas appliquer de sanctions pénales, du fait de leur entrée irrégulière, aux réfugiés qui arrivent directement d'un territoire où leur vie ou leur liberté est menacée et qui se trouvent sur leur territoire sans autorisation, « sous la réserve qu'ils se présentent sans délai aux autorités et leur exposent des raisons reconnues valables de leur entrée ou présence irrégulières » (par. 31(1)).

[43] Consistent with this, s. 133 of the *IRPA* provides that foreign nationals who enter Canada without documents cannot be charged with illegal entry or presence while their refugee claims are pending. As I explain in *B010*, art. 31(1) of the *Refugee Convention* seeks to provide immunity for genuine refugees who enter illegally in order to seek refuge. For that protection to be effective, the law must recognize that persons often seek refuge in groups and work together to enter a country illegally. To comply with art. 31(1), a state cannot impose a criminal sanction on refugees solely because they have aided others to enter illegally in their collective flight to safety.

[44] The *Smuggling Protocol* is concerned with stopping the organized crime of people smuggling. It seeks to prevent and combat the smuggling of migrants and to promote cooperation among states to this end, while protecting the rights of smuggled migrants: art. 2. Article 6(1)(a) requires signatory states to adopt measures to establish migrant smuggling as a criminal offence. The *Smuggling Protocol* includes as a minimum definition for this offence, procuring illegal entry of a person into a state of which the person is not a national or a permanent resident, “in order to obtain, directly or indirectly, a financial or other material benefit”: art. 3(a). As I explain in *B010*, the *Smuggling Protocol* was not directed at family members or humanitarians: paras. 60 and 68. Furthermore, while the *Smuggling Protocol* permits subscribing states to enact national laws criminalizing migration-related offences, it includes a “saving clause” that provides that nothing in the *Smuggling Protocol* “shall affect the other rights, obligations and responsibilities of States and individuals under international law, including international humanitarian law and international human rights law”: art. 19(1). It would depart from the balance struck in the *Smuggling Protocol* to allow prosecution for mutual assistance among refugees, family support and reunification, and humanitarian aid. This suggests that the Crown’s broad interpretation of s. 117’s purpose is inconsistent with the

[43] Conformément à cette disposition de la Convention, l’art. 133 de la *LIPR* prévoit que les sans-papiers qui entrent au Canada ne peuvent, tant qu’il n’est pas statué sur leur demande d’asile, être accusés d’entrée ou de présence irrégulières. Ainsi que je l’explique dans l’arrêt *B010*, le par. 31(1) de la *Convention relative aux réfugiés* cherche à protéger les véritables réfugiés qui entrent illégalement au pays pour y demander l’asile. Pour qu’ils soient effectivement protégés, il faut que la loi reconnaisse que souvent les demandeurs d’asile se regroupent et s’entraident pour entrer illégalement dans un pays. L’État qui respecte le par. 31(1) ne peut infliger de sanctions pénales aux demandeurs d’asile simplement parce qu’ils en ont aidé d’autres à entrer illégalement dans un pays au cours de leur fuite collective vers la sécurité.

[44] Le *Protocole contre le trafic illicite* vise à mettre fin à la criminalité organisée dans le passage de clandestins. Il cherche à la prévenir et à la combattre, ainsi qu’à favoriser la coopération entre les États à cette fin, tout en protégeant les droits des migrants qui sont l’objet d’un tel trafic (art. 2). L’alinéa 6(1)a) exige que les États signataires adoptent des mesures pour conférer le caractère d’infraction pénale au trafic illicite de migrants. Le *Protocole contre le trafic illicite* prévoit minimale-ment que cette infraction consiste à assurer l’entrée illégale dans un État d’une personne qui n’est ni un ressortissant ni un résident permanent de cet État « afin d’en tirer, directement ou indirectement, un avantage financier ou un autre avantage matériel » (al. 3a)). J’explique dans l’arrêt *B010* que le *Protocole contre le trafic illicite* ne vise pas les activités de membres d’une famille ou de travailleurs humanitaires (par. 60 et 68). Par ailleurs, bien que le *Protocole contre le trafic illicite* permette aux États signataires d’adopter des lois nationales qui criminalisent les infractions liées à la migration, il prévoit une « clause de sauvegarde » selon laquelle aucune de ses dispositions « n’a incidences sur les autres droits, obligations et responsabilités des États et des particuliers en vertu du droit international, y compris du droit international humanitaire et du droit international relatif aux droits de l’homme » (par. 19(1)). En permettant que soient

Smuggling Protocol's object of protecting the rights of smuggled migrants.

intentées des poursuites visant des actes d'assistance mutuelle entre demandeurs d'asile, des actes d'entraide familiale et de réunification des familles ou encore des actes d'aide humanitaire, on romprait l'équilibre établi par le *Protocole contre le trafic illicite*. Ainsi, on peut penser que l'interprétation libérale de l'objet de l'art. 117 avancée par le ministère public est inconciliable avec l'objet du *Protocole contre le trafic illicite*, qui est de protéger les droits des migrants objet de trafic illicite.

[45] In dealing with conflicting statements of the legislative objects of a statute, the way forward lies in an interpretation which harmonizes obligations in the international instruments to which Canada is a party in a way that avoids conflict and gives expression to each of the various commitments. I conclude that read together in this way, Canada's international commitments support the view that the purpose of s. 117 is to permit the robust fight against people smuggling in the context of organized crime. This excludes criminalizing conduct that amounts solely to humanitarian, mutual or family aid.

[45] Lorsque les tribunaux doivent examiner des énoncés contradictoires quant à l'objet d'une loi, la solution consiste dans une interprétation de cette dernière qui s'harmonise avec les obligations prévues dans les instruments internationaux auxquels le Canada est partie afin d'éviter les conflits et de donner effet à chacun des différents engagements. À mon avis, il ressort des engagements internationaux du Canada, dont l'interprétation éclaire celle de la loi, que l'objet de l'art. 117 est de lutter vigoureusement contre le passage de clandestins dans le contexte de la criminalité organisée, et non de criminaliser les actes qui constituent uniquement de l'aide humanitaire, de l'assistance mutuelle ou de l'entraide familiale.

(iii) The Role of Section 117 Within the IRPA

(iii) Le rôle de l'art. 117 dans la LIPR

[46] Section 117 of the *IRPA* must also be read harmoniously with other provisions of the statute.

[46] L'article 117 de la *LIPR* doit en outre s'harmoniser avec les autres dispositions de la loi.

[47] Section 117 of the *IRPA* falls under Part 3 of the *IRPA*, entitled "Enforcement". Section 117 of the *IRPA* and the provisions that follow it fall under the subheading "Human Smuggling and Trafficking". Section 118 creates the offence of human trafficking, leaving s. 117, as noted, to constitute the offence of human smuggling. The only other references in the *IRPA* to smuggling or trafficking are contained in s. 37(1)(b), which renders inadmissible to Canada a person who has engaged in smuggling or trafficking in persons.

[47] Il figure à la partie 3 de la *LIPR*, intitulée « Exécution ». L'article 117 et les dispositions suivantes paraissent sous la rubrique « Organisation d'entrée illégale au Canada ». Étant donné que l'art. 118 crée l'infraction de trafic de personnes, il s'ensuit, comme je l'ai expliqué précédemment, que l'art. 117 crée l'infraction de passage de clandestins. La seule autre mention dans la *LIPR* du passage de clandestins ou du trafic de personnes figure à l'al. 37(1)b), lequel interdit de territoire au Canada quiconque se livre à l'une ou l'autre de ces activités.

[48] As explained in *B010*, the conduct captured by s. 37(1)(b) is that which is set out in the *Smuggling Protocol*. In that context, people smuggling

[48] Ainsi que je l'explique dans l'arrêt *B010*, la conduite visée par l'al. 37(1)b) est celle que prévoyait le *Protocole contre le trafic illicite*. Dans ce

only occurs for “financial or other material benefit” and “in the context of transnational crime”. Reading the inadmissibility and enforcement provisions of the *IRPA* harmoniously and as part of an integrated scheme therefore supports the view that the purpose of s. 117 is to penalize organizing or abetting illegal entry to Canada through acts knowingly connected to and furthering transnational organized crimes or criminal aims, to obtain, directly or indirectly, a financial or other material benefit. This excludes humanitarian, mutual or family assistance.

(iv) Statements of Legislative Purpose

[49] The first, “most direct and authoritative evidence” of the legislative purpose of a provision is found in statements of purpose in the legislation itself — whether at the beginning of a statute, in the section in which a provision is found, or in sections providing interpretive guidelines: Sullivan, at pp. 274-76.

[50] In *Febles v. Canada (Citizenship and Immigration)*, 2014 SCC 68, [2014] 3 S.C.R. 431, at paras. 29-30, this Court held that the *Refugee Convention* has the broad general aim of providing humanitarian refuge for those fleeing persecution while recognizing the need to protect states’ borders.

[51] As discussed in *B010*, the object provisions of the *IRPA* establish that both of these broad goals are important to the *IRPA* as well. It follows that s. 117 should be interpreted in a balanced way that respects both the security concerns as well as the humanitarian aims of the *IRPA*. An interpretation of s. 117 that catches all acts of assistance to undocumented migrants arguably allows security concerns to trump the humanitarian aims of the *IRPA*.

[52] The Crown’s view that the purpose of s. 117 is to catch all acts of assistance to undocumented

contexte, il y a passage de clandestins seulement lorsqu’« un avantage financier ou un autre avantage matériel » est obtenu « dans le cadre de la criminalité transnationale ». En interprétant les dispositions de la *LIPR* relatives à l’inadmissibilité et à l’exécution harmonieusement et en tenant compte du fait qu’elles s’inscrivent dans un régime intégré, on peut conclure que l’objet de l’art. 117 est de sanctionner quiconque organise l’entrée illégale de personnes au Canada ou les encourage à y entrer illégalement par des actes qu’il ou elle sait liés à la criminalité transnationale organisée ou dans un but criminel ou favorisant de telles activités en vue d’en tirer, directement ou indirectement, un avantage financier ou un autre avantage matériel. Ne sont pas visés les actes d’aide humanitaire, d’assistance mutuelle ou d’entraide familiale.

(iv) Les énoncés de l’objet de la loi

[49] La [TRADUCTION] « preuve la plus directe et la plus digne de foi » de l’objet d’une disposition législative se trouve dans l’énoncé même de cet objet, placé soit au début de la loi, soit dans la partie où s’insère la disposition, soit dans les parties qui fournissent des directives interprétatives (Sullivan, p. 274-276).

[50] Dans l’arrêt *Febles c. Canada (Citoyenneté et Immigration)*, 2014 CSC 68, [2014] 3 R.C.S. 431, par. 29-30, la Cour conclut que la *Convention relative aux réfugiés* poursuit l’objectif général d’ordre humanitaire d’accorder l’asile à ceux qui fuient la persécution, tout en reconnaissant le besoin des États de protéger leurs frontières.

[51] Comme je le précise dans l’arrêt *B010*, les dispositions énonçant les objets de la *LIPR* établissent que ces deux grands objectifs sont importants aussi dans la *LIPR*. Il s’ensuit que l’art. 117 devrait recevoir une interprétation équilibrée tenant compte tant des préoccupations liées à la sécurité que des objectifs humanitaires de la *LIPR*. Or, si l’interprétation de l’art. 117 permettait qu’il vise toute forme d’aide à des sans-papiers, les premières l’emporteraient alors sur les seconds.

[52] Le point de vue du ministère public selon lequel l’art. 117 vise toute forme d’aide apportée à

migrants relies heavily on the fact that among the purposes of the *IRPA* is to control Canada's borders to prevent migrants from entering the country illegally, for reasons of security, health and safety. To be sure, this is an important goal of the *IRPA*. It is reflected in the s. 3(2)(h) objective "to promote international justice and security by denying access to Canadian territory to persons, including refugee claimants, who are security risks or serious criminals": see also s. 3(1)(i). It is likewise evinced by the aim "to protect the health and safety of Canadians and to maintain the security of Canadian society": s. 3(2)(g); see also s. 3(1)(h).

[53] A concern with security is also reflected in the specific legislative objects of *An Act to amend the Immigration Act and the Criminal Code in consequence thereof*, R.S.C. 1985, c. 29 (4th Supp.), the statute which enacted what later became s. 117 of the *IRPA* (the "1988 amendments"):

1. The *Immigration Act* is amended by adding thereto, immediately after section 2 thereof, the following heading and section:

Purposes of Amendments

2.1 . . .

(a) to preserve for persons in genuine need of protection access to the procedures for determining refugee claims;

(b) to control widespread abuse of the procedures for determining refugee claims, particularly in light of organized incidents involving large-scale introduction of persons into Canada to take advantage of those procedures;

(c) to deter those who assist in the illegal entry of persons into Canada and thereby minimize the exploitation of and risks to persons seeking to come to Canada; and

(d) to respond to security concerns, including the fulfilment of Canada's obligations in respect of internationally protected persons.

des sans-papiers se fonde largement sur le fait que l'un des objets de la *LIPR* se rapporte au contrôle frontalier visant à empêcher l'entrée illégale de clandestins au Canada, pour des raisons de sécurité et de santé. Certes, il s'agit d'un objet important de la *LIPR*, énoncé à l'al. 3(2)h), soit de « promouvoir, à l'échelle internationale, la sécurité et la justice par l'interdiction du territoire aux personnes et demandeurs d'asile qui sont de grands criminels ou constituent un danger pour la sécurité » (voir aussi l'al. 3(1)i)). Il se trouve également dans l'objet qui consiste à « protéger la santé des Canadiens et [à] garantir leur sécurité » (al. 3(2)g); voir aussi l'al. 3(1)h).

[53] Une préoccupation en matière de sécurité ressort en outre des objets exprès de la *Loi modifiant la Loi sur l'immigration et apportant des modifications corrélatives au Code criminel*, L.R.C. 1985, c. 29 (4^e suppl.), laquelle a créé la disposition qui est devenue l'art. 117 de la *LIPR* (les « modifications de 1988 ») :

1. La *Loi sur l'immigration* est modifiée par insertion, après l'article 2, de ce qui suit :

Objet des modifications

2.1 . . .

a) de préserver pour les personnes qui ont véritablement besoin de protection l'accès à la procédure de détermination des revendications du statut de réfugié;

b) de contrôler les fréquents abus de la procédure de détermination des revendications du statut de réfugié en raison notamment d'incidents délibérés impliquant l'introduction à grande échelle au Canada de personnes cherchant à se prévaloir de cette procédure;

c) de décourager ceux qui aident à l'introduction illégale de personnes au Canada afin de minimiser l'exploitation des personnes désireuses d'entrer au Canada et les risques qu'elles courent;

d) de répondre aux préoccupations en matière de sécurité et, notamment, de remplir les obligations du Canada à l'égard des personnes jouissant de la protection internationale.

[54] The same statute, however, also recognized humanitarian commitments, including a stated objective “to preserve for persons in genuine need of protection access to the procedures for determining refugee claims” and concern for “exploitation” and risks to persons wishing to come to Canada: s. 1, adding ss. 2.1(a) and 2.1(c).

[55] The *IRPA*’s general objects further illustrate the importance of its broad humanitarian aims. Section 3(2)(c) speaks of “Canada’s humanitarian ideals”. The stated objects include “saving lives and offering protection to the displaced and persecuted” and “safe haven to persons with a well-founded fear of persecution”: ss. 3(2)(a) and 3(2)(d). Similarly, the objectives include striving to comply with “international human rights instruments to which Canada is signatory”: s. 3(3)(f); see also s. 3(2)(b).

[56] The *IRPA* also reveals a commitment to family, through stated objects of facilitating family reunification in Canada: s. 3(2)(f).

[57] In sum, while the security goals of the *IRPA* and the amendment that became s. 117 are important, they do not supplant Canada’s commitment to humanitarian aid and family unity. Both broad aims must be respected. This is accomplished by interpreting s. 117 as targeting organized smuggling operations having a criminal dimension, thereby excluding humanitarian, mutual and family aid. Under the Crown’s interpretation of s. 117, a father offering a blanket to a shivering child, or friends sharing food aboard a migrant vessel, could be subject to prosecution. This is incompatible with the refugee protection objects of the *IRPA* and the amendment that became s. 117.

[54] Or, cette même loi reconnaissait aussi les engagements d’ordre humanitaire, dont l’objet « de préserver pour les personnes qui ont véritablement besoin de protection l’accès à la procédure de détermination des revendications du statut de réfugié », et les préoccupations liées à « l’exploitation » des personnes désireuses d’entrer au Canada et des risques courus par celles-ci (l’art. 1 à ajouté les al. 2.1a) et c)).

[55] Les objets généraux de la *LIPR* révèlent également l’importance accordée à ses grands principes humanitaires. L’alinéa 3(2)c) fait état des « idéaux humanitaires du Canada ». Les énoncés parlent notamment de « sauver des vies et [de] protéger les personnes de la persécution », d’offrir « l’asile à ceux qui craignent avec raison d’être persécutés » (al. 3(2)a) et d)) et de voir à se conformer aux « instruments internationaux portant sur les droits de l’homme dont le Canada est signataire » (al. 3(3)f); voir également l’al. 3(2)b)).

[56] La *LIPR* révèle en outre un engagement envers la famille, car faciliter la réunification des familles au Canada compte au nombre de ses objets énoncés (al. 3(2)f)).

[57] Pour résumer, même si les objets en matière de sécurité de la *LIPR* et de la modification qui deviendra l’art. 117 important, ils ne supplantent pas l’engagement du Canada à l’égard de l’aide humanitaire et de la réunification des familles. Ces deux objectifs généraux doivent être respectés. Pour ce faire, il faut donner à l’art. 117 une interprétation qui fait entrer dans son champ d’application le passage de clandestins lié à la criminalité organisée, mais en exclut les actes d’aide humanitaire, d’assistance mutuelle ou d’entraide familiale. Suivant l’interprétation du ministère public, le père qui entoure son enfant grelottant d’une couverture ou des amis qui partagent de la nourriture à bord d’un navire transportant des clandestins pourraient être poursuivis. Un tel résultat est inconciliable avec les objets en matière de protection des réfugiés de la *LIPR* et de la modification qui deviendra l’art. 117.

(v) The Legislative Evolution of Section 117

[58] The legislative history of a provision may assist in determining its purpose: Sullivan, at pp. 286-87.

[59] Canada has had laws criminalizing the assisting of undocumented migrants to enter the country since 1902. Early incarnations of the offence were focused on organizing illegal arrival by rail or ship, with little concern for the plight of the migrants, who were typically expelled: *An Act to amend the Immigration Act*, S.C. 1902, c. 14, s. 2; *Immigration Act*, R.S.C. 1906, c. 93, ss. 65 and 66.

[60] In 1919, s. 12(4) of *An Act to amend The Immigration Act*, S.C. 1919, c. 25, made it an offence to transport into Canada, harbour or conceal the entry of prohibited immigrants. The provision was a summary conviction offence, with a maximum penalty of six months imprisonment and/or fines. Broadly similar offences were preserved in the 1952 and 1976 iterations of the *Immigration Act*.

[61] In 1988, “in light of organized incidents involving large-scale introduction of persons into Canada”, amendments introduced a new offence which, with minor changes, is the offence currently found in s. 117 of the *IRPA*: s. 1 of the 1988 amendments, adding s. 2.1(b). It criminalized third party assistance to undocumented migrants. In so doing, it established maximum penalties where the number of undocumented entrants was small: six months’ imprisonment and/or \$2,000 fines on summary conviction, and five years’ imprisonment and/or \$10,000 fines on indictment. By contrast, where the undocumented entrants numbered 10 or more, proceedings were exclusively by indictment, and the maximum penalty was 10 years’ imprisonment and/or fines up to \$500,000: s. 9 of the 1988 amendments, adding ss. 94.1 and 94.2. Thus, at the inception of what would become s. 117, greater culpability already attached to large-scale breaches, reflecting greater organizational activity on the part of the accused or others with whom

(v) L’évolution législative de l’art. 117

[58] L’historique législatif d’une disposition peut être utile lorsqu’il s’agit d’arrêter son objet (Sullivan, p. 286-287).

[59] Depuis 1902, le Canada a adopté des lois qui criminalisent le fait d’aider des sans-papiers à entrer au Canada. Les premières versions de l’infraction concernaient surtout l’organisation d’arrivées illégales, par train ou par navire, et ne s’attachaient guère au sort des migrants, qui étaient généralement expulsés (*Acte modifiant l’Acte d’immigration*, S.C. 1902, c. 14, art. 2; *Loi de l’immigration*, S.R.C. 1906, c. 93, art. 65 et 66).

[60] En 1919, aux termes du par. 12(4) de la *Loi modifiant la Loi de l’Immigration*, S.C. 1919, c. 25, quiconque débarquait au Canada ou hébergeait tout immigrant à qui l’entrée était interdite ou en dissimulait l’entrée au Canada commettait une infraction punissable sur déclaration de culpabilité par procédure sommaire et assortie d’une peine maximale de six mois d’emprisonnement, d’une amende ou des deux. Des infractions largement similaires ont été reprises dans les versions de 1952 et de 1976 de la loi régissant l’immigration.

[61] En 1988, « en raison [...] d’incidents délinquants impliquant l’introduction à grande échelle au Canada de personnes », des modifications apportées à la loi ont créé une nouvelle infraction qui, sauf pour quelques changements mineurs, constitue l’infraction que prévoit actuellement l’art. 117 de la *LIPR* (l’art. 1 des modifications de 1988 a ajouté l’al. 2.1b)). Cette disposition criminalisait l’aide fournie par des tiers à des sans-papiers. Elle prévoyait des peines maximales dans les cas où les sans-papiers étaient peu nombreux : un emprisonnement de six mois et une amende de 2 000 \$ ou l’une de ces peines, par procédure sommaire, et un emprisonnement de cinq ans et une amende de 10 000 \$ ou l’une de ces peines, par mise en accusation. Par comparaison, dans les cas où le nombre de sans-papiers était de 10 ou plus, les poursuites devaient obligatoirement être intentées par mise en accusation, et la peine maximale prévue était un emprisonnement de 10 ans et une amende d’au plus 500 000 \$ ou l’une de ces peines (l’art. 9 des

the accused acted in concert. The offence created in 1988 also included a new screening mechanism: no proceedings could be instituted under ss. 94.1 or 94.2 without the consent of the Attorney General (s. 9 of the 1988 amendments, adding s. 94.3).

[62] The current s. 117 was part of a new comprehensive statute dealing with immigration and refugee protection, the *IRPA*, enacted in 2001. The offence remained substantially the same as previously, preserving the differing penalties based on scale, and the charge-screening mechanism. However, maximum penalties were significantly increased, while another provision was added to guide sentencing under the offence. Section 121 provided that in determining the penalty to be imposed under s. 117, the court was to take into account (1) bodily harm or death to the migrant; (2) association with a criminal organization; (3) profit from the operation; and (4) harm to or degrading treatment of the migrants. These changes came on the heels of the adoption of the *Smuggling Protocol*, which obliged state parties to criminalize the smuggling of migrants done for financial or other material benefit and to adopt legislative measures to establish aggravating circumstances such as harm to and degrading treatment of migrants: arts. 6(1) and 6(3). The second factor in s. 121 reflected a more significant link between the offensive conduct and organized crime. The first and fourth factors recognized more serious crime. The third factor may be an indicator of either or both.

[63] From this brief survey of the historical evolution of prohibitions on assisting the entry to Canada of undocumented people, I draw the following conclusions: (a) the prohibitions have, for over a century, focused on smuggling activity tied to

modifications de 1988 a ajouté les art. 94.1 et 94.2). Par conséquent, au moment de la création de la disposition qui allait devenir l'art. 117, des peines alourdies s'appliquaient déjà à la perpétration à grande échelle, en phase avec des activités démontrant un niveau élevé d'organisation de la part de l'accusé ou des personnes qui agissaient de concert avec lui. L'infraction créée en 1988 comportait également un nouveau mécanisme de filtrage, qui subordonnait au consentement du procureur général toute poursuite intentée à l'égard d'une infraction prévue aux art. 94.1 ou 94.2 (l'art. 9 des modifications de 1988 a ajouté l'art. 94.3).

[62] L'actuel art. 117 a été intégré à une nouvelle loi générale régissant l'immigration et la protection des réfugiés — la *LIPR* —, adoptée en 2001. L'infraction est essentiellement demeurée la même, et la disposition qui la prévoit maintient le barème des peines ainsi que le mécanisme de filtrage pré-inculpation. Cependant, la sévérité des sanctions maximales a été considérablement haussée, et une nouvelle disposition sur la détermination de la peine a été adoptée. Aux termes de l'art. 121, au moment de déterminer la peine visée à l'art. 117, le tribunal devait tenir compte des éléments suivants : (1) infliction de blessures ou mort; (2) association avec une organisation criminelle; (3) profit tiré de l'opération; (4) infliction de blessures ou traitement dégradant des clandestins. Ces modifications sont survenues après l'adoption du *Protocole contre le trafic illicite*, lequel oblige les États parties à criminaliser le trafic illicite de migrants commis pour un avantage financier ou un autre avantage matériel et à prévoir expressément dans leurs lois des circonstances aggravantes, par exemple le préjudice aux migrants ou le traitement dégradant de ceux-ci (par. 6(1) et (3)). Le deuxième élément énuméré à l'art. 121 révèle un lien étroit entre l'acte reproché et le crime organisé. Les premier et quatrième dénotent des crimes graves. Le troisième indique l'un ou l'autre ou les deux.

[63] De ce bref historique de l'évolution des dispositions prohibant le fait d'aider des sans-papiers à entrer au Canada, je tire les conclusions suivantes : a) depuis plus d'un siècle, les interdictions intéressent les activités de passage de clandestins

organizing and furthering the illegal entry, not aid merely incidental to it; (b) successive revisions to the provision have coupled increased penalties with more precise targeting of organized crime-related smuggling activity, and the 2001 revision in particular followed in the footsteps of key developments in international law; and (c) s. 117, from its inception in 1988 and as continued and revised by the *IRPA* in 2001, provided a filter to screen out assistance not associated with organized criminal smuggling, namely innocent humanitarian acts, mutual aid and assistance to family members.

(vi) The Parliamentary Debates

[64] Statements made in the legislature leading up to the enactment of a provision may supply evidence of its purpose: Sullivan, at p. 277; *Application under s. 83.28 of the Criminal Code (Re)*, 2004 SCC 42, [2004] 2 S.C.R. 248, at para. 37; *Global Securities Corp. v. British Columbia (Securities Commission)*, 2000 SCC 21, [2000] 1 S.C.R. 494, at para. 25; *R. v. Gladue*, [1999] 1 S.C.R. 688, at para. 45; *Reference re Firearms Act (Can.)*, 2000 SCC 31, [2000] 1 S.C.R. 783, at para. 17.

[65] The parliamentary debates establish that the original enactment of the offence in 1988 was motivated by incidents of organized large-scale smuggling of undocumented migrants by sea. Concerns were expressed in the debates about protecting the health, safety and security of Canadians and Canadian society, the integrity and efficacy of Canada's lawful immigration and refugee regimes, and Canada's ability to control its borders and the domestic and international interests tied to them. Concerns were also expressed about the safety and protection of genuine refugees, and not subjecting humanitarian groups to prosecution. Then-Minister Benoît Bouchard summarized Parliament's purpose as follows in the Committee meetings of August 25, 1987:

liées à l'organisation et au soutien de l'entrée illégale, et non simplement l'aide accessoire à celle-ci; b) les modifications successives de la disposition ont à la fois alourdi les peines et précisé son champ d'application — le passage de clandestins lié au crime organisé —, plus particulièrement la modification de 2001, qui a traduit une importante évolution en droit international; c) l'art. 117, depuis sa création en 1988 jusqu'à sa modification en 2001 dans la *LIPR*, prévoit un mécanisme de filtrage qui empêche que soit criminalisée l'aide qui n'est pas associée au passage de clandestins lié au crime organisé, c'est-à-dire des actes innocents d'aide humanitaire, d'assistance mutuelle ou d'entraide familiale.

(vi) Les débats parlementaires

[64] Les déclarations faites dans le cadre d'une assemblée législative avant l'adoption d'une disposition peuvent permettre d'établir l'objet de cette dernière (Sullivan, p. 277; *Demande fondée sur l'art. 83.28 du Code criminel (Re)*, 2004 CSC 42, [2004] 2 R.C.S. 248, par. 37; *Global Securities Corp. c. Colombie-Britannique (Securities Commission)*, 2000 CSC 21, [2000] 1 R.C.S. 494, par. 25; *R. c. Gladue*, [1999] 1 R.C.S. 688, par. 45; *Renvoi relatif à la Loi sur les armes à feu (Can.)*, 2000 CSC 31, [2000] 1 R.C.S. 783, par. 17).

[65] Selon les débats parlementaires, la promulgation initiale, en 1988, de la disposition créant l'infraction était motivée par des incidents de passage organisé à grande échelle de sans-papiers au Canada par voie maritime. Les débats ont porté sur la nécessité de protéger la santé et la sécurité des Canadiens et de la société canadienne, l'intégrité et l'efficacité des processus légitimes d'immigration et d'asile et la capacité du Canada de contrôler ses frontières ainsi que les intérêts du Canada sur les plans intérieur et international qui s'y rattachent. Des préoccupations ont également été exprimées à propos de la sécurité et de la protection des véritables réfugiés ainsi que du risque que des groupes humanitaires soient exposés à des poursuites. Le ministre de l'époque, Benoît Bouchard, a résumé en ces termes l'intention du législateur lors de la réunion du comité du 25 août 1987 :

We are going to put a stop to the large-scale trafficking of illegal migrants by smugglers. There has been much discussion about amending these sections of the bill. We have all pressed lawyers and legislative drafters to consider alternatives to the current wording. We looked at phrases such as religious group, profit, reward, smuggle and clandestine entry, but every possibility creates loopholes and undermines our ability to prosecute the unscrupulous. We cannot let such individuals escape sanction by adding phrases which create insurmountable problems of proof and create gaps through which the unscrupulous would march.

(House of Commons, *Minutes of Proceedings and Evidence of the Legislative Committee on Bill C-84*, No. 9, 2nd Sess., 33rd Parl., at p. 24)

[66] It thus emerges from the 1987 debates that the reason s. 117(1) of the *IRPA* permits prosecution of those providing humanitarian assistance to fleeing refugees or assistance to close family members is not because Parliament wanted to capture such persons, but because of a drafting dilemma — it was feared that a categorical approach to exceptions would inadequately respond to the multifaceted and complex nature of real-life smuggling cases. Parliament agreed that those offering humanitarian assistance and mutual aid were not meant to be prosecuted under s. 117 of the *IRPA*. However, instead of legislatively exempting such people from potential criminal liability, it sought to screen them out at the prosecution stage by requiring the Attorney General's consent to prosecute.

[67] The debates on the enactment of the *IRPA* in 2001 echo these preoccupations. Again, members of Parliament expressed concerns that s. 117 might criminalize people who assist family members to come to Canada or people who provide humanitarian aid to asylum-seekers. The government's response was that these fears were misplaced because they focused exclusively on s. 117(1) and

Ces mesures nous permettront de mettre un terme aux activités de ceux qui amènent de nombreux immigrants clandestins au Canada. La possibilité d'amender ces articles a été longuement discutée. Nous avons tous insisté auprès des avocats et des rédacteurs de loi pour qu'ils essaient de trouver un autre libellé. Nous nous sommes aussi penchés sur les termes tels que groupe confessionnel, profit, récompense, fraude ou entrée clandestine. Mais chaque tentative de changement réduisait notre capacité de poursuivre les gens sans scrupule. Nous ne pouvons permettre à ces individus d'échapper aux sanctions en ajoutant des termes qui créeraient des problèmes insurmontables quand viendrait le temps d'établir des preuves et qui constitueraient des échappatoires pour les gens sans scrupule.

(Chambre des communes, *Procès-verbaux et témoignages du Comité législatif sur le projet de loi C-84*, n° 9, 2^e sess., 33^e lég., p. 24)

[66] Par conséquent, il ressort des débats de 1987 que le par. 117(1) de la *LIPR* permet de poursuivre des personnes qui fournissent de l'aide humanitaire aux demandeurs d'asile fuyant la persécution ou qui prêtent assistance à des parents proches, non pas parce que le législateur voulait que ces personnes soient visées, mais en raison d'un dilemme relatif au libellé : on craignait qu'une exception fondée sur une certaine catégorie de personnes ne convienne pas compte tenu de la nature multidimensionnelle et complexe des activités réelles de passage de clandestins. Le législateur a reconnu que les personnes qui fournissent de l'aide humanitaire et celles qui s'entraident n'étaient pas censées être poursuivies en vertu de l'art. 117 de la *LIPR*. Toutefois, au lieu de soustraire à la responsabilité criminelle ces personnes par voie législative, le législateur a prévu les écarter à l'étape de la poursuite en subordonnant toute poursuite au consentement du procureur général.

[67] Les débats ayant précédé l'adoption de la *LIPR* en 2001 évoquent ces préoccupations. Là encore, les députés craignaient que l'art. 117 incrimine les personnes qui aident des membres de leur famille à entrer au Canada ou celles qui fournissent de l'aide humanitaire aux demandeurs d'asile. Le gouvernement a répondu que ces craintes n'étaient pas fondées parce qu'elles concernaient exclusivement le

overlooked s. 117(4) which was expected to prevent these and other unintended prosecutions. The following excerpts from the parliamentary debates summarize those discussions:

Mr. John McCallum: . . . we heard a fair amount of testimony in our hearings from people doing humanitarian work, reverends and saintly people, if you will, and the last people in the world we would want to prosecute. Yet, if you read that literally, it looks like some of these people who are helping refugees could be prosecuted. Or if my sister is in a bad country and I help her, it looks like I can be prosecuted. How does that work?

Mr. Daniel Therrien [General Counsel]: The protection against such prosecutions is in subclause 117(4), which provides that no prosecution under the smuggling provision can occur without the consent of the Attorney General

. . . .

Ms. Joan Atkinson [Assistant Deputy Minister]: . . . Subclause 117(4) is what's in the current act. . . . It is in place . . . in the current act, and as Daniel has said, there has been no prosecution of anyone who was involved in trying to help refugees come to Canada. That is the safeguard. All the circumstances will be reviewed by the Attorney General to put in humanitarian considerations without defining what that means [otherwise] you don't have the flexibility you need . . . to be able to consider all the individual circumstances in a case before any decision is taken to prosecute.

(House of Commons, Standing Committee on Citizenship and Immigration, *Evidence*, No. 27, 1st Sess., 37th Parl., May 17, 2001 (online), at 10:35)

[68] These excerpts from the parliamentary debates make it clear that Parliament understood that s. 117(1) criminalized assistance to family members and humanitarian assistance, and was relying on ministerial discretion to prevent prosecution. General Counsel Therrien and Assistant Deputy Minister Atkinson did not deny that s. 117 caught these cases, but defended this overreach far beyond

par. 117(1) et ne tenaient pas compte du par. 117(4) qui visait à prévenir ce type de poursuites et toute autre poursuite non désirée. L'extrait suivant des débats parlementaires résume bien ces discussions :

M. John McCallum : . . . nous avons, dans le cadre de nos audiences, entendu de nombreux témoignages de personnes qui se consacrent à du travail humanitaire, des religieux et des personnes pleines de bonté, si vous voulez, et ce sont les dernières personnes que nous voudrions jamais poursuivre. Or, si vous lisez attentivement le texte, il semble, littéralement, que certaines de ces personnes qui aident les réfugiés pourraient se faire poursuivre. Ou encore, si ma sœur se trouve dans un mauvais pays et que je lui viens en aide, j'ai bien l'impression que je pourrais, moi, être poursuivi. Comment cela fonctionne-t-il?

M. Daniel Therrien [avocat général] : La protection contre ce genre de poursuites est explicitée au paragraphe 117(4), qui prévoit qu'aucune poursuite pour une infraction de trafic de personnes ne peut être engagée sans le consentement du procureur général . . .

. . . .

M^{me} Joan Atkinson [sous-ministre adjointe] : . . . Le paragraphe 117(4) correspond à ce qui est déjà dans la loi. [. . .] [Il s'agit d'une mesure] en place [. . .] dans l'actuelle loi et, comme l'a dit Daniel, on n'a jamais poursuivi qui que ce soit pour avoir essayé d'aider des réfugiés à venir au Canada. C'est là la garantie. Toutes les circonstances doivent être examinées par le procureur général, qui devra se pencher sur les considérations humanitaires sans qu'on les définisse. Cela veut dire que le procureur général dispose de toute la marge de manœuvre voulue pour être en mesure d'examiner les circonstances au cas par cas, avant toute décision de poursuivre.

(Chambre des communes, Comité permanent de la citoyenneté et de l'immigration, *Témoignages*, n° 27, 1^{re} sess., 37^e lég., 17 mai 2001 (en ligne), 10 h 35)

[68] Ces extraits des débats parlementaires démontrent clairement que le législateur savait que le par. 117(1) criminalisait l'aide humanitaire et l'assistance fournie par une personne à des membres de sa famille, et qu'il comptait sur le pouvoir discrétionnaire du ministre pour éviter les poursuites dans ces cas. L'avocat général, M^e Therrien, et la sous-ministre adjointe, M^{me} Atkinson, n'ont pas nié

any reasonable definition of the targeted smuggling activity on the basis that the Attorney General's permission under s. 117(4) would be an adequate "safeguard" against inappropriate prosecutions.

[69] In sum, we may fairly infer the following from the debate surrounding the adoption of s. 117 of the *IRPA*: From the beginning, the government conceded that the words of s. 117(1) had been cast broadly enough to catch family and humanitarian assistance to undocumented migrants. At the same time, the government made it clear that s. 117 was not intended to catch persons aiding family members or providing humanitarian or mutual aid. The risk would be alleviated, or so the government asserted, by the requirement that the Attorney General authorize prosecutions under s. 117(4) of the *IRPA*.

(vii) Conclusion on the Purpose of Section 117 of the *IRPA*

[70] The foregoing considerations establish that the purpose of s. 117 is to criminalize the smuggling of people into Canada in the context of organized crime, and does not extend to permitting prosecution for simply assisting family or providing humanitarian or mutual aid to undocumented entrants to Canada. A broad punitive goal that would prosecute persons with no connection to and no furtherance of organized crime is not consistent with Parliament's purpose as evinced by the text of s. 117 read together with Canada's international commitments, s. 117's role within the *IRPA*, the *IRPA*'s objects, the history of s. 117, and the parliamentary debates.

(b) *The Scope of Section 117 of the IRPA*

[71] I now turn to the scope of s. 117 of the *IRPA* to see whether it "goes too far and interferes with

que ces cas tombaient sous le coup de l'art. 117, mais ils ont justifié la portée excessive de cette disposition, débordant toute définition raisonnable de l'infraction ciblée de passage de clandestins, en disant que le consentement du procureur général exigé par le par. 117(4) constituerait une « garantie » suffisante contre les poursuites injustifiées.

[69] Bref, nous pouvons légitimement inférer ce qui suit du débat ayant précédé l'adoption de l'art. 117 de la *LIPR* : dès le départ, le gouvernement a reconnu que le par. 117(1) avait été formulé de manière suffisamment large pour criminaliser l'aide fournie à des sans-papiers par des membres de leur famille et des travailleurs humanitaires. Or, il a clairement indiqué que son intention n'était pas de faire tomber sous le coup de l'art. 117 les personnes qui assistent des membres de leur famille, celles qui fournissent de l'aide humanitaire ou celles qui s'assistent mutuellement. Selon le gouvernement, le risque était atténué par l'exigence subordonnant toute poursuite à l'autorisation du procureur général, prévue au par. 117(4) de la *LIPR*.

(vii) Conclusion sur l'objet de l'art. 117 de la *LIPR*

[70] Ces considérations démontrent que l'art. 117 a pour objet de criminaliser le passage de clandestins au Canada lié à la criminalité organisée, et non des actes constituant simplement de l'entraide familiale, de l'assistance mutuelle entre sans-papiers qui entrent au Canada ou encore de l'aide humanitaire à de telles personnes. Un objectif punitif général qui permettrait que soient poursuivies des personnes qui sont dépourvues de lien avec le crime organisé et ne font rien pour favoriser le crime organisé est contredit par l'intention du législateur qui se dégage du libellé de l'art. 117, interprétée à la lumière des engagements internationaux du Canada, du rôle de l'art. 117 au sein de la *LIPR*, des objets de la *LIPR*, de l'historique de l'art. 117 et des débats parlementaires.

b) *La portée de l'art. 117 de la LIPR*

[71] J'examine maintenant la portée de l'art. 117 de la *LIPR* afin de vérifier s'il « va trop loin et

some conduct that bears no connection to its objective”: *Bedford*, at para. 101.

[72] The scope of s. 117(1) is plain. The provision admits of no ambiguity. Parliament itself understood when it enacted s. 117 that the provision’s reach exceeded its purpose by catching those who provide humanitarian, mutual and family assistance to asylum-seekers coming to Canada, but argued that this overbreadth was not a problem because the Attorney General would not permit the prosecution of such people. We cannot avoid the overbreadth problem by interpreting s. 117(1) as not permitting prosecution of persons providing humanitarian, mutual or family assistance. Such an interpretation would require the Court to ignore the ordinary meaning of the words of s. 117(1), which unambiguously make it an offence to “organize, induce, aid or abet” the undocumented entry. To adopt this suggestion would violate the rule of statutory interpretation that the meaning of the words of the provision should be read in their “grammatical and ordinary sense”: Sullivan, at p. 28. It would also require us to ignore statements from the legislative debate record suggesting Parliament knew in advance that the provision was overbroad.

[73] I conclude that s. 117(1) appears to criminalize some conduct that bears no relation to its objective, raising the spectre that s. 117 as a whole is overbroad. The remaining question is whether the requirement under s. 117(4) that the Attorney General authorize prosecution saves s. 117 from the charge of overbreadth by effectively narrowing the scope of s. 117(1).

[74] In my view, s. 117(4) does not cure the overbreadth problem created by s. 117(1). Ministerial discretion, whether conscientiously exercised or not,

empiète sur un comportement sans lien avec son objectif » (*Bedford*, par. 101).

[72] La portée du par. 117(1) est claire. La disposition ne comporte aucune ambiguïté. Le législateur savait, lorsqu’il a promulgué l’art. 117, que la portée de cette disposition excédait son objet parce qu’elle faisait entrer dans son champ d’application les personnes qui accomplissent des actes d’aide humanitaire, d’assistance mutuelle ou d’entraide familiale en faveur de demandeurs d’asile entrant au Canada. Il a affirmé que cette portée excessive ne posait aucun problème parce que le procureur général n’autoriserait pas la poursuite de ces personnes. Or, il n’est pas possible de contourner le problème de la portée excessive en donnant au par. 117(1) une interprétation qui soustrairait de son champ d’application les personnes qui fournissent de l’aide humanitaire, s’assistent mutuellement ou aident des membres de leur famille. Une telle interprétation obligerait la Cour à faire fi du sens ordinaire des mots employés au par. 117(1), qui prévoit sans la moindre ambiguïté que commet une infraction quiconque « organise [. . .] ou incite, aide ou encourage » des sans-papiers à entrer au Canada. En faisant droit à cette proposition, nous contreviendrions à la règle d’interprétation des lois portant que les termes employés dans la disposition doivent être interprétés [TRADUCTION] « en suivant leur sens grammatical et ordinaire » (Sullivan, p. 28). Il nous faudrait également ne pas tenir compte des déclarations tenues lors des débats législatifs, qui tendaient à indiquer que le législateur savait que la disposition avait une portée excessive.

[73] Je conclus que le par. 117(1) semble criminaliser des comportements sans lien avec son objectif, ce qui pourrait indiquer, pour l’art. 117 dans son ensemble, une portée excessive. Reste à déterminer si l’exigence prévue au par. 117(4), qui subordonne toute poursuite au consentement du procureur général, permet de faire échec à une conclusion de portée excessive en restreignant effectivement la portée du par. 117(1).

[74] J’estime que le par. 117(4) ne règle pas le problème de portée excessive que crée le par. 117(1). Le pouvoir discrétionnaire du ministre, qu’il soit exercé

does not negate the fact that s. 117(1) criminalizes conduct beyond Parliament's object, and that people whom Parliament did not intend to prosecute are therefore at risk of prosecution, conviction and imprisonment. So long as the provision is on the books, and so long as it is not impossible that the Attorney General could consent to prosecute, a person who assists a family member or who provides mutual or humanitarian assistance to an asylum-seeker entering Canada faces a possibility of imprisonment. If the Attorney General were to authorize prosecution of such an individual, despite s. 117's limited purpose, nothing remains in the provision to prevent conviction and imprisonment. This possibility alone engages s. 7 of the *Charter*. Further, as this Court unanimously noted in *R. v. Anderson*, 2014 SCC 41, [2014] 2 S.C.R. 167, at para. 17, per Moldaver J., "prosecutorial discretion provides no answer to the breach of a constitutional duty". See also *Nur*.

[75] Implicit in the Court of Appeal's position is that the problem of humanitarian workers or family members prosecuted under s. 117 of the *IRPA* is a problem of administrative law, and that if a constitutional attack is to be made, it should be made against improper exercise of the Attorney General's duty under s. 117(4) not to prosecute such persons. I cannot agree. As noted, although the purpose of s. 117 of the *IRPA* was not to capture such persons, nothing in the provision actually enacted disallows it. As a result, an individual charged with an offence under s. 117 would have difficulty challenging the decision. Further, judicial review of such discretion is not currently available, and there are good reasons why it may not be desirable. As the Court observed in *Anderson*, judicial oversight of Crown decisions whether to prosecute puts at risk the discrete roles of different actors in our adversarial system:

consciencieusement ou non, n'empêche pas que le par. 117(1) criminalise un comportement que le législateur ne visait pas, ni que des personnes que le législateur ne voulait pas poursuivre risquent d'être poursuivies, déclarées coupables et emprisonnées. Dans la mesure où cette disposition est encore susceptible d'application, et dans la mesure où il n'est pas impossible que le procureur général consente à intenter des poursuites, les personnes qui aident un membre de leur famille, celles qui fournissent de l'aide humanitaire à un demandeur d'asile entrant au Canada ou encore les demandeurs d'asile qui s'assistent mutuellement risquent l'emprisonnement. Si le procureur général autorise qu'une telle personne soit poursuivie, en dépit de l'objet restreint de l'art. 117, la disposition ne prévoit aucune autre protection pour éviter une déclaration de culpabilité ou une peine d'emprisonnement. Cette possibilité, à elle seule, fait intervenir l'art. 7 de la *Charte*. En outre, comme la Cour le dit à l'unanimité dans l'arrêt *R. c. Anderson*, 2014 CSC 41, [2014] 2 R.C.S. 167, sous la plume du juge Moldaver, « le pouvoir discrétionnaire en matière de poursuites n'est pas la solution au manquement à une obligation constitutionnelle » (par. 17). Voir également *Nur*.

[75] Il ressort implicitement de la position de la Cour d'appel que la possibilité que des travailleurs humanitaires ou des membres d'une famille soient poursuivis en vertu de l'art. 117 de la *LIPR* est un problème de droit administratif et qu'en cas de contestation constitutionnelle, c'est l'exercice irrégulier, par le procureur général, de l'obligation qui découle du par. 117(4) de ne pas intenter de poursuites contre ces personnes qui devrait être contesté. Je ne suis pas de cet avis. Comme je le souligne précédemment, s'il est vrai que l'art. 117 de la *LIPR* n'était pas censé viser ces personnes, rien dans la disposition qui a effectivement été adoptée ne l'interdit. En conséquence, il serait difficile pour la personne accusée de l'infraction prévue à l'art. 117 de contester la décision. Qui plus est, ce pouvoir discrétionnaire n'est pas susceptible de contrôle judiciaire, et ce pour de bonnes raisons. Ainsi que le fait remarquer la Cour dans l'arrêt *Anderson*, la surveillance judiciaire des décisions du ministère public d'engager ou non des poursuites brouille les rôles distincts des différents acteurs de notre système accusatoire :

There has been a long-standing and deeply engrained reluctance to permit routine judicial review of the exercise of [prosecutorial] discretion. . . . The imposition of a sweeping duty that opens up for routine judicial review all of the aforementioned decisions is contrary to our constitutional traditions. [para. 32]

[76] It may also be noted that judicial review of the Attorney General's decision to authorize prosecution under s. 117(4) may have undesirable consequences for other federal statutes in which a similar clause is present: see e.g. *Freezing Assets of Corrupt Foreign Officials Act*, S.C. 2011, c. 10; *Foreign Extraterritorial Measures Act*, R.S.C. 1985, c. F-29; *Special Economic Measures Act*, S.C. 1992, c. 17; *Crimes Against Humanity and War Crimes Act*, S.C. 2000, c. 24; *Geneva Conventions Act*, R.S.C. 1985, c. G-3. At this point, it suffices to note that judicial review does not answer the constitutional non-conformity of s. 117(1).

[77] I conclude that s. 117 of the *IRPA* is overbroad. The remaining issue is whether this overbreadth is justified under s. 1 of the *Charter* as a reasonable measure in a free and democratic society.

(2) Gross Disproportionality, Vagueness and Equality

[78] In addition to the overbreadth claim, some of the appellants assert that s. 117 offends s. 7 by depriving persons of liberty in a manner that violates the principles of fundamental justice against gross disproportionality and vagueness. They also claim that equal treatment under the law is a principle of fundamental justice within the meaning of s. 7, and that s. 117 violates it. In view of my conclusion that s. 117 is overbroad, I find it unnecessary to consider these arguments.

Il existe depuis longtemps une réticence fortement enracinée à permettre le contrôle judiciaire automatique de l'exercice d[u] pouvoir discrétionnaire [en matière de poursuites]. [. . .] L'imposition d'une obligation très générale qui donne ouverture à la révision automatique de toutes les décisions susmentionnées va à l'encontre de nos traditions constitutionnelles. [par. 32]

[76] Il importe également de souligner que le contrôle judiciaire de la décision du procureur général d'autoriser une poursuite en vertu du par. 117(4) peut avoir un effet non souhaitable sur d'autres lois fédérales comportant une disposition semblable (voir, p. ex., *Loi sur le blocage des biens de dirigeants étrangers corrompus*, L.C. 2011, c. 10; *Loi sur les mesures extraterritoriales étrangères*, L.R.C. 1985, c. F-29; *Loi sur les mesures économiques spéciales*, L.C. 1992, c. 17; *Loi sur les crimes contre l'humanité et les crimes de guerre*, L.C. 2000, c. 24; *Loi sur les conventions de Genève*, L.R.C. 1985, c. G-3). Il suffit de souligner, à ce stade-ci, que le contrôle judiciaire ne permet pas de remédier à la non-conformité constitutionnelle du par. 117(1).

[77] Je conclus que l'art. 117 de la *LIPR* a une portée excessive. La question qu'il reste à trancher est celle de savoir si la portée excessive est justifiée au regard de l'article premier de la *Charte* comme étant une mesure raisonnable dans une société libre et démocratique.

(2) Caractère totalement disproportionné, imprécision et égalité

[78] Outre son argument sur la portée excessive, certains appelants affirment que l'art. 117 contrevient à l'art. 7 parce qu'il prive des personnes de leur liberté d'une manière qui viole les principes de justice fondamentale interdisant le caractère totalement disproportionné et l'imprécision. Ils font également valoir que l'égalité devant la loi est un principe de justice fondamentale au sens où il faut l'entendre pour l'application de l'art. 7, et que l'art. 117 y porte atteinte. Compte tenu de ma conclusion selon laquelle l'art. 117 a une portée excessive, j'estime qu'il est inutile d'examiner ces arguments.

B. *Is the Inconsistency With Section 7 Justified Under Section 1 of the Charter?*

[79] The test to determine whether infringement of a right may be constitutionally justified under s. 1 of the *Charter* was set out in *R. v. Oakes*, [1986] 1 S.C.R. 103. The first step of the s. 1 analysis asks whether the Crown has demonstrated a pressing and substantial objective: *Oakes*, at pp. 138-39. The broad purpose of s. 117 of the *IRPA* is to combat organized crime-related people smuggling, without criminalizing family assistance, mutual aid or humanitarian aid to asylum-seekers coming to Canada. This objective is clearly pressing and substantial.

[80] The second step of the s. 1 analysis asks whether the legislative objective is rationally connected to the limit the law imposes on the right at issue. Not all applications of s. 117 are rationally connected to the legislative object; notably, s. 117 of the *IRPA*, as discussed, catches mutual and family as well as humanitarian aid which I earlier concluded was not Parliament's object to criminalize. However, since other applications of s. 117 are rationally connected to the legislative object, this suffices to satisfy the rational connection stage of the analysis: *Heywood*, at p. 803. A rational *connection*, not a complete rational *correspondence*, is all this branch of *Oakes* requires.

[81] The third step of the s. 1 analysis asks whether the offending law is tailored to its objective: *R. v. Edwards Books and Art Ltd.*, [1986] 2 S.C.R. 713. Evidently, where a law goes too far, it is a challenge to satisfy minimal impairment. In *Heywood*, Cory J. concluded (at p. 803) that “for the same reasons that [the law] is overly broad, it fails the minimal impairment branch of the s. 1 analysis”. The record here shows why that will not *always* necessarily be the case.

B. *L'incompatibilité avec l'art. 7 est-elle justifiée au regard de l'article premier de la Charte?*

[79] Le critère qui permet de déterminer si l'atteinte à un droit est justifiée sur le plan constitutionnel au regard de l'article premier de la *Charte* a été établi dans l'arrêt *R. c. Oakes*, [1986] 1 R.C.S. 103. Dans le premier volet de l'analyse que commande l'article premier, il faut se demander si le ministère public a démontré l'existence d'un objectif urgent et réel (*Oakes*, p. 138-139). L'objet général de l'art. 117 de la *LIPR* concerne la lutte contre le passage de clandestins lié au crime organisé, et ne vise pas à criminaliser les actes d'entraide familiale, d'assistance mutuelle ou d'aide humanitaire en faveur de demandeurs d'asile entrant au Canada. Il s'agit clairement d'un objectif urgent et réel.

[80] Dans le deuxième volet, il faut se demander s'il existe un lien rationnel entre l'objectif poursuivi par le législateur et la restriction que la loi impose au droit en cause. Ce lien rationnel n'est pas démontré à l'égard de toutes les applications de l'art. 117 de la *LIPR* : comme nous l'avons vu, cette disposition fait entrer dans son champ d'application les actes d'assistance mutuelle, d'entraide familiale et d'aide humanitaire, et j'ai conclu précédemment que le législateur n'avait pas l'intention de les viser. Or, comme il existe un lien rationnel entre l'objectif poursuivi par le législateur et d'autres applications de l'art. 117, il est satisfait à ce volet de l'analyse (*Heywood*, p. 803). Ce volet du critère établi dans l'arrêt *Oakes* ne requiert que l'existence d'un *lien* rationnel et non une parfaite *correspondance*.

[81] Dans le troisième volet de l'analyse que commande l'article premier, il faut se demander si la loi contestée est adaptée à son objet (*R. c. Edwards Books and Art Ltd.*, [1986] 2 R.C.S. 713). À l'évidence, lorsqu'une loi va trop loin, il sera difficilement satisfait au critère de l'atteinte minimale. Dans l'arrêt *Heywood*, le juge Cory conclut à la p. 803 que « pour les mêmes motifs qui font que [la loi] a une portée excessive, [elle] ne satisfait pas au volet de l'atteinte minimale de l'analyse fondée sur l'article premier ». En l'espèce, le dossier démontre pourquoi ce ne sera pas nécessairement *toujours* le cas.

[82] The Crown's position appears to be that even though the provision is overbroad, it is nevertheless minimally impairing, because although imperfect, there was no better alternative. As discussed, the government recognized in advance that the provision would catch conduct it did not intend to criminalize. However, Parliament nevertheless enacted an overbroad provision because it was concerned that wording exempting this conduct would create unacceptable loopholes. Section 1 of the *Charter* does not allow rights to be limited on the basis of bare claims, but requires the Crown to provide a *demonstrable justification* for inconsistencies with *Charter* rights: *Oakes*, at pp. 136-37. The Crown has not satisfied its burden under s. 1.

VI. Remedy

[83] Section 52(1) of the *Constitution Act, 1982* provides:

52. (1) The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect.

It follows that s. 117 is of no force or effect to the extent of its inconsistency with the *Charter*.

[84] The extent of the inconsistency that has been proven is the overbreadth of s. 117 in relation to three categories of conduct: (1) humanitarian aid to undocumented entrants, (2) mutual aid amongst asylum-seekers, and (3) assistance to family entering without the required documents.

[85] The appellants ask the Court to strike s. 117 down in its entirety. Section 117, as it was at the time of the alleged offences, has been replaced. In the particular circumstances of this case, I conclude that the preferable remedy is to read down s. 117 as not applicable to persons who give humanitarian, mutual or family assistance. This remedy reconciles the former s. 117 with the requirements of the *Charter* while leaving the prohibition on human

[82] Le ministère public semble dire que si la disposition a une portée excessive, son atteinte est néanmoins minimale, car malgré son caractère imparfait, elle se présentait comme la meilleure des solutions. Nous avons vu que le gouvernement avait reconnu avant l'adoption de la loi que la disposition ferait entrer dans son champ d'application des actes qu'il n'avait pas voulu criminaliser. Le législateur a néanmoins adopté une disposition d'une portée excessive parce qu'il craignait qu'une exception applicable à ces actes crée des failles inacceptables. L'article premier de la *Charte* ne permet pas que les droits soient restreints sur le fondement de simples affirmations; il exige du ministère public une *justification qui puisse se démontrer* lorsqu'il y a incompatibilité avec les droits garantis par la *Charte* (*Oakes*, p. 136-137). Le ministère public ne s'est pas déchargé du fardeau que lui impose l'article premier.

VI. Réparation

[83] Le paragraphe 52(1) de la *Loi constitutionnelle de 1982* dispose :

52. (1) La Constitution du Canada est la loi suprême du Canada; elle rend inopérantes les dispositions incompatibles de toute autre règle de droit.

Par conséquent, l'art. 117 est inopérant dans la mesure de son incompatibilité avec la *Charte*.

[84] En l'espèce, l'incompatibilité qui a été démontrée concerne la portée excessive de l'art. 117 relativement à trois catégories d'actes, soit (1) l'aide humanitaire à des sans-papiers, (2) l'assistance mutuelle entre demandeurs d'asile et (3) l'aide fournie par une personne à un membre de sa famille qui entre au Canada sans être muni des documents requis.

[85] Les appelants demandent à la Cour d'invalider l'art. 117 au complet. La version de cette disposition qui était en vigueur au moment de la perpétration des infractions reprochées a été remplacée. Dans les circonstances particulières de la présente espèce, je conclus qu'il est préférable de donner à l'art. 117 une interprétation atténuée qui exclurait de son champ d'application les actes d'aide humanitaire, d'assistance mutuelle ou d'entraide familiale.

smuggling for the relevant period in place. This remedy is consistent with the guidance this Court gave in *Schachter v. Canada*, [1992] 2 S.C.R. 679.

Cette réparation permet de concilier l'ancien art. 117 avec les impératifs de la *Charte* et de conserver, pendant la période pertinente, l'interdiction applicable au passage de clandestins. La réparation respecte les précisions énoncées par la Cour dans l'arrêt *Schachter c. Canada*, [1992] 2 R.C.S. 679.

VII. Conclusion

[86] I would allow the appeals and read down s. 117 of the *IRPA*, as it was at the time of the alleged offences, as not applying to persons providing humanitarian aid to asylum-seekers or to asylum-seekers who provide each other mutual aid (including aid to family members), to bring it in conformity with the *Charter*. The charges are remitted for trial on this basis.

VII. Conclusion

[86] Je suis d'avis d'accueillir les pourvois et de donner à l'art. 117 de la *LIPR* — tel qu'il était libellé au moment des infractions reprochées — une interprétation atténuée qui exclut de son champ d'application les personnes qui fournissent de l'aide humanitaire à des demandeurs d'asile ou les demandeurs d'asile qui s'assistent mutuellement (y compris en aidant des membres de leur famille), en vue d'assurer la conformité de la disposition avec la *Charte*. Les accusations sont renvoyées au tribunal de première instance pour être jugées sur la base de ces conclusions.

APPENDIX A

Immigration and Refugee Protection Act, S.C. 2001, c. 27 (version in force at time)

3. (1) [Objectives — immigration] The objectives of this Act with respect to immigration are

- (a) to permit Canada to pursue the maximum social, cultural and economic benefits of immigration;
- (b) to enrich and strengthen the social and cultural fabric of Canadian society, while respecting the federal, bilingual and multicultural character of Canada;
- (b.1) to support and assist the development of minority official languages communities in Canada;
- (c) to support the development of a strong and prosperous Canadian economy, in which the benefits of immigration are shared across all regions of Canada;
- (d) to see that families are reunited in Canada;
- (e) to promote the successful integration of permanent residents into Canada, while recognizing that

ANNEXE A

Loi sur l'immigration et la protection des réfugiés, L.C. 2001, c. 27 (version en vigueur à l'époque)

3. (1) [Objet en matière d'immigration] En matière d'immigration, la présente loi a pour objet :

- a) de permettre au Canada de retirer de l'immigration le maximum d'avantages sociaux, culturels et économiques;
- b) d'enrichir et de renforcer le tissu social et culturel du Canada dans le respect de son caractère fédéral, bilingue et multiculturel;
- b.1) de favoriser le développement des collectivités de langues officielles minoritaires au Canada;
- c) de favoriser le développement économique et la prospérité du Canada et de faire en sorte que toutes les régions puissent bénéficier des avantages économiques découlant de l'immigration;
- d) de veiller à la réunification des familles au Canada;
- e) de promouvoir l'intégration des résidents permanents au Canada, compte tenu du fait que cette intégration

integration involves mutual obligations for new immigrants and Canadian society;

(f) to support, by means of consistent standards and prompt processing, the attainment of immigration goals established by the Government of Canada in consultation with the provinces;

(g) to facilitate the entry of visitors, students and temporary workers for purposes such as trade, commerce, tourism, international understanding and cultural, educational and scientific activities;

(h) to protect the health and safety of Canadians and to maintain the security of Canadian society;

(i) to promote international justice and security by fostering respect for human rights and by denying access to Canadian territory to persons who are criminals or security risks; and

(j) to work in cooperation with the provinces to secure better recognition of the foreign credentials of permanent residents and their more rapid integration into society.

(2) [Objectives — refugees] The objectives of this Act with respect to refugees are

(a) to recognize that the refugee program is in the first instance about saving lives and offering protection to the displaced and persecuted;

(b) to fulfil Canada's international legal obligations with respect to refugees and affirm Canada's commitment to international efforts to provide assistance to those in need of resettlement;

(c) to grant, as a fundamental expression of Canada's humanitarian ideals, fair consideration to those who come to Canada claiming persecution;

(d) to offer safe haven to persons with a well-founded fear of persecution based on race, religion, nationality, political opinion or membership in a particular social group, as well as those at risk of torture or cruel and unusual treatment or punishment;

(e) to establish fair and efficient procedures that will maintain the integrity of the Canadian refugee protection system, while upholding Canada's respect for the

suppose des obligations pour les nouveaux arrivants et pour la société canadienne;

f) d'atteindre, par la prise de normes uniformes et l'application d'un traitement efficace, les objectifs fixés pour l'immigration par le gouvernement fédéral après consultation des provinces;

g) de faciliter l'entrée des visiteurs, étudiants et travailleurs temporaires qui viennent au Canada dans le cadre d'activités commerciales, touristiques, culturelles, éducatives, scientifiques ou autres, ou pour favoriser la bonne entente à l'échelle internationale;

h) de protéger la santé des Canadiens et de garantir leur sécurité;

i) de promouvoir, à l'échelle internationale, la justice et la sécurité par le respect des droits de la personne et l'interdiction de territoire aux personnes qui sont des criminels ou constituent un danger pour la sécurité;

j) de veiller, de concert avec les provinces, à aider les résidents permanents à mieux faire reconnaître leurs titres de compétence et à s'intégrer plus rapidement à la société.

(2) [Objet relatif aux réfugiés] S'agissant des réfugiés, la présente loi a pour objet :

a) de reconnaître que le programme pour les réfugiés vise avant tout à sauver des vies et à protéger les personnes de la persécution;

b) de remplir les obligations en droit international du Canada relatives aux réfugiés et aux personnes déplacées et d'affirmer la volonté du Canada de participer aux efforts de la communauté internationale pour venir en aide aux personnes qui doivent se réinstaller;

c) de faire bénéficier ceux qui fuient la persécution d'une procédure équitable reflétant les idéaux humanitaires du Canada;

d) d'offrir l'asile à ceux qui craignent avec raison d'être persécutés du fait de leur race, leur religion, leur nationalité, leurs opinions politiques, leur appartenance à un groupe social en particulier, ainsi qu'à ceux qui risquent la torture ou des traitements ou peines cruels et inusités;

e) de mettre en place une procédure équitable et efficace qui soit respectueuse, d'une part, de l'intégrité du processus canadien d'asile et, d'autre part, des

human rights and fundamental freedoms of all human beings;

(f) to support the self-sufficiency and the social and economic well-being of refugees by facilitating reunification with their family members in Canada;

(g) to protect the health and safety of Canadians and to maintain the security of Canadian society; and

(h) to promote international justice and security by denying access to Canadian territory to persons, including refugee claimants, who are security risks or serious criminals.

(3) [Application] This Act is to be construed and applied in a manner that

(a) furthers the domestic and international interests of Canada;

(b) promotes accountability and transparency by enhancing public awareness of immigration and refugee programs;

(c) facilitates cooperation between the Government of Canada, provincial governments, foreign states, international organizations and non-governmental organizations;

(d) ensures that decisions taken under this Act are consistent with the *Canadian Charter of Rights and Freedoms*, including its principles of equality and freedom from discrimination and of the equality of English and French as the official languages of Canada;

(e) supports the commitment of the Government of Canada to enhance the vitality of the English and French linguistic minority communities in Canada; and

(f) complies with international human rights instruments to which Canada is signatory.

37. (1) [Organized criminality] A permanent resident or a foreign national is inadmissible on grounds of organized criminality for

(a) being a member of an organization that is believed on reasonable grounds to be or to have been engaged in activity that is part of a pattern of criminal activity planned and organized by a number of persons acting

droits et des libertés fondamentales reconnus à tout être humain;

f) d'encourager l'autonomie et le bien-être socioéconomique des réfugiés en facilitant la réunification de leurs familles au Canada;

g) de protéger la santé des Canadiens et de garantir leur sécurité;

h) de promouvoir, à l'échelle internationale, la sécurité et la justice par l'interdiction du territoire aux personnes et demandeurs d'asile qui sont de grands criminels ou constituent un danger pour la sécurité.

(3) [Interprétation et mise en œuvre] L'interprétation et la mise en œuvre de la présente loi doivent avoir pour effet :

a) de promouvoir les intérêts du Canada sur les plans intérieur et international;

b) d'encourager la responsabilisation et la transparence par une meilleure connaissance des programmes d'immigration et de ceux pour les réfugiés;

c) de faciliter la coopération entre le gouvernement fédéral, les gouvernements provinciaux, les États étrangers, les organisations internationales et les organismes non gouvernementaux;

d) d'assurer que les décisions prises en vertu de la présente loi sont conformes à la *Charte canadienne des droits et libertés*, notamment en ce qui touche les principes, d'une part, d'égalité et de protection contre la discrimination et, d'autre part, d'égalité du français et de l'anglais à titre de langues officielles du Canada;

e) de soutenir l'engagement du gouvernement du Canada à favoriser l'épanouissement des minorités francophones et anglophones du Canada;

f) de se conformer aux instruments internationaux portant sur les droits de l'homme dont le Canada est signataire.

37. (1) [Activités de criminalité organisée] Emportent interdiction de territoire pour criminalité organisée les faits suivants :

a) être membre d'une organisation dont il y a des motifs raisonnables de croire qu'elle se livre ou s'est livrée à des activités faisant partie d'un plan d'activités criminelles organisées par plusieurs personnes agissant

in concert in furtherance of the commission of an offence punishable under an Act of Parliament by way of indictment, or in furtherance of the commission of an offence outside Canada that, if committed in Canada, would constitute such an offence, or engaging in activity that is part of such a pattern; or

(b) engaging, in the context of transnational crime, in activities such as people smuggling, trafficking in persons or money laundering.

. . .

PART 3

ENFORCEMENT

Human Smuggling and Trafficking

117. (1) [Organizing entry into Canada] No person shall knowingly organize, induce, aid or abet the coming into Canada of one or more persons who are not in possession of a visa, passport or other document required by this Act.

(2) [Penalties — fewer than 10 persons] A person who contravenes subsection (1) with respect to fewer than 10 persons is guilty of an offence and liable

(a) on conviction on indictment

(i) for a first offence, to a fine of not more than \$500,000 or to a term of imprisonment of not more than 10 years, or to both, or

(ii) for a subsequent offence, to a fine of not more than \$1,000,000 or to a term of imprisonment of not more than 14 years, or to both; and

(b) on summary conviction, to a fine of not more than \$100,000 or to a term of imprisonment of not more than two years, or to both.

(3) [Penalty — 10 persons or more] A person who contravenes subsection (1) with respect to a group of 10 persons or more is guilty of an offence and liable on conviction by way of indictment to a fine of not more than \$1,000,000 or to life imprisonment, or to both.

(4) [No proceedings without consent] No proceedings for an offence under this section may be instituted

de concert en vue de la perpétration d'une infraction à une loi fédérale punissable par mise en accusation ou de la perpétration, hors du Canada, d'une infraction qui, commise au Canada, constituerait une telle infraction, ou se livrer à des activités faisant partie d'un tel plan;

b) se livrer, dans le cadre de la criminalité transnationale, à des activités telles le passage de clandestins, le trafic de personnes ou le recyclage des produits de la criminalité.

. . .

PARTIE 3

EXÉCUTION

Organisation d'entrée illégale au Canada

117. (1) [Entrée illégale] Commet une infraction quiconque sciemment organise l'entrée au Canada d'une ou plusieurs personnes non munies des documents — passeport, visa ou autre — requis par la présente loi ou incite, aide ou encourage une telle personne à entrer au Canada.

(2) [Peines] L'auteur de l'infraction visant moins de dix personnes est passible, sur déclaration de culpabilité :

a) par mise en accusation :

(i) pour une première infraction, d'une amende maximale de cinq cent mille dollars et d'un emprisonnement maximal de dix ans, ou de l'une de ces peines,

(ii) en cas de récidive, d'une amende maximale de un million de dollars et d'un emprisonnement maximal de quatorze ans, ou de l'une de ces peines;

b) par procédure sommaire, d'une amende maximale de cent mille dollars et d'un emprisonnement maximal de deux ans, ou de l'une de ces peines.

(3) [Peines] L'auteur de l'infraction visant un groupe de dix personnes et plus est passible, sur déclaration de culpabilité par mise en accusation, d'une amende maximale de un million de dollars et de l'emprisonnement à perpétuité, ou de l'une de ces peines.

(4) [Consentement du procureur général du Canada] Il n'est engagé aucune poursuite pour une infraction prévue

except by or with the consent of the Attorney General of Canada.

118. (1) [Offence — trafficking in persons] No person shall knowingly organize the coming into Canada of one or more persons by means of abduction, fraud, deception or use or threat of force or coercion.

(2) [Definition of “organize”] For the purpose of subsection (1), “organize”, with respect to persons, includes their recruitment or transportation and, after their entry into Canada, the receipt or harbouring of those persons.

121. (1) [Aggravating factors] The court, in determining the penalty to be imposed under subsection 117(2) or (3) or section 120, shall take into account whether

(a) bodily harm or death occurred during the commission of the offence;

(b) the commission of the offence was for the benefit of, at the direction of or in association with a criminal organization;

(c) the commission of the offence was for profit, whether or not any profit was realized; and

(d) a person was subjected to humiliating or degrading treatment, including with respect to work or health conditions or sexual exploitation as a result of the commission of the offence.

(2) [Definition of “criminal organization”] For the purposes of paragraph (1)(b), “criminal organization” means an organization that is believed on reasonable grounds to be or to have been engaged in activity that is part of a pattern of criminal activity planned and organized by a number of persons acting in concert in furtherance of the commission of an offence punishable under an Act of Parliament by way of indictment or in furtherance of the commission of an offence outside Canada that, if committed in Canada, would constitute such an offence.

133. [Deferral] A person who has claimed refugee protection, and who came to Canada directly or indirectly from the country in respect of which the claim is made, may not be charged with an offence under section 122, paragraph 124(1)(a) or section 127 of this Act or under section 57, paragraph 340(c) or section 354, 366, 368, 374 or 403 of the *Criminal Code*, in relation to the coming into Canada of the person, pending disposition of

au présent article sans le consentement du procureur général du Canada.

118. (1) [Trafic de personnes] Commet une infraction quiconque sciemment organise l’entrée au Canada d’une ou plusieurs personnes par fraude, tromperie, enlèvement ou menace ou usage de la force ou de toute autre forme de coercition.

(2) [Sens de « organisation »] Sont assimilés à l’organisation le recrutement des personnes, leur transport à destination du Canada et, après l’entrée, à l’intérieur du pays, ainsi que l’accueil et l’hébergement de celles-ci.

121. (1) [Infliction de la peine] Le tribunal tient compte, dans l’infliction de la peine visée aux paragraphes 117(2) et (3) et à l’article 120, des facteurs suivants :

a) la mort est survenue ou des blessures ont été infligées;

b) l’infraction a été commise au profit ou sous la direction d’une organisation criminelle ou en association avec elle;

c) l’infraction a été commise en vue de tirer un profit, que celui-ci ait été ou non réalisé;

d) la personne est soumise à tout traitement dégradant ou attentatoire à la dignité humaine, notamment en ce qui touche les activités professionnelles, la santé ou l’exploitation sexuelle.

(2) [Définition de « organisation criminelle »] On entend par organisation criminelle l’organisation dont il y a des motifs raisonnables de croire qu’elle se livre ou s’est livrée à des activités faisant partie d’un plan d’activités criminelles organisées par plusieurs personnes agissant de concert en vue de la perpétration d’une infraction à une loi fédérale punissable par mise en accusation ou de la perpétration, hors du Canada, d’une infraction qui, commise au Canada, constituerait une telle infraction.

133. [Immunité] L’auteur d’une demande d’asile ne peut, tant qu’il n’est statué sur sa demande, ni une fois que l’asile lui est conféré, être accusé d’une infraction visée à l’article 122, à l’alinéa 124(1)a) ou à l’article 127 de la présente loi et à l’article 57, à l’alinéa 340c) ou aux articles 354, 366, 368, 374 ou 403 du *Code criminel*, dès lors qu’il est arrivé directement ou indirectement au Canada du pays duquel il cherche à être protégé et à la

their claim for refugee protection or if refugee protection is conferred.

condition que l'infraction ait été commise à l'égard de son arrivée au Canada.

APPENDIX B

Convention relating to the Status of Refugees, 189 U.N.T.S. 150

Article 31

REFUGEES UNLAWFULLY IN THE COUNTRY OF REFUGE

1. The Contracting States shall not impose penalties, on account of their illegal entry or presence, on refugees who, coming directly from a territory where their life or freedom was threatened in the sense of article 1, enter or are present in their territory without authorization, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence.

. . .

Article 33

PROHIBITION OF EXPULSION OR RETURN ("REFOULEMENT")

1. No Contracting State shall expel or return ("refouler") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.

2. The benefit of the present provision may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country.

United Nations Convention against Transnational Organized Crime, 2225 U.N.T.S. 209

Article 1. Statement of purpose

The purpose of this Convention is to promote cooperation to prevent and combat transnational organized crime more effectively.

ANNEXE B

Convention relative au statut des réfugiés, 189 R.T.N.U. 150

Article 31

RÉFUGIÉS EN SITUATION IRRÉGULIÈRE DANS LE PAYS D'ACCUEIL

1. Les États Contractants n'appliqueront pas de sanctions pénales, du fait de leur entrée ou de leur séjour irréguliers, aux réfugiés qui, arrivant directement du territoire où leur vie ou leur liberté était menacée au sens prévu par l'article premier, entrent ou se trouvent sur leur territoire sans autorisation, sous la réserve qu'ils se présentent sans délai aux autorités et leur exposent des raisons reconnues valables de leur entrée ou présence irrégulières.

. . .

Article 33

DÉFENSE D'EXPULSION ET DE REFOULEMENT

1. Aucun des États Contractants n'expulsera ou ne refoulera, de quelque manière que ce soit, un réfugié sur les frontières des territoires où sa vie ou sa liberté serait menacée en raison de sa race, de sa religion, de sa nationalité, de son appartenance à un certain groupe social ou de ses opinions politiques.

2. Le bénéfice de la présente disposition ne pourra toutefois être invoqué par un réfugié qu'il y aura des raisons sérieuses de considérer comme un danger pour la sécurité du pays où il se trouve ou qui, ayant été l'objet d'une condamnation définitive pour un crime ou délit particulièrement grave, constitue une menace pour la communauté dudit pays.

Convention des Nations Unies contre la criminalité transnationale organisée, 2225 R.T.N.U. 209

Article premier. Objet

L'objet de la présente Convention est de promouvoir la coopération afin de prévenir et de combattre plus efficacement la criminalité transnationale organisée.

Article 5. Criminalization of participation in an organized criminal group

1. Each State Party shall adopt such legislative and other measures as may be necessary to establish as criminal offences, when committed intentionally:

(a) Either or both of the following as criminal offences distinct from those involving the attempt or completion of the criminal activity:

(i) Agreeing with one or more other persons to commit a serious crime for a purpose relating directly or indirectly to the obtaining of a financial or other material benefit and, where required by domestic law, involving an act undertaken by one of the participants in furtherance of the agreement or involving an organized criminal group;

(ii) Conduct by a person who, with knowledge of either the aim and general criminal activity of an organized criminal group or its intention to commit the crimes in question, takes an active part in:

a. Criminal activities of the organized criminal group;

b. Other activities of the organized criminal group in the knowledge that his or her participation will contribute to the achievement of the above-described criminal aim;

(b) Organizing, directing, aiding, abetting, facilitating or counselling the commission of serious crime involving an organized criminal group.

2. The knowledge, intent, aim, purpose or agreement referred to in paragraph 1 of this article may be inferred from objective factual circumstances.

3. States Parties whose domestic law requires involvement of an organized criminal group for purposes of the offences established in accordance with paragraph 1 (a) (i) of this article shall ensure that their domestic law covers all serious crimes involving organized criminal groups. Such States Parties, as well as States Parties whose domestic law requires an act in furtherance of the agreement for purposes of the offences established in accordance with paragraph 1 (a) (i) of this article, shall so inform the Secretary-General of the United Nations at the time of their signature or of deposit of their instrument of ratification, acceptance or approval of or accession to this Convention.

Article 5. Incrimination de la participation à un groupe criminel organisé

1. Chaque État Partie adopte les mesures législatives et autres nécessaires pour conférer le caractère d'infraction pénale, lorsque commis intentionnellement :

a) À l'un ou l'autre des actes suivants ou aux deux, en tant qu'infractions pénales distinctes de celles impliquant une tentative d'activité criminelle ou sa consommation :

i) Au fait de s'entendre avec une ou plusieurs personnes en vue de commettre une infraction grave à une fin liée directement ou indirectement à l'obtention d'un avantage financier ou autre avantage matériel et, lorsque le droit interne l'exige, impliquant un acte commis par un des participants en vertu de cette entente ou impliquant un groupe criminel organisé;

ii) À la participation active d'une personne ayant connaissance soit du but et de l'activité criminelle générale d'un groupe criminel organisé soit de son intention de commettre les infractions en question :

a. Aux activités criminelles du groupe criminel organisé;

b. À d'autres activités du groupe criminel organisé lorsque cette personne sait que sa participation contribuera à la réalisation du but criminel susmentionné;

b) Au fait d'organiser, de diriger, de faciliter, d'encourager ou de favoriser au moyen d'une aide ou de conseils la commission d'une infraction grave impliquant un groupe criminel organisé.

2. La connaissance, l'intention, le but, la motivation ou l'entente visés au paragraphe 1 du présent article peuvent être déduits de circonstances factuelles objectives.

3. Les États Parties dont le droit interne subordonne l'établissement des infractions visées à l'alinéa a) i) du paragraphe 1 du présent article à l'implication d'un groupe criminel organisé veillent à ce que leur droit interne couvre toutes les infractions graves impliquant des groupes criminels organisés. Ces États Parties, de même que les États Parties dont le droit interne subordonne l'établissement des infractions visées à l'alinéa a) i) du paragraphe 1 du présent article à la commission d'un acte en vertu de l'entente, portent cette information à la connaissance du Secrétaire général de l'Organisation des Nations Unies au moment où ils signent la présente Convention ou déposent leurs instruments de ratification, d'acceptation ou d'approbation ou d'adhésion.

Article 34. Implementation of the Convention

1. Each State Party shall take the necessary measures, including legislative and administrative measures, in accordance with fundamental principles of its domestic law, to ensure the implementation of its obligations under this Convention.

2. The offences established in accordance with articles 5, 6, 8 and 23 of this Convention shall be established in the domestic law of each State Party independently of the transnational nature or the involvement of an organized criminal group as described in article 3, paragraph 1, of this Convention, except to the extent that article 5 of this Convention would require the involvement of an organized criminal group.

3. Each State Party may adopt more strict or severe measures than those provided for by this Convention for preventing and combating transnational organized crime.

Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention against Transnational Organized Crime, 2241 U.N.T.S. 480

Article 2. Statement of purpose

The purpose of this Protocol is to prevent and combat the smuggling of migrants, as well as to promote cooperation among States Parties to that end, while protecting the rights of smuggled migrants.

Article 3. Use of terms

For the purposes of this Protocol:

(a) “Smuggling of migrants” shall mean the procurement, in order to obtain, directly or indirectly, a financial or other material benefit, of the illegal entry of a person into a State Party of which the person is not a national or a permanent resident;

. . .

Article 6. Criminalization

1. Each State Party shall adopt such legislative and other measures as may be necessary to establish as criminal

Article 34. Application de la Convention

1. Chaque État Partie prend les mesures nécessaires, y compris législatives et administratives, conformément aux principes fondamentaux de son droit interne, pour assurer l'exécution de ses obligations en vertu de la présente Convention.

2. Les infractions établies conformément aux articles 5, 6, 8 et 23 de la présente Convention sont établies dans le droit interne de chaque État Partie indépendamment de leur nature transnationale ou de l'implication d'un groupe criminel organisé comme énoncé au paragraphe 1 de l'article 3 de la présente Convention, sauf dans la mesure où, conformément à l'article 5 de la présente Convention, serait requise l'implication d'un groupe criminel organisé.

3. Chaque État Partie peut adopter des mesures plus strictes ou plus sévères que celles qui sont prévues par la présente Convention afin de prévenir et de combattre la criminalité transnationale organisée.

Protocole contre le trafic illicite de migrants par terre, air et mer; additionnel à la Convention des Nations Unies contre la criminalité transnationale organisée, 2241 R.T.N.U. 480

Article 2. Objet

Le présent Protocole a pour objet de prévenir et combattre le trafic illicite de migrants, ainsi que de promouvoir la coopération entre les États Parties à cette fin, tout en protégeant les droits des migrants objet d'un tel trafic.

Article 3. Terminologie

Aux fins du présent Protocole :

a) L'expression « trafic illicite de migrants » désigne le fait d'assurer, afin d'en tirer, directement ou indirectement, un avantage financier ou un autre avantage matériel, l'entrée illégale dans un État Partie d'une personne qui n'est ni un ressortissant ni un résident permanent de cet État;

. . .

Article 6. Incrimination

1. Chaque État Partie adopte les mesures législatives et autres nécessaires pour conférer le caractère d'infraction

offences, when committed intentionally and in order to obtain, directly or indirectly, a financial or other material benefit:

- (a) The smuggling of migrants;

. . .

3. Each State Party shall adopt such legislative and other measures as may be necessary to establish as aggravating circumstances to the offences established in accordance with paragraph 1 (a), (b) (i) and (c) of this article and, subject to the basic concepts of its legal system, to the offences established in accordance with paragraph 2 (b) and (c) of this article, circumstances:

(a) That endanger, or are likely to endanger, the lives or safety of the migrants concerned; or

(b) That entail inhuman or degrading treatment, including for exploitation, of such migrants.

4. Nothing in this Protocol shall prevent a State Party from taking measures against a person whose conduct constitutes an offence under its domestic law.

Appeals allowed.

Solicitors for the appellant Francis Anthonimuthu Appulonappa: Fiona Begg, Vancouver; Maria Sokolova, Vancouver.

Solicitors for the appellant Hamalraj Handasamy: Edelmann & Co. Law Offices, Vancouver.

Solicitors for the appellant Jeyachandran Kanagarajah: Rankin & Bond, Vancouver.

Solicitors for the appellant Vignarajah Thevarajah: Gregory P. DelBigio, Q.C., Vancouver; Lisa Sturgess, Vancouver.

Solicitor for the respondent: Public Prosecution Service of Canada, Vancouver.

Solicitor for the intervener the Attorney General of Ontario: Attorney General of Ontario, Toronto.

pénale, lorsque les actes ont été commis intentionnellement et pour en tirer, directement ou indirectement, un avantage financier ou autre avantage matériel :

- a) Au trafic illicite de migrants;

. . .

3. Chaque État Partie adopte les mesures législatives et autres nécessaires pour conférer le caractère de circonstance aggravante des infractions établies conformément aux alinéas a), b) i) et c) du paragraphe 1 du présent article et, sous réserve des concepts fondamentaux de son système juridique, des infractions établies conformément aux alinéas b) et c) du paragraphe 2 du présent article :

a) Au fait de mettre en danger ou de risquer de mettre en danger la vie ou la sécurité des migrants concernés; ou

b) Au traitement inhumain ou dégradant de ces migrants, y compris pour l'exploitation.

4. Aucune disposition du présent Protocole n'empêche un État Partie de prendre des mesures contre une personne dont les actes constituent, dans son droit interne, une infraction.

Pourvois accueillis.

Procureurs de l'appellant Francis Anthonimuthu Appulonappa : Fiona Begg, Vancouver; Maria Sokolova, Vancouver.

Procureurs de l'appellant Hamalraj Handasamy : Edelmann & Co. Law Offices, Vancouver.

Procureurs de l'appellant Jeyachandran Kanagarajah : Rankin & Bond, Vancouver.

Procureurs de l'appellant Vignarajah Thevarajah : Gregory P. DelBigio, c.r., Vancouver; Lisa Sturgess, Vancouver.

Procureur de l'intimée : Service des poursuites pénales du Canada, Vancouver.

Procureur de l'intervenant le procureur général de l'Ontario : Procureur général de l'Ontario, Toronto.

Solicitors for the intervener Amnesty International (Canadian Section, English Branch): South Ottawa Community Legal Services, Ottawa; Community Legal Services Ottawa Centre, Ottawa.

Solicitors for the intervener the British Columbia Civil Liberties Association: Sack Goldblatt Mitchell, Toronto.

Solicitors for the intervener the Canadian Civil Liberties Association: Fasken Martineau DuMoulin, Vancouver.

Solicitors for the intervener the Canadian Council for Refugees: Angus Grant, Toronto; Refugee Law Office, Toronto; Laura Best & Fadi Yachoua, Vancouver.

Solicitors for the intervener the Canadian Association of Refugee Lawyers: Refugee Law Office, Toronto; University of Ottawa, Ottawa.

Procureurs de l'intervenante Amnesty International (Canadian Section, English Branch) : Services juridiques communautaires du Sud d'Ottawa, Ottawa; Services juridiques communautaires du Centre d'Ottawa, Ottawa.

Procureurs de l'intervenante l'Association des libertés civiles de la Colombie-Britannique : Sack Goldblatt Mitchell, Toronto.

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

Procureurs de l'intervenant le Conseil canadien pour les réfugiés : Angus Grant, Toronto; Refugee Law Office, Toronto; Laura Best & Fadi Yachoua, Vancouver.

Procureurs de l'intervenante l'Association canadienne des avocats et avocates en droit des réfugiés : Refugee Law Office, Toronto; Université d'Ottawa, Ottawa.

**Her Majesty The Queen and Attorney
General of Quebec** *Appellants*

v.

Alexandre Bissonnette *Respondent*

and

Attorney General of Canada,
Attorney General of Ontario,
Attorney General of Nova Scotia,
Attorney General of British
Columbia, Attorney General of
Alberta, Association des avocats
de la défense de Montréal-Laval-
Longueuil, Queen’s Prison Law
Clinic, Toronto Police Association,
Canadian Police Association, Karen
Fraser, Jennifer Sweet, Nicole Sweet,
Kim Sweet, John Sweet, J. Robert
Sweet, Charles Sweet, Patricia
Corcoran, Ann Parker, Ted Baylis,
Sharon Baylis, Cory Baylis, Michael
Leone, Doug French, Donna French,
Deborah Mahaffy, Observatory
on National Security Measures,
Independent Criminal Defence
Advocacy Society, Canadian Prison
Law Association, National Council
of Canadian Muslims, Canadian
Civil Liberties Association, British
Columbia Civil Liberties Association
and Canadian Association of Chiefs
of Police *Interveners*

INDEXED AS: **R. v. BISSONNETTE**

2022 SCC 23

File No.: 39544.

2022: March 24; **2022: May 27.**

Present: **Wagner C.J.**, and Moldaver, Karakatsanis, Côté,
Brown, Rowe, Martin, Kasirer and Jamal JJ.

**Sa Majesté la Reine et procureur
général du Québec** *Appelants*

c.

Alexandre Bissonnette *Intimé*

et

Procureur général du Canada,
procureur général de l’Ontario,
procureur général de la Nouvelle-
Écosse, procureur général de la
Colombie-Britannique, procureur
général de l’Alberta, Association
des avocats de la défense de
Montréal-Laval-Longueuil, Queen’s
Prison Law Clinic, Toronto Police
Association, Association canadienne
des policiers, Karen Fraser, Jennifer
Sweet, Nicole Sweet, Kim Sweet,
John Sweet, J. Robert Sweet,
Charles Sweet, Patricia Corcoran,
Ann Parker, Ted Baylis, Sharon
Baylis, Cory Baylis, Michael Leone,
Doug French, Donna French,
Deborah Mahaffy, Observatoire des
mesures visant la sécurité nationale,
Independent Criminal Defence
Advocacy Society, Canadian Prison
Law Association, Conseil national des
musulmans canadiens, Association
canadienne des libertés civiles, British
Columbia Civil Liberties Association
et Association canadienne des chefs
de police *Intervenants*

RÉPERTORIÉ : **R. c. BISSONNETTE**

2022 CSC 23

N° du greffe : 39544.

2022 : 24 mars; 2022 : 27 mai.

Présents : Le juge en chef Wagner et les juges
Moldaver, Karakatsanis, Côté, Brown, Rowe, Martin,
Kasirer et Jamal.

ON APPEAL FROM THE COURT OF APPEAL FOR QUEBEC

Constitutional law — Charter of Rights — Cruel and unusual treatment or punishment — Punishment that is cruel and unusual by nature — Remedy — Section 745.51 of Criminal Code authorizing imposition of consecutive 25-year parole ineligibility periods in cases involving multiple first degree murders — Whether s. 745.51 infringes s. 12 of Charter, which guarantees right not to be subjected to cruel and unusual treatment or punishment — Appropriate remedy if s. 12 infringed — Constitution Act, 1982, s. 52(1) — Canadian Charter of Rights and Freedoms, s. 12 — Criminal Code, R.S.C. 1985, c. C-46, s. 745.51.

On January 29, 2017, 46 people were gathered in the Great Mosque of Québec for evening prayer. B burst in and, armed with a semi-automatic rifle and a pistol, opened fire on the worshippers, causing the death of 6 people and seriously injuring 5 others. B pleaded guilty to the 12 charges laid against him, including 6 counts of first degree murder. An accused who is convicted of first degree murder will receive a minimum sentence of imprisonment for life and will be eligible for parole only after serving an ineligibility period of 25 years. B therefore received that sentence automatically. The Crown also asked that s. 745.51 of the *Criminal Code* be applied. This provision authorizes a court to order that the periods without eligibility for parole for each murder conviction be served consecutively rather than concurrently. In the context of first degree murders, the application of this provision allows a court to add up parole ineligibility periods of 25 years for each murder.

B challenged the constitutionality of s. 745.51. The trial judge held that this provision infringed the right not to be subjected to any cruel and unusual treatment or punishment and the right to liberty and security of the person guaranteed to B by s. 12 and s. 7 of the *Charter*, respectively, and that the provision could not be saved under s. 1. To remedy the unconstitutionality of the provision, the trial judge applied the technique of reading in and interpreted s. 745.51 as granting courts a discretion to choose the length of the additional ineligibility period to impose on an offender. He ordered that B serve a total ineligibility period of 40 years before being able to apply for parole. The Court of Appeal allowed B's appeal and declared s. 745.51 invalid and unconstitutional on the basis that it was contrary to ss. 12 and 7 of the *Charter*. It noted that the declaration

EN APPEL DE LA COUR D'APPEL DU QUÉBEC

Droit constitutionnel — Charte des droits — Traitements ou peines cruels et inusités — Peines cruelles et inusitées par nature — Réparation — Cumul de périodes d'inadmissibilité à la libération conditionnelle de 25 ans en cas de meurtres multiples au premier degré autorisé par l'art. 745.51 du Code criminel — L'article 745.51 contrevient-il à l'art. 12 de la Charte qui confère une protection contre les traitements ou peines cruels et inusités? — Dans l'affirmative, quelle est la réparation convenable? — Loi constitutionnelle de 1982, art. 52(1) — Charte canadienne des droits et libertés, art. 12 — Code criminel, L.R.C. 1985, c. C-46, art. 745.51.

Le 29 janvier 2017, 46 personnes sont réunies à la Grande Mosquée de Québec pour la prière du soir. B y fait irruption et, armé d'une carabine semi-automatique et d'un pistolet, il fait feu en direction des fidèles, provoquant ainsi la mort de 6 personnes, en plus d'en blesser grièvement 5 autres. B plaide coupable aux 12 chefs d'accusation portés contre lui, notamment 6 meurtres au premier degré. Lorsqu'un accusé est déclaré coupable de meurtre au premier degré, il est condamné à une peine minimale d'emprisonnement à perpétuité et il ne devient admissible à une libération conditionnelle qu'après un temps d'épreuve de 25 ans. B écope donc automatiquement de cette peine. Le ministère public demande également l'application de l'art. 745.51 du *Code criminel*. Cette disposition autorise le tribunal à ordonner que les périodes d'inadmissibilité à la libération conditionnelle pour chaque condamnation pour meurtre soient purgées consécutivement, plutôt que concurremment. Lorsqu'il s'agit de meurtres au premier degré, l'application de cette disposition permet au tribunal d'additionner des périodes d'inadmissibilité à la libération conditionnelle de 25 ans pour chaque meurtre.

B conteste la constitutionnalité de l'art. 745.51. Le juge de première instance conclut que cette disposition viole le droit à la protection contre tous traitements ou peines cruels et inusités et le droit à la liberté et à la sécurité de la personne garantis à B par l'art. 12 et l'art. 7 de la *Charte*, respectivement, et qu'elle ne peut être sauvegardée par l'article premier. Pour remédier à l'inconstitutionnalité de la disposition, le juge de première instance recourt à la technique de l'interprétation large et interprète l'art. 745.51 comme ayant pour effet de conférer au tribunal le pouvoir discrétionnaire de choisir la durée de la période d'inadmissibilité additionnelle à infliger au contrevenant. Il condamne B à purger un temps d'épreuve total de 40 ans avant de pouvoir demander une libération conditionnelle. La Cour d'appel accueille le pourvoi de B et déclare l'art. 745.51

of unconstitutionality was to take effect immediately. It found that reading in was inappropriate, and it therefore struck down the unconstitutional provision. It accordingly ordered that B serve a 25-year parole ineligibility period on each count before being able to apply for parole and that these periods be served concurrently.

Held: The appeal should be dismissed.

Section 745.51 of the *Criminal Code* is contrary to s. 12 of the *Charter* and is not saved under s. 1. It must be declared to be of no force or effect immediately under s. 52(1) of the *Constitution Act, 1982*, and the declaration must strike down the impugned provision retroactively to the date it was enacted. In the case of multiple first degree murders, s. 745.51 authorizes the imposition of sentences of imprisonment that effectively deprive all offenders who receive such sentences of a realistic possibility of being granted parole before they die. Such sentences are degrading in nature and thus incompatible with human dignity, because they deny offenders any possibility of reintegration into society, which presupposes, definitively and irreversibly, that they lack the capacity to reform and re-enter society. B's total parole ineligibility period must therefore be 25 years, in accordance with the law as it existed prior to the enactment of s. 745.51.

Section 12 of the *Charter* guarantees the right not to be subjected to any cruel and unusual treatment or punishment. In essence, the purpose of s. 12 of the *Charter* is to protect human dignity and ensure respect for the inherent worth of each individual. The protection afforded by s. 12 has two prongs. Section 12 protects, first, against the imposition of a punishment that is so excessive as to be incompatible with human dignity and, second, against the imposition of a punishment that is intrinsically incompatible with human dignity. The first prong of the s. 12 guarantee relates to punishment whose effect is grossly disproportionate to what would have been appropriate. The second prong of the protection afforded by s. 12 concerns a narrow class of punishments that are cruel and unusual by nature; these punishments will always be grossly disproportionate because they are intrinsically incompatible with human dignity.

A punishment is cruel and unusual by nature if the court is convinced that, having regard to its nature and effects, it could never be imposed in a manner consonant with human dignity in the Canadian criminal context. To determine

invalide et inconstitutionnel parce que contraire aux art. 12 et 7 de la *Charte*. Elle précise que cette déclaration d'inconstitutionnalité prend effet immédiatement. Elle juge que le recours à la technique de l'interprétation large est inapproprié et annule donc la disposition frappée d'inconstitutionnalité. Elle ordonne en conséquence que B purge de façon concurrente un temps d'épreuve de 25 ans pour chacun des chefs avant de pouvoir demander la libération conditionnelle.

Arrêt : Le pourvoi est rejeté.

L'article 745.51 du *Code criminel* est contraire à l'art. 12 de la *Charte* et n'est pas sauvegardé par l'article premier. Il doit être déclaré immédiatement inopérant en application du par. 52(1) de la *Loi constitutionnelle de 1982* et la déclaration doit invalider rétroactivement la disposition contestée à compter de l'adoption de celle-ci. En cas de meurtres multiples au premier degré, l'art 745.51 permet l'infliction de peines d'emprisonnement qui, dans les faits, privent tous les contrevenants visés d'une possibilité réaliste d'obtenir une libération conditionnelle avant leur décès. De telles peines sont de nature dégradante, et donc contraires à la dignité humaine, puisqu'elles retirent aux contrevenants toute possibilité de réinsertion sociale, ce qui présuppose, de manière finale et irréversible, que ces derniers ne possèdent pas la capacité de s'amender et de réintégrer la société. B doit donc se voir infliger une période totale d'inadmissibilité à la libération conditionnelle de 25 ans, conformément au droit tel qu'il existait avant l'adoption de l'art. 745.51.

L'article 12 de la *Charte* confère une protection contre tous les traitements ou peines cruels et inusités. Fondamentalement, l'art. 12 de la *Charte* a pour objet de protéger la dignité humaine et d'assurer le respect de la valeur inhérente à chaque personne. La protection conférée par l'art. 12 comprend deux volets. L'article 12 protège contre l'infliction d'une peine excessive au point de ne pas être compatible avec la dignité humaine, d'une part, et contre l'infliction d'une peine intrinsèquement incompatible avec la dignité humaine, d'autre part. Le premier volet de la garantie prévue à l'art. 12 concerne les peines dont l'effet est exagérément disproportionné par rapport à ce qui aurait été approprié. Le deuxième volet de la protection conférée par l'art. 12 quant à lui vise une catégorie restreinte de peines cruelles et inusitées par nature, des peines qui sont toujours exagérément disproportionnées parce qu'intrinsèquement incompatibles avec la dignité humaine.

Une peine est cruelle et inusitée par nature si le tribunal est convaincu que, compte tenu de sa nature et de ses effets, cette peine ne pourrait jamais être infligée d'une manière conforme à la dignité humaine dans le contexte

whether a punishment is intrinsically incompatible with human dignity, the court must determine whether the punishment is, by its very nature, degrading or dehumanizing. The effects that the punishment may have on all offenders on whom it is imposed can also inform the court and provide support for its analysis of the nature of the punishment. A punishment that is cruel and unusual by nature must always be excluded from the arsenal of punishments available to the state. It follows that the mere possibility that a punishment that is cruel and unusual by nature may be imposed is enough to infringe s. 12 of the *Charter*.

Where both prongs of the protection of s. 12 are in issue in the same case, the analysis of the nature of the punishment must precede that of gross disproportionality. If the punishment that might be imposed is cruel and unusual by nature, and hence intrinsically incompatible with human dignity, it will be pointless to consider whether the punishment is grossly disproportionate in a given case, because it will by definition always be grossly disproportionate.

The parole ineligibility period constitutes punishment for the purposes of s. 12. State action is considered to be punishment for the purposes of s. 12 if it is a consequence of conviction that forms part of the arsenal of sanctions to which an accused may be liable in respect of a particular offence, and either it is imposed in furtherance of the purpose and principles of sentencing, or it has a significant impact on an offender's liberty or security interests. The length of parole ineligibility is part of an offender's punishment given that it is a consequence of conviction and that it has a significant impact on the offender's interests in liberty and security of the person. It also furthers the objectives of denunciation and deterrence that underlie a sentence. The imposition of consecutive parole ineligibility periods authorized by s. 745.51 therefore constitutes punishment, the constitutionality of which must be determined under s. 12 of the *Charter*.

Section 745.51 effectively authorizes the imposition of a sentence of imprisonment for life without a realistic possibility of parole. This punishment is, by its very nature, intrinsically incompatible with human dignity. It is degrading in nature in that it presupposes at the time of its imposition that the offender is beyond redemption and lacks the moral autonomy needed for rehabilitation. Although Parliament has latitude to establish sentences whose severity expresses society's condemnation of the offence committed, it may not prescribe a sentence that deprives every offender on whom it is imposed of any realistic possibility of parole from the outset. To ensure

pénal canadien. Pour déterminer si une peine est intrinsèquement incompatible avec la dignité humaine, le tribunal doit évaluer si la peine est, par sa nature, dégradante ou déshumanisante. Les effets susceptibles d'être causés à l'ensemble des contrevenants condamnés à un tel châtiment peuvent également éclairer le tribunal et appuyer son analyse de la nature de la peine. Une peine cruelle et inusitée par nature doit toujours être exclue de l'arsenal des mesures punitives à la disposition de l'État. Il s'ensuit que la simple possibilité qu'une peine cruelle et inusitée par nature puisse être infligée suffit pour enfreindre l'art. 12 de la *Charte*.

Lorsque les deux volets de la protection de l'art. 12 sont en cause dans une même affaire, l'analyse de la nature de la peine doit précéder celle de la disproportion exagérée. En effet, si la peine susceptible d'être infligée est cruelle et inusitée par nature, et donc intrinsèquement incompatible avec la dignité humaine, il est inutile de s'interroger sur son caractère exagérément disproportionné dans un cas donné puisqu'elle est, par définition, toujours exagérément disproportionnée.

La période d'inadmissibilité à la libération conditionnelle est une peine visée à l'art. 12. Une mesure imposée par l'État est considérée comme une peine visée à l'art. 12 lorsqu'elle est une conséquence d'une déclaration de culpabilité qui fait partie des sanctions dont est passible un accusé pour une infraction donnée, et soit elle est conforme à l'objectif et aux principes de la détermination de la peine, soit elle a une grande incidence sur le droit du contrevenant à la liberté ou à la sécurité. La durée de l'inadmissibilité à la libération conditionnelle fait partie du châtiment, dans la mesure où elle découle de la déclaration de culpabilité et a des conséquences importantes sur le droit du contrevenant à la liberté et à la sécurité de sa personne. De plus, elle répond aux objectifs de dénonciation et de dissuasion qui sous-tendent une peine. Ainsi, le cumul de périodes d'inadmissibilité à la libération conditionnelle autorisé par l'art. 745.51 constitue une peine, dont la constitutionnalité doit être évaluée au regard de l'art. 12 de la *Charte*.

L'article 745.51 autorise, dans les faits, l'infliction d'une peine d'emprisonnement à perpétuité sans possibilité réaliste de libération conditionnelle. Cette peine est, par sa nature même, intrinsèquement incompatible avec la dignité humaine. Elle est de nature dégradante en ce qu'elle présuppose, dès son infliction, que le contrevenant est irrécupérable et ne possède pas l'autonomie morale nécessaire pour se réhabiliter. Bien que le Parlement dispose d'une latitude pour établir des peines dont la sévérité exprime la réprobation de la société à l'égard de l'infraction commise, il ne peut prescrire une peine qui prive d'emblée tous les contrevenants qui y sont assujettis d'une possibilité réaliste

respect for human dignity, Parliament must leave a door open for rehabilitation, even in cases where this objective is of minimal importance. This objective is intimately linked to human dignity in that it conveys the conviction that every individual is capable of repenting and re-entering society. The intent here is not to have the objective of rehabilitation prevail over all the others, but rather to preserve a certain place for it in a penal system based on respect for the inherent dignity of every individual, including the vilest of criminals. Where the offence of first degree murder is concerned, rehabilitation is already subordinate to the objectives of denunciation and deterrence, as can be seen from the severity of the mandatory minimum sentence for this offence.

The objectives of denunciation and deterrence are not better served by the imposition of excessive sentences. Beyond a certain threshold, these objectives lose all of their functional value, especially when the sentence far exceeds human life expectancy. The imposition of excessive sentences that fulfil no function does nothing more than bring the administration of justice into disrepute and undermine public confidence in the rationality and fairness of the criminal justice system. A punishment that can never be carried out is contrary to the fundamental values of Canadian society.

The effects of a sentence of imprisonment for life without a realistic possibility of parole support the conclusion that it is degrading in nature and thus intrinsically incompatible with human dignity. Offenders who have no realistic possibility of parole are deprived of any incentive to reform, and the psychological consequences flowing from this sentence are in some respects comparable to those experienced by inmates on death row, since only death will end their incarceration. For offenders who are sentenced to imprisonment for life without a realistic possibility of parole, the feeling of leading a monotonous, futile existence in isolation from their loved ones and from the outside world is very hard to tolerate, so much so that some prefer to put an end to their lives rather than die slowly and endure suffering that seems endless to them. Furthermore, in international and comparative law, a sentence that deprives offenders of any possibility of being released is generally considered to be incompatible with human dignity.

The royal prerogative of mercy, which gives Her Majesty the Queen an absolute discretion to grant a remission of sentence to any individual sentenced by a court, cannot save

de libération conditionnelle. Pour respecter la dignité humaine, le Parlement doit laisser la porte entrouverte à la réhabilitation, même dans les cas où cet objectif revêt une importance minime. Cet objectif est intimement lié à la dignité humaine en ce qu'il véhicule la conviction que chaque individu possède la capacité nécessaire pour se repentir et réintégrer la société. Il ne s'agit pas ici de faire primer l'objectif de la réhabilitation sur tous les autres, mais bien de lui préserver une certaine place dans un système pénal fondé sur le respect de la dignité inhérente à chaque individu, incluant les plus vils criminels. Dans le contexte de l'infraction de meurtre au premier degré, la réhabilitation est déjà subordonnée aux objectifs de dénonciation et de dissuasion, comme en témoigne la sévérité de la peine minimale obligatoire prévue pour cette infraction.

Les objectifs de dénonciation et de dissuasion ne sont pas mieux servis par l'infliction de peines excessives. En effet, passé un certain seuil, ces objectifs perdent toute leur valeur fonctionnelle, particulièrement lorsque la peine infligée dépasse largement l'espérance de vie humaine. L'infliction de peines excessives qui ne remplissent aucune fonction a uniquement pour effet de déconsidérer l'administration de la justice et de miner la confiance du public dans la rationalité et l'équité du système de justice criminel. Un châtiment qui ne peut jamais se réaliser est contraire aux valeurs fondamentales de la société canadienne.

Les effets de la peine d'emprisonnement à perpétuité sans possibilité réaliste de libération conditionnelle appuient la conclusion selon laquelle elle est de nature dégradante et donc intrinsèquement incompatible avec la dignité humaine. Les contrevenants qui n'ont aucune possibilité réaliste de libération conditionnelle sont privés de tout incitatif à se réformer, et les conséquences psychologiques découlant de cette peine sont, à certains égards, comparables à celles vécues par les détenus dans le couloir de la mort, puisque seul le décès mettra fin à leur incarcération. Pour les contrevenants condamnés à une peine d'emprisonnement à perpétuité sans possibilité réaliste de libération conditionnelle, le sentiment de mener une existence monotone, futile et isolée de leurs proches et du monde extérieur est très difficile à supporter, à un point tel que certains préfèrent mettre fin à leurs jours plutôt que de mourir à petit feu et endurer des souffrances qui leur paraissent interminables. En outre, en droit international et en droit comparé, une peine qui prive les contrevenants de toute possibilité de remise en liberté est généralement considérée comme étant contraire à la dignité humaine.

La prérogative royale de clémence que possède Sa Majesté la Reine, qui lui confère le pouvoir discrétionnaire absolu d'accorder une remise de peine à tout individu

the impugned provision. The royal prerogative of mercy cannot be considered a true sentence review mechanism, because it is exercised only in exceptional circumstances. It is at best a release mechanism based on compassion and on the existence of humanitarian grounds, which means that individuals suffering the normal consequences of a properly imposed sentence are unlikely to obtain such a pardon. The existence of the royal prerogative of mercy therefore creates no realistic possibility of parole for offenders serving a sentence of imprisonment for life for which there is no other review mechanism.

The infringement of s. 12 of the *Charter* is not justified under s. 1. In order to justify an infringement of a *Charter* right, the state is required to show that the impugned law addresses a pressing and substantial objective and that the means chosen to achieve that objective are proportional to it. In this case, since no arguments were made concerning the justification for the impugned provision, the state did not discharge the onus resting on it.

The appropriate remedy in this case is a declaration that s. 745.51 is of no force or effect immediately pursuant to s. 52(1) of the *Constitution Act, 1982*, under which any law that is inconsistent with the provisions of the Constitution can be declared to be of no force or effect to the extent of the inconsistency. The technique of reading in is inappropriate in the circumstances. This technique allows a court to extend the reach of a statute so that it includes what was wrongly excluded from it. When a court applies this interpretive technique, it does so on the assumption that had Parliament been aware of the provision's constitutional defect, it would likely have passed it with the alterations made by the court. In this case, however, the imposition of consecutive 25-year ineligibility periods is directly related to Parliament's objective in enacting s. 745.51, as shown by the words of the provision and the parliamentary debate. The words of s. 745.51 are clear as regards the length of the ineligibility periods that a court may make consecutive: for first degree murder, these periods must be 25 years under s. 745(a) of the *Criminal Code*. As well, the parliamentary debate clearly shows that Parliament's intention was to authorize courts to impose consecutive ineligibility periods in blocks of 25 years. In fact, Parliament specifically rejected a proposed amendment that would have given courts a discretion to determine the total length of the parole ineligibility period. It is therefore impossible to conclude that Parliament would likely have passed the impugned

condamné par un tribunal, ne peut sauvegarder la disposition contestée. La prérogative royale de clémence ne peut être considérée comme un véritable mécanisme de révision de la peine, puisqu'elle n'est exercée que dans des circonstances exceptionnelles. Elle constitue, au mieux, un mécanisme de libération fondé sur la compassion et sur l'existence de motifs humanitaires de sorte que les individus qui subissent les conséquences normales d'une peine régulièrement infligée ne sont pas susceptibles d'obtenir un tel pardon. L'existence de la prérogative royale de clémence ne crée donc aucune possibilité réaliste d'obtenir une libération conditionnelle pour les contrevenants assujettis à une peine d'emprisonnement à perpétuité qui n'est assortie d'aucun autre mécanisme de révision.

L'atteinte à l'art. 12 de la *Charte* n'est pas justifiée au regard de l'article premier. Pour justifier une atteinte à un droit garanti par la *Charte*, l'État a le fardeau de démontrer que le texte de loi contesté répond à un objectif réel et urgent et que le moyen choisi pour réaliser cet objectif est proportionné à celui-ci. En l'espèce, aucun argument sur la justification de la disposition attaquée n'a été présenté, de sorte que l'État ne s'est pas acquitté du fardeau qui lui incombait.

La réparation convenable en l'espèce est une déclaration portant que l'art. 745.51 est immédiatement inopérant en application du par. 52(1) de la *Loi constitutionnelle de 1982*, lequel permet de déclarer inopérante toute disposition incompatible avec la Constitution. Le recours à la technique de l'interprétation large est inapproprié dans les circonstances. Cette technique permet au tribunal d'élargir la portée d'un texte de loi pour que celui-ci inclue ce qui en a été exclu à tort. Lorsqu'il applique cette technique d'interprétation, le tribunal part du principe que, si le législateur avait su que la disposition était entachée d'un vice sur le plan constitutionnel, il l'aurait probablement édictée sous la forme modifiée que lui donne le tribunal. Or, en l'espèce le cumul de périodes d'inadmissibilité de 25 ans est directement lié à l'objectif poursuivi par le législateur par l'édiction de l'art. 745.51, comme le démontrent le texte de loi de même que les débats parlementaires. Le texte de l'art. 745.51 est clair en ce qui concerne la durée des périodes d'inadmissibilité susceptibles d'être cumulées par le tribunal : pour un meurtre au premier degré, ces périodes sont forcément de 25 ans en vertu de l'al. 745a) du *Code criminel*. De surcroît, les débats parlementaires illustrent clairement que l'intention du législateur était de permettre au tribunal de procéder au cumul de périodes d'inadmissibilité par bonds de 25 ans. Le législateur a d'ailleurs expressément rejeté une proposition d'amendement qui aurait conféré au tribunal un pouvoir discrétionnaire

provision with the modifications that would result from applying the technique of reading in as the trial judge did.

The declaration of invalidity must have immediate effect given the seriousness of the infringement of the right of every individual not to be subjected to cruel and unusual punishment. The declaration must also strike down the impugned provision retroactively to the date it was enacted, in view of the continuing nature of the infringement of the right guaranteed by s. 12 of the *Charter*. The applicable law is therefore the law that existed prior to that date. The 25-year parole ineligibility periods imposed on B for each of the 6 counts of first degree murder must thus be served concurrently. As a result, B may not apply for parole until he has served a total ineligibility period of 25 years, in accordance with s. 745(a). The Parole Board of Canada remains the ultimate arbiter of whether B can be released on parole at the end of the ineligibility period.

Cases Cited

Applied: *R. v. Boudreault*, 2018 SCC 58, [2018] 3 S.C.R. 599; *R. v. Ferguson*, 2008 SCC 6, [2008] 1 S.C.R. 96; *Schachter v. Canada*, [1992] 2 S.C.R. 679; **considered:** *R. v. Luxton*, [1990] 2 S.C.R. 711; **referred to:** *Sherman Estate v. Donovan*, 2021 SCC 25, [2021] 2 S.C.R. 75; *R. v. Nur*, 2015 SCC 15, [2015] 1 S.C.R. 773; *Canada (Attorney General) v. Whaling*, 2014 SCC 20, [2014] 1 S.C.R. 392; *R. v. Shropshire*, [1995] 4 S.C.R. 227; *R. v. Zinck*, 2003 SCC 6, [2003] 1 S.C.R. 41; *R. v. M. (C.A.)*, [1996] 1 S.C.R. 500; *R. v. B.W.P.*, 2006 SCC 27, [2006] 1 S.C.R. 941; *R. v. Lacasse*, 2015 SCC 64, [2015] 3 S.C.R. 1089; *R. v. Lyons*, [1987] 2 S.C.R. 309; *R. v. Nasogaluak*, 2010 SCC 6, [2010] 1 S.C.R. 206; *R. v. Ipeelee*, 2012 SCC 13, [2012] 1 S.C.R. 433; *Re B.C. Motor Vehicle Act*, [1985] 2 S.C.R. 486; *Lacelle Belec v. R.*, 2019 QCCA 711; *R. v. Paré*, 2011 QCCA 2047; *R. v. Malmö-Levine*, 2003 SCC 74, [2003] 3 S.C.R. 571; *R. v. Safarzadeh-Markhali*, 2016 SCC 14, [2016] 1 S.C.R. 180; *R. v. K.R.J.*, 2016 SCC 31, [2016] 1 S.C.R. 906; *R. v. Simmonds*, 2018 BCCA 205, 362 C.C.C. (3d) 215; *Québec (Attorney General) v. 9147-0732 Québec inc.*, 2020 SCC 32, [2020] 3 S.C.R. 426; *Blencoe v. British Columbia (Human Rights Commission)*, 2000 SCC 44, [2000] 2 S.C.R. 307; *Ward v. Québec (Commission des droits de la personne et des droits de la jeunesse)*, 2021

dans la détermination de la durée totale de la période d'inadmissibilité à la libération conditionnelle. En conséquence, il est impossible de conclure que le législateur aurait probablement adopté la disposition attaquée avec les modifications qui découleraient de l'application de la technique de l'interprétation large comme l'a fait le juge de première instance.

La déclaration d'invalidité doit avoir un effet immédiat en raison de la gravité de la violation du droit de toute personne à la protection contre l'infliction d'une peine cruelle et inusitée. La déclaration doit également invalider rétroactivement la disposition contestée à compter de la date de l'adoption de celle-ci considérant le caractère continu de la violation du droit prévu à l'art. 12 de la *Charte*. Le droit applicable est donc celui qui existait antérieurement à cette date. Les périodes d'inadmissibilité à la libération conditionnelle de 25 ans auxquelles est assujéti B pour chacun des 6 chefs de meurtre au premier degré doivent en conséquence être purgées concurremment. Ainsi, conformément à l'al. 745a), B ne pourra présenter de demande de libération conditionnelle avant d'avoir purgé un temps d'épreuve total de 25 ans. La Commission des libérations conditionnelles du Canada demeure l'arbitre qui décidera ultimement si B pourra obtenir une libération conditionnelle à la fin de la période d'inadmissibilité.

Jurisprudence

Arrêts appliqués : *R. c. Boudreault*, 2018 CSC 58, [2018] 3 R.C.S. 599; *R. c. Ferguson*, 2008 CSC 6, [2008] 1 R.C.S. 96; *Schachter c. Canada*, [1992] 2 R.C.S. 679; **arrêt examiné :** *R. c. Luxton*, [1990] 2 R.C.S. 711; **arrêts mentionnés :** *Sherman (Succession) c. Donovan*, 2021 CSC 25, [2021] 2 R.C.S. 75; *R. c. Nur*, 2015 CSC 15, [2015] 1 R.C.S. 773; *Canada (Procureur général) c. Whaling*, 2014 CSC 20, [2014] 1 R.C.S. 392; *R. c. Shropshire*, [1995] 4 R.C.S. 227; *R. c. Zinck*, 2003 CSC 6, [2003] 1 R.C.S. 41; *R. c. M. (C.A.)*, [1996] 1 R.C.S. 500; *R. c. B.W.P.*, 2006 CSC 27, [2006] 1 R.C.S. 941; *R. c. Lacasse*, 2015 CSC 64, [2015] 3 R.C.S. 1089; *R. c. Lyons*, [1987] 2 R.C.S. 309; *R. c. Nasogaluak*, 2010 CSC 6, [2010] 1 R.C.S. 206; *R. c. Ipeelee*, 2012 CSC 13, [2012] 1 R.C.S. 433; *Renvoi relatif à la Motor Vehicle Act (C.-B.)*, [1985] 2 R.C.S. 486; *Lacelle Belec c. R.*, 2019 QCCA 711; *R. c. Paré*, 2011 QCCA 2047; *R. c. Malmö-Levine*, 2003 CSC 74, [2003] 3 R.C.S. 571; *R. c. Safarzadeh-Markhali*, 2016 CSC 14, [2016] 1 R.C.S. 180; *R. c. K.R.J.*, 2016 CSC 31, [2016] 1 R.C.S. 906; *R. c. Simmonds*, 2018 BCCA 205, 362 C.C.C. (3d) 215; *Québec (Procureure générale) c. 9147-0732 Québec inc.*, 2020 CSC 32, [2020] 3 R.C.S. 426; *Blencoe c. Colombie-Britannique (Human Rights Commission)*, 2000 CSC 44, [2000] 2 R.C.S. 307; *Ward c. Québec*

SCC 43, [2021] 3 S.C.R. 176; *Quebec (Public Curator) v. Syndicat national des employés de l'hôpital St-Ferdinand*, [1996] 3 S.C.R. 211; *R. v. Smith*, [1987] 1 S.C.R. 1045; *R. v. Lloyd*, 2016 SCC 13, [2016] 1 S.C.R. 130; *R. v. Wiles*, 2005 SCC 84, [2005] 3 S.C.R. 895; *Reference re Same-Sex Marriage*, 2004 SCC 79, [2004] 3 S.C.R. 698; *Hunter v. Southam Inc.*, [1984] 2 S.C.R. 145; *Edwards v. Attorney-General for Canada*, [1930] A.C. 124; *Kindler v. Canada (Minister of Justice)*, [1991] 2 S.C.R. 779; *Suresh v. Canada (Minister of Citizenship and Immigration)*, 2002 SCC 1, [2002] 1 S.C.R. 3; *Steele v. Mountain Institution*, [1990] 2 S.C.R. 1385; *R. v. Guiller* (1985), 48 C.R. (3d) 226; *R. v. Gladue*, [1999] 1 S.C.R. 688; *R. v. Bourque*, 2014 NBQB 237, 427 N.B.R. (2d) 259; *R. v. Saretzky*, 2017 ABQB 496; *R. v. Ostamas*, 2016 MBQB 136, 329 Man. R. (2d) 203; *R. v. Wilmott*, [1967] 1 C.C.C. 171; *Health Services and Support — Facilities Subsector Bargaining Assn. v. British Columbia*, 2007 SCC 27, [2007] 2 S.C.R. 391; *Saskatchewan Federation of Labour v. Saskatchewan*, 2015 SCC 4, [2015] 1 S.C.R. 245; *Vinter v. United Kingdom* [GC], No. 66069/09, July 9, 2013 (HUDOC); *Murray v. Netherlands* [GC], No. 10511/10, April 26, 2016 (HUDOC); *Hutchinson v. United Kingdom* [GC], No. 57592/08, January 17, 2017 (HUDOC); *Kafkaris v. Cyprus* [GC], No. 21906/04, February 12, 2008 (HUDOC); *Bodein v. France*, No. 40014/10, November 13, 2014 (HUDOC); *Life Imprisonment Case* (1977), 45 BVerfGE 187 (Germany); *Harmelin v. Michigan*, 501 U.S. 957 (1991); *Graham v. Florida*, 560 U.S. 48 (2010); *Miller v. Alabama*, 567 U.S. 460 (2012); *R. v. McLoughlin*, [2014] EWCA Crim 188, [2014] 1 W.L.R. 3964; *R. v. Millard*, 2018 ONSC 1299; *R. v. Granados-Arana*, 2017 ONSC 6785, 356 C.C.C. (3d) 340; *R. v. Husbands*, [2015] O.J. No. 2673 (QL), 2015 CarswellOnt 7677 (WL), rev'd 2017 ONCA 607, 353 C.C.C. (3d) 317; *Hinse v. Canada (Attorney General)*, 2015 SCC 35, [2015] 2 S.C.R. 621; *R. v. Heywood*, [1994] 3 S.C.R. 761; *R. v. Sarson*, [1996] 2 S.C.R. 223; *R. v. Latimer*, 2001 SCC 1, [2001] 1 S.C.R. 3; *R. v. Oakes*, [1986] 1 S.C.R. 103; *Irwin Toy Ltd. v. Quebec (Attorney General)*, [1989] 1 S.C.R. 927; *R. v. Albashir*, 2021 SCC 48, [2021] 3 S.C.R. 531; *R. v. Sullivan*, 2022 SCC 19, [2022] 1 S.C.R. 460; *Ontario (Attorney General) v. G.*, 2020 SCC 38, [2020] 3 S.C.R. 629; *Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143; *R. v. Sharpe*, 2001 SCC 2, [2001] 1 S.C.R. 45; *Mouvement laïque québécois v. Saguenay (City)*, 2015 SCC 16, [2015] 2 S.C.R. 3; *Canada (Attorney General) v. Hislop*, 2007 SCC 10, [2007] 1 S.C.R. 429; *Nova Scotia (Workers' Compensation Board) v. Martin*, 2003 SCC 54, [2003] 2 S.C.R. 504; *R. v. Thomas*, [1990] 1 S.C.R. 713; *Reference re Manitoba Language Rights*, [1985] 1 S.C.R. 721; *R. v.*

(Commission des droits de la personne et des droits de la jeunesse), 2021 CSC 43, [2021] 3 R.C.S. 176; *Québec (Curateur public) c. Syndicat national des employés de l'hôpital St-Ferdinand*, [1996] 3 R.C.S. 211; *R. c. Smith*, [1987] 1 R.C.S. 1045; *R. c. Lloyd*, 2016 CSC 13, [2016] 1 R.C.S. 130; *R. c. Wiles*, 2005 CSC 84, [2005] 3 R.C.S. 895; *Renvoi relatif au mariage entre personnes du même sexe*, 2004 CSC 79, [2004] 3 R.C.S. 698; *Hunter c. Southam Inc.*, [1984] 2 R.C.S. 145; *Edwards c. Attorney-General for Canada*, [1930] A.C. 124; *Kindler c. Canada (Ministre de la Justice)*, [1991] 2 R.C.S. 779; *Suresh c. Canada (Ministre de la Citoyenneté et de l'Immigration)*, 2002 CSC 1, [2002] 1 R.C.S. 3; *Steele c. Établissement Mountain*, [1990] 2 R.C.S. 1385; *R. c. Guiller* (1985), 48 C.R. (3d) 226; *R. c. Gladue*, [1999] 1 R.C.S. 688; *R. c. Bourque*, 2014 NBBR 237, 427 R.N.-B. (2e) 259; *R. c. Saretzky*, 2017 ABQB 496; *R. c. Ostamas*, 2016 MBQB 136, 329 Man. R. (2d) 203; *R. c. Wilmott*, [1967] 1 C.C.C. 171; *Health Services and Support — Facilities Subsector Bargaining Assn. c. Colombie-Britannique*, 2007 CSC 27, [2007] 2 R.C.S. 391; *Saskatchewan Federation of Labour c. Saskatchewan*, 2015 CSC 4, [2015] 1 R.C.S. 245; *Vinter c. Royaume-Uni* [GC], n° 66069/09, 9 juillet 2013 (HUDOC); *Murray c. Pays-Bas* [GC], n° 10511/10, 26 avril 2016 (HUDOC); *Hutchinson c. Royaume-Uni* [GC], n° 57592/08, 17 janvier 2017 (HUDOC); *Kafkaris c. Chypre* [GC], n° 21906/04, 12 février 2008 (HUDOC); *Bodein c. France*, n° 40014/10, 13 novembre 2014 (HUDOC); *Life Imprisonment Case* (1977), 45 BVerfGE 187 (Allemagne); *Harmelin c. Michigan*, 501 U.S. 957 (1991); *Graham c. Florida*, 560 U.S. 48 (2010); *Miller c. Alabama*, 567 U.S. 460 (2012); *R. c. McLoughlin*, [2014] EWCA Crim 188, [2014] 1 W.L.R. 3964; *R. c. Millard*, 2018 ONSC 1299; *R. c. Granados-Arana*, 2017 ONSC 6785, 356 C.C.C. (3d) 340; *R. c. Husbands*, [2015] O.J. No. 2673 (QL), 2015 CarswellOnt 7677 (WL), inf. par 2017 ONCA 607, 353 C.C.C. (3d) 317; *Hinse c. Canada (Procureur général)*, 2015 CSC 35, [2015] 2 R.C.S. 621; *R. c. Heywood*, [1994] 3 R.C.S. 761; *R. c. Sarson*, [1996] 2 R.C.S. 223; *R. c. Latimer*, 2001 CSC 1, [2001] 1 R.C.S. 3; *R. c. Oakes*, [1986] 1 R.C.S. 103; *Irwin Toy Ltd. c. Québec (Procureur général)*, [1989] 1 R.C.S. 927; *R. c. Albashir*, 2021 CSC 48, [2021] 3 R.C.S. 531; *R. c. Sullivan*, 2022 CSC 19, [2022] 1 R.C.S. 460; *Ontario (Procureur général) c. G.*, 2020 CSC 38, [2020] 3 R.C.S. 629; *Andrews c. Law Society of British Columbia*, [1989] 1 R.C.S. 143; *R. c. Sharpe*, 2001 CSC 2, [2001] 1 R.C.S. 45; *Mouvement laïque québécois c. Saguenay (Ville)*, 2015 CSC 16, [2015] 2 R.C.S. 3; *Canada (Procureur général) c. Hislop*, 2007 CSC 10, [2007] 1 R.C.S. 429; *Nouvelle-Écosse (Workers' Compensation Board) c. Martin*, 2003 CSC 54, [2003] 2 R.C.S. 504; *R. c. Thomas*, [1990] 1 R.C.S. 713; *Renvoi*

Wigman, [1987] 1 S.C.R. 246; *R. v. Gamble*, [1988] 2 S.C.R. 595.

Statutes and Regulations Cited

Act to amend the Criminal Code and another Act, S.C. 2011, c. 2.
Act to amend the Criminal Code (Capital Murder), S.C. 1960-61, c. 44, ss. 1, 2.
Act to amend the Criminal Code (judicial review of parole ineligibility) and another Act, S.C. 1996, c. 34.
Act to amend the National Defence Act and to make consequential amendments to other Acts, S.C. 1998, c. 35.
Act to provide for the Conditional Liberation of Penitentiary Convicts, S.C. 1899, c. 49.
Canadian Charter of Rights and Freedoms, ss. 1, 7, 12, 24(1).
Code de procédure pénale (France), arts. 720-4 para. 2, 729 para. 4.
Constitution Act, 1982, s. 52.
Constitution of the Portuguese Republic, art. 30(1).
Corrections and Conditional Release Act, S.C. 1992, c. 20, ss. 100, 100.1, 101(a), 102, 103, 107, 120(1), 122, 123(1), (5), (5.01), 133(3), (3.1), 135, 140(4), (5.1), (5.2), (10) to (12).
Crime (Sentences) Act 1997 (U.K.), 1997, c. 43, s. 30.
Crimes Against Humanity and War Crimes Act, S.C. 2000, c. 24, ss. 4(2), 15(1).
Criminal Code, R.S.C. 1985, c. C-46, ss. 231(2), 235, 718, 718.2(c), 718.3(4), 745, 745.51, 748, 749.
Criminal Law Amendment Act, 1977, S.C. 1976-77, c. 53.
Criminal Law Amendment Act (No. 2), 1976, S.C. 1974-75-76, c. 105, s. 21.
Letters Patent Constituting the Office of Governor General of Canada (1947). In *Canada Gazette*, Part I, vol. 81, p. 3014, s. XII [reproduced in R.S.C. 1985, App. II, No. 31].
Parole Act, S.C. 1958, c. 38.
Penitentiary Act of 1868, S.C. 1868, c. 75, s. 62.
Protecting Canadians by Ending Sentence Discounts for Multiple Murders Act, S.C. 2011, c. 5, s. 5.
Rikoslaki (Finland), c. 2(c), s. 10.
Safe Streets and Communities Act, S.C. 2012, c. 1.
Sentencing Act 2002 (N.Z.), ss. 103, 104.
Straffeloven (Denmark), s. 41.
Straffeloven (Norway), s. 43.
Strafgesetzbuch (Germany), s. 57a.
Swiss Criminal Code, art. 86 para. 5.

relatif aux droits linguistiques au Manitoba, [1985] 1 R.C.S. 721; *R. c. Wigman*, [1987] 1 R.C.S. 246; *R. c. Gamble*, [1988] 2 R.C.S. 595.

Lois et règlements cités

Acte des pénitenciers de 1868, S.C. 1868, c. 75, art. 62.
Acte relatif à la libération conditionnelle des détenus aux pénitenciers, S.C. 1899, c. 49.
Charte canadienne des droits et libertés, art. 1, 7, 12, 24(1).
Code criminel, L.R.C. 1985, c. C-46, art. 231(2), 235, 718, 718.2(c), 718.3(4), 745, 745.51, 748, 749.
Code de procédure pénale (France), art. 720-4 al. 2, 729 al. 4.
Constitution de la République portugaise, art. 30(1).
Crime (Sentences) Act 1997 (R.-U.), 1997, c. 43, art. 30.
Code pénal suisse, art. 86 al. 5.
Lettres patentes constituant la charge de Gouverneur général du Canada (1947). Dans *Gazette du Canada*, partie I, vol. 81, p. 3109, art. XII [reproduites dans L.R.C. 1985, app. II, n° 31].
Loi constitutionnelle de 1982, art. 52.
Loi de 1976 modifiant le droit pénal, n° 2, S.C. 1974-1975-1976, c. 105, art. 21.
Loi de 1977 modifiant le droit pénal, S.C. 1976-1977, c. 53.
Loi modifiant la Loi sur la défense nationale et d'autres lois en conséquence, L.C. 1998, c. 35.
Loi modifiant le Code criminel et une autre loi, L.C. 2011, c. 2.
Loi modifiant le Code criminel (Meurtre qualifié), S.C. 1960-1961, c. 44, art. 1, 2.
Loi modifiant le Code criminel (révision judiciaire de l'inadmissibilité à la libération conditionnelle) et une autre loi en conséquence, L.C. 1996, c. 34.
Loi protégeant les Canadiens en mettant fin aux peines à rabais en cas de meurtres multiples, L.C. 2011, c. 5, art. 5.
Loi sur la libération conditionnelle de détenus, S.C. 1958, c. 38.
Loi sur la sécurité des rues et des communautés, L.C. 2012, c. 1.
Loi sur le système correctionnel et la mise en liberté sous condition, L.C. 1992, c. 20, art. 100, 100.1, 101a), 102, 103, 107, 120(1), 122, 123(1), (5), (5.01), 133(3), (3.1), 135, 140(4), (5.1), (5.2), (10) à (12).
Loi sur les crimes contre l'humanité et les crimes de guerre, L.C. 2000, c. 24, art. 4(2), 15(1).
Rikoslaki (Finlande), c. 2(c), art. 10.
Sentencing Act 2002 (N.-Z.), art. 103, 104.
Straffeloven (Danemark), art. 41.
Straffeloven (Norvège), art. 43.
Strafgesetzbuch (Allemagne), art. 57a.

Treaties and Other International Instruments

- Charter of the United Nations*, Can. T.S. 1945 No. 7, preamble.
- Convention for the Protection of Human Rights and Fundamental Freedoms*, 213 U.N.T.S. 221 [the *European Convention on Human Rights*], art. 3.
- International Covenant on Civil and Political Rights*, Can. T.S. 1976 No. 47, preamble, art. 10.
- Rome Statute of the International Criminal Court*, Can. T.S. 2002 No. 13, arts. 5(1), 77, 110(3).

Authors Cited

- Anderson, John L. “The Label of Life Imprisonment in Australia: A Principled or Populist Approach to an Ultimate Sentence” (2012), 35 *U.N.S.W.L.J.* 747.
- Brunelle, Christian. “La dignité dans la *Charte des droits et libertés de la personne*: de l’ubiquité à l’ambiguïté d’une notion fondamentale”, [2006] *R. du B.* (numéro thématique) 143.
- Canada. Canadian Sentencing Commission. *Sentencing Reform: A Canadian Approach*. Ottawa, 1987.
- Canada. Correctional Service. Research Branch. *A review and estimate of time spent in prison by offenders sentenced for murder*, by Mark Nafekh and Jillian Flight, November 2002 (online: https://publications.gc.ca/collections/collection_2011/scc-csc/PS83-6-27-eng.pdf; archived version: https://www.scc-csc.ca/cso-dce/2022SCC-CSC23_2_eng.pdf).
- Canada. Department of Justice. *A Values and Evidence Approach to Sentencing Purposes and Principles*, by Anthony N. Doob. Ottawa, 2017.
- Canada. Department of Justice. *An Analysis of the Use of the Faint Hope Clause*, by Ting Zhang and Lisa Ha. Ottawa, 2010.
- Canada. Department of Justice. *Report of a Committee Appointed to Inquire Into the Principles and Procedures Followed in the Remission Service of the Department of Justice of Canada*. Ottawa, 1956.
- Canada. House of Commons. *House of Commons Debates*, vol. 145, No. 96, 3rd Sess., 40th Parl., November 15, 2010, p. 5931.
- Canada. House of Commons. *House of Commons Debates*, vol. 145, No. 121, 3rd Sess., 40th Parl., February 1, 2011, pp. 7510, 7515.
- Canada. House of Commons. Standing Committee on Justice and Human Rights. *Evidence*, No. 42, 3rd Sess., 40th Parl., December 9, 2010, pp. 10-11.
- Canada. Library of Parliament. Parliamentary Information and Research Service. *Bill S-6: An Act to amend the Criminal Code and another Act*, Legislative Summary 40-3-S6-E, by Robin MacKay, Legal and

Traité et autres instruments internationaux

- Charte des Nations Unies*, R.T. Can. 1945 n° 7, préambule.
- Convention de sauvegarde des droits de l’homme et des libertés fondamentales*, 213 R.T.N.U. 221 [la *Convention européenne des droits de l’homme*], art. 3.
- Pacte international relatif aux droits civils et politiques*, R.T. Can. 1976 n° 47, préambule, art. 10.
- Statut de Rome de la Cour pénale internationale*, R.T. Can. 2002 n° 13, art. 5(1), 77, 110(3).

Doctrine et autres documents cités

- Anderson, John L. « The Label of Life Imprisonment in Australia : A Principled or Populist Approach to an Ultimate Sentence » (2012), 35 *U.N.S.W.L.J.* 747.
- Brunelle, Christian. « La dignité dans la *Charte des droits et libertés de la personne* : de l’ubiquité à l’ambiguïté d’une notion fondamentale », [2006] *R. du B.* (numéro thématique) 143.
- Canada. Bibliothèque du Parlement. Service d’information et de recherche parlementaires. *Projet de loi S-6 : Loi modifiant le Code criminel et une autre loi*, Résumé législatif 40-3-S6-F, par Robin MacKay, Division des affaires juridiques et législatives, 30 avril 2010, révisé le 6 avril 2011.
- Canada. Bureau de l’enquêteur correctionnel. Commission canadienne des droits de la personne. *Vieillir et mourir en prison : enquête sur les expériences vécues par les personnes âgées sous garde fédérale*, Ottawa, 2019.
- Canada. Chambre des communes. Comité permanent de la justice et des droits de la personne. *Témoignages*, n° 42, 3^e sess., 40^e lég., 9 décembre 2010, p. 10-11.
- Canada. Chambre des communes. *Débats de la Chambre des communes*, vol. 145, n° 96, 3^e sess., 40^e lég., 15 novembre 2010, p. 5931.
- Canada. Chambre des communes. *Débats de la Chambre des communes*, vol. 145, n° 121, 3^e sess., 40^e lég., 1^{er} février 2011, p. 7510, 7515.
- Canada. Commission canadienne sur la détermination de la peine. *Réformer la sentence : une approche canadienne*, Ottawa, 1987.
- Canada. Commission des libérations conditionnelles. *Directives ministérielles sur la prérogative royale de clémence*, 31 octobre 2014 (en ligne : <https://www.canada.ca/content/dam/pbc-clcc/documents/publications/Royal-Prerogative-Of-Mercy-Ministerial-Guidelines.pdf>; version archivée : https://www.scc-csc.ca/cso-dce/2022SCC-CSC23_1_eng_fra.pdf).
- Canada. Commission des libérations conditionnelles. *Rapport de surveillance du rendement 2018-2019*, Ottawa, mis à jour 2022.

- Legislative Affairs Division, April 30, 2010, revised April 6, 2011.
- Canada. Office of the Correctional Investigator. Canadian Human Rights Commission. *Aging and Dying in Prison: An Investigation into the Experiences of Older Individuals in Federal Custody*. Ottawa, 2019.
- Canada. Parole Board. *Performance Monitoring Report 2018-2019*. Ottawa, updated 2022.
- Canada. Parole Board. *Royal Prerogative of Mercy Ministerial Guidelines*, October 31, 2014 (online: <https://www.canada.ca/content/dam/pbc-clcc/documents/publications/Royal-Prerogative-Of-Mercy-Ministerial-Guidelines.pdf>; archived version: https://www.scc-csc.ca/cso-dce/2022SCC-CSC23_1_eng_fra.pdf).
- Canada. Senate. Standing Senate Committee on Legal and Constitutional Affairs. *Proceedings of the Standing Senate Committee on Legal and Constitutional Affairs*, No. 22, 3rd Sess., 40th Parl., March 2, 2011, pp. 10-11, 23-24.
- Canada. Statistics Canada. “Deaths, 2020”, in *The Daily*, January 24, 2022 (online: <https://www150.statcan.gc.ca/n1/daily-quotidien/220124/dq220124a-eng.htm>; archived version: https://www.scc-csc.ca/cso-dce/2022SCC-CSC23_3_eng.pdf).
- Campbell, Mary E., and David Cole. “Sentencing and Parole for Persons Convicted of Murder”, in David Cole and Julian Roberts, eds., *Sentencing in Canada: Essays in Law, Policy, and Practice*. Toronto: Irwin Law, 2020, 183.
- Cole, David P., and Allan Manson. *Release from Imprisonment: The Law of Sentencing, Parole and Judicial Review*. Carswell: Toronto, 1990.
- Desrosiers, Julie, et Catherine Bernard. “L’emprisonnement à perpétuité sans possibilité de libération conditionnelle: une peine inconstitutionnelle?” (2021), 25 *Can. Crim. L.R.* 275.
- Grant, Isabel, Crystal Choi and Debra Parkes. “The Meaning of Life: A Study of the Use of Parole Ineligibility for Murder Sentencing” (2020), 52 *Ottawa L. Rev.* 133.
- Henry, Jessica S. “Death-in-Prison Sentences: Overutilized and Underscrutinized”, in Charles J. Ogletree, Jr., and Austin Sarat, eds., *Life without Parole: America’s New Death Penalty?* New York: New York University Press, 2012, 66.
- Hood, Roger, and Carolyn Hoyle. *The Death Penalty: A Worldwide Perspective*, 5th ed. New York: Oxford University Press, 2015.
- Iftene, Adelina. “R. c. Bissonnette and the (Un)Constitutionality of Consecutive Periods of Parole Ineligibility for a Life Sentence: Why the QCCA Got It Right and Why Section 745.51 Should Never Be Re-Written” (2021), 69 *Crim. L.Q.* 312.
- Canada. Ministère de la Justice. *Rapport d’un comité institué pour faire enquête sur les principes et les méthodes suivis au Service des pardons du ministère de la Justice du Canada*, Ottawa, 1956.
- Canada. Ministère de la Justice. *Une analyse de l’utilisation de la disposition de la dernière chance*, par Ting Zhang et Lisa Ha, Ottawa, 2010.
- Canada. Ministère de la Justice. *Une approche des objectifs et des principes de détermination de la peine basée sur les valeurs et sur les preuves*, par Anthony N. Doob, Ottawa, 2017.
- Canada. Sénat. Comité sénatorial permanent des Affaires juridiques et constitutionnelles. *Délibérations du Comité sénatorial permanent des Affaires juridiques et constitutionnelles*, n° 22, 3^e sess., 40^e lég., 2 mars 2011, p. 10-11, 23-24.
- Canada. Service correctionnel. Direction de la recherche. *Examen et estimation de la durée de la détention chez les délinquants condamnés pour meurtre*, par Mark Nafekh et Jillian Flight, novembre 2002 (en ligne : https://publications.gc.ca/collections/collection_2011/scc-csc/PS83-6-27-fra.pdf; version archivée : https://www.scc-csc.ca/cso-dce/2022SCC-CSC23_2_fra.pdf).
- Canada. Statistique Canada. « Décès, 2020 », dans *Le Quotidien*, 24 janvier 2022 (en ligne : <https://www150.statcan.gc.ca/n1/daily-quotidien/220124/dq220124a-fra.htm>; version archivée : https://www.scc-csc.ca/cso-dce/2022SCC-CSC23_3_fra.pdf).
- Campbell, Mary E., and David Cole. « Sentencing and Parole for Persons Convicted of Murder », in David Cole and Julian Roberts, eds., *Sentencing in Canada : Essays in Law, Policy, and Practice*, Toronto, Irwin Law, 2020, 183.
- Cole, David P., and Allan Manson. *Release from Imprisonment : The Law of Sentencing, Parole and Judicial Review*, Carswell, Toronto, 1990.
- Desrosiers, Julie, et Catherine Bernard. « L’emprisonnement à perpétuité sans possibilité de libération conditionnelle : une peine inconstitutionnelle? » (2021), 25 *Rev. can. D.P.* 275.
- Grant, Isabel, Crystal Choi and Debra Parkes. « The Meaning of Life : A Study of the Use of Parole Ineligibility for Murder Sentencing » (2020), 52 *R.D. Ottawa* 133.
- Henry, Jessica S. « Death-in-Prison Sentences : Overutilized and Underscrutinized », in Charles J. Ogletree, Jr., and Austin Sarat, eds., *Life without Parole : America’s New Death Penalty?*, New York, New York University Press, 2012, 66.
- Hood, Roger, and Carolyn Hoyle. *The Death Penalty : A Worldwide Perspective*, 5th ed., New York, Oxford University Press, 2015.

- Johnson, Robert, and Sandra McGunigall-Smith. "Life Without Parole, America's Other Death Penalty" (2008), 88 *Prison J.* 328.
- Kerr, Lisa, and Benjamin L. Berger. "Methods and Severity: The Two Tracks of Section 12" (2020), 94 *S.C.L.R.* (2d) 235.
- Kleinstuber, Ross, and Jeremiah Coldsmith. "Is life without parole an effective way to reduce violent crime? An empirical assessment" (2020), 19 *Criminol. & Pub. Pol'y* 617.
- Kommers, Donald P., and Russell A. Miller. *The Constitutional Jurisprudence of the Federal Republic of Germany*, 3rd ed. Durham, N.C.: Duke University Press, 2012.
- Manning, Morris, and Peter Sankoff. *Manning, Mewett & Sankoff: Criminal Law*, 5th ed. Markham, Ont.: LexisNexis, 2015.
- Manson, Allan. "The Easy Acceptance of Long Term Confinement in Canada" (1990), 79 *C.R.* (3d) 265.
- Ormerod, David, and Karl Laird. *Smith, Hogan, and Ormerod's Criminal Law*, 16th ed. New York: Oxford University Press, 2021.
- Ruby, Clayton C. *Sentencing*, 10th ed. Toronto: LexisNexis, 2020.
- Spencer, Derek. "How Multiple Murder Sentencing Provisions May Violate the *Charter*" (2019), 55 *C.R.* (7th) 165.
- Strange, Carolyn. "Mercy for Murderers? A Historical Perspective on the Royal Prerogative of Mercy" (2001), 64 *Sask. L. Rev.* 559.
- United Kingdom. Ministry of Justice. National Offender Management Service. *PSO 4700 — The Indeterminate Sentence Manual*, 2010.
- van Zyl Smit, Dirk. "Outlawing Irreducible Life Sentences: Europe on the Brink?" (2010), 23 *Fed. Sentencing Rep.* 39.
- Iftene, Adelina. « R. c. Bissonnette and the (Un)Constitutionality of Consecutive Periods of Parole Ineligibility for a Life Sentence : Why the QCCA Got It Right and Why Section 745.51 Should Never Be Re-Written » (2021), 69 *Crim. L.Q.* 312.
- Johnson, Robert, and Sandra McGunigall-Smith. « Life Without Parole, America's Other Death Penalty » (2008), 88 *Prison J.* 328.
- Kerr, Lisa, and Benjamin L. Berger. « Methods and Severity : The Two Tracks of Section 12 » (2020), 94 *S.C.L.R.* (2d) 235.
- Kleinstuber, Ross, and Jeremiah Coldsmith. « Is life without parole an effective way to reduce violent crime? An empirical assessment » (2020), 19 *Criminol. & Pub. Pol'y* 617.
- Kommers, Donald P., and Russell A. Miller. *The Constitutional Jurisprudence of the Federal Republic of Germany*, 3rd ed., Durham (N.C.), Duke University Press, 2012.
- Manning, Morris, and Peter Sankoff. *Manning, Mewett & Sankoff : Criminal Law*, 5th ed., Markham (Ont.), LexisNexis, 2015.
- Manson, Allan. « The Easy Acceptance of Long Term Confinement in Canada » (1990), 79 *C.R.* (3d) 265.
- Ormerod, David, and Karl Laird. *Smith, Hogan, and Ormerod's Criminal Law*, 16th ed., New York, Oxford University Press, 2021.
- Royaume-Uni. Ministry of Justice. National Offender Management Service. *PSO 4700 — The Indeterminate Sentence Manual*, 2010.
- Ruby, Clayton C. *Sentencing*, 10th ed., Toronto, LexisNexis, 2020.
- Spencer, Derek. « How Multiple Murder Sentencing Provisions May Violate the *Charter* » (2019), 55 *C.R.* (7th) 165.
- Strange, Carolyn. « Mercy for Murderers? A Historical Perspective on the Royal Prerogative of Mercy » (2001), 64 *Sask. L. Rev.* 559.
- van Zyl Smit, Dirk. « Outlawing Irreducible Life Sentences : Europe on the Brink? » (2010), 23 *Fed. Sentencing Rep.* 39.

APPEAL from a judgment of the Quebec Court of Appeal (Doyon, Gagnon and Bélanger JJ.A.), 2020 QCCA 1585, 405 C.C.C. (3d) 524, 68 C.R. (7th) 1, [2020] AZ-51725265, [2020] Q.J. No. 11243 (QL), 2020 CarswellQue 13124 (WL), setting aside in part a decision of Huot J., 2019 QCCS 354, [2019] AZ-51568159, [2019] Q.J. No. 758 (QL), 2019 CarswellQue 6617 (WL). Appeal dismissed.

POURVOI contre un arrêt de la Cour d'appel du Québec (les juges Doyon, Gagnon et Bélanger), 2020 QCCA 1585, 405 C.C.C. (3d) 524, 68 C.R. (7th) 1, [2020] AZ-51725265, [2020] J.Q. n° 11243 (QL), 2020 CarswellQue 12129 (WL), qui a infirmé en partie une décision du juge Huot, 2019 QCCS 354, [2019] AZ-51568159, [2019] J.Q. n° 758 (QL), 2019 CarswellQue 750 (WL). Pourvoi rejeté.

François Godin and Olivier T. Raymond, for the appellant Her Majesty The Queen.

Jean-François Paré, Sylvain Leboeuf, Julie Dassylva and Stéphanie Quirion-Cantin, for the appellant the Attorney General of Quebec.

Charles-Olivier Gosselin and Nicolas Déry, for the respondent.

Ian Demers, for the intervener the Attorney General of Canada.

Milan Rupic and Katie Doherty, for the intervener the Attorney General of Ontario.

Written submissions only by *Glenn Hubbard*, for the intervener the Attorney General of Nova Scotia.

Micah B. Rankin, for the intervener the Attorney General of British Columbia.

Written submissions only by *Christine Rideout, Q.C.*, for the intervener the Attorney General of Alberta.

Juliette Vani, for the intervener Association des avocats de la défense de Montréal-Laval-Longueuil.

Erin Dann and Paul Socka, for the intervener the Queen's Prison Law Clinic.

Timothy S. B. Danson and Marjan Delavar, for the interveners the Toronto Police Association, the Canadian Police Association, Karen Fraser, Jennifer Sweet, Nicole Sweet, Kim Sweet, John Sweet, J. Robert Sweet, Charles Sweet, Patricia Corcoran, Ann Parker, Ted Baylis, Sharon Baylis, Cory Baylis, Michael Leone, Doug French, Donna French and Deborah Mahaffy.

Stéphane Beaulac, for the intervener the Observatory on National Security Measures.

Eric Purtzki and Alix Tolliday, for the intervener the Independent Criminal Defence Advocacy Society.

François Godin et Olivier T. Raymond, pour l'appelante Sa Majesté la Reine.

Jean-François Paré, Sylvain Leboeuf, Julie Dassylva et Stéphanie Quirion-Cantin, pour l'appelant le procureur général du Québec.

Charles-Olivier Gosselin et Nicolas Déry, pour l'intimé.

Ian Demers, pour l'intervenant le procureur général du Canada.

Milan Rupic et Katie Doherty, pour l'intervenant le procureur général de l'Ontario.

Argumentation écrite seulement par *Glenn Hubbard*, pour l'intervenant le procureur général de la Nouvelle-Écosse.

Micah B. Rankin, pour l'intervenant le procureur général de la Colombie-Britannique.

Argumentation écrite seulement par *Christine Rideout, c.r.*, pour l'intervenant le procureur général de l'Alberta.

Juliette Vani, pour l'intervenante l'Association des avocats de la défense de Montréal-Laval-Longueuil.

Erin Dann et Paul Socka, pour l'intervenante Queen's Prison Law Clinic.

Timothy S. B. Danson et Marjan Delavar, pour les intervenants Toronto Police Association, l'Association canadienne des policiers, Karen Fraser, Jennifer Sweet, Nicole Sweet, Kim Sweet, John Sweet, J. Robert Sweet, Charles Sweet, Patricia Corcoran, Ann Parker, Ted Baylis, Sharon Baylis, Cory Baylis, Michael Leone, Doug French, Donna French et Deborah Mahaffy.

Stéphane Beaulac, pour l'intervenant l'Observatoire des mesures visant la sécurité nationale.

Eric Purtzki et Alix Tolliday, pour l'intervenante Independent Criminal Defence Advocacy Society.

Simon Borys, for the intervener the Canadian Prison Law Association.

Sameha Omer and *Daniel Kuhlen*, for the intervener the National Council of Canadian Muslims.

Stephanie DiGiuseppe and *Harshi Mann*, for the intervener the Canadian Civil Liberties Association.

Danielle Robitaille and *Carly Peddle*, for the intervener the British Columbia Civil Liberties Association.

Mathieu St-Germain and *Jason Fraser*, for the intervener the Canadian Association of Chiefs of Police.

Simon Borys, pour l'intervenante Canadian Prison Law Association.

Sameha Omer et *Daniel Kuhlen*, pour l'intervenant le Conseil national des musulmans canadiens.

Stephanie DiGiuseppe et *Harshi Mann*, pour l'intervenante l'Association canadienne des libertés civiles.

Danielle Robitaille et *Carly Peddle*, pour l'intervenante British Columbia Civil Liberties Association.

Mathieu St-Germain et *Jason Fraser*, pour l'intervenante l'Association canadienne des chefs de police.

TABLE OF CONTENTS

	Paragraph
I. <u>Introduction</u>	1
II. <u>Background and Judicial History</u>	10
A. <i>Facts</i>	10
B. <i>Quebec Superior Court, 2019 QCCS 354 (Huot J.)</i>	13
C. <i>Quebec Court of Appeal, 2020 QCCA 1585, 405 C.C.C. (3d) 524 (Doyon, Gagnon and Bélanger J.J.A.)</i>	20
III. <u>Issues</u>	25
IV. <u>Analysis</u>	27
A. <i>History of Section 745.51 Cr. C.</i>	27
B. <i>The Parole System in Canada</i>	37
C. <i>Sentencing Objectives in Canadian Law</i>	45
D. <i>The Right Under Section 12 of the Charter Not to Be Subjected to Cruel and Unusual Punishment</i>	54
(1) <u>The Parole Ineligibility Period Constitutes Punishment</u>	56

TABLE DES MATIÈRES

	Paragraphe
I. <u>Introduction</u>	1
II. <u>Contexte et historique judiciaire</u>	10
A. <i>Contexte factuel</i>	10
B. <i>Cour supérieure du Québec, 2019 QCCS 354 (le juge Huot)</i>	13
C. <i>Cour d'appel du Québec, 2020 QCCA 1585, 68 C.R. (7th) 1 (les juges Doyon, Gagnon et Bélanger)</i>	20
III. <u>Questions en litige</u>	25
IV. <u>Analyse</u>	27
A. <i>L'historique de l'art. 745.51 C. cr.</i>	27
B. <i>Le système de libération conditionnelle au Canada</i>	37
C. <i>Les objectifs de la peine en droit canadien</i>	45
D. <i>La protection contre les peines cruelles et inusitées garantie par l'art. 12 de la Charte</i>	54
(1) <u>La période d'inadmissibilité à la libération conditionnelle est une peine</u>	56

(2) <u>The Two Prongs of the Right Not to Be Subjected to Cruel and Unusual Punishment</u>	(2) <u>Les deux volets de la protection contre les peines cruelles et inusitées</u>	59	59
E. <i>Does Section 745.51 Cr. C. Infringe Section 12 of the Charter?</i>	E. <i>L'article 745.51 C. cr. contrevient-il à l'art. 12 de la Charte?</i>	71	71
(1) <u>Scope of Section 745.51 Cr. C.</u>	(1) <u>La portée de l'art. 745.51 C. cr.</u>	74	74
(2) <u>Imprisonment for Life Without a Realistic Possibility of Parole Constitutes Punishment That Is Cruel and Unusual by Nature</u>	(2) <u>L'emprisonnement à perpétuité sans possibilité réaliste de libération conditionnelle constitue une peine cruelle et inusitée par nature</u>	81	81
(a) <i>Examination of the Nature of a Sentence of Imprisonment for Life Without a Realistic Possibility of Parole</i>	(a) <i>L'examen de la nature de la peine d'emprisonnement à perpétuité sans possibilité réaliste de libération conditionnelle</i>	82	82
(b) <i>Effects of a Sentence of Imprisonment for Life Without a Realistic Possibility of Parole</i>	(b) <i>Les effets de la peine d'emprisonnement à perpétuité sans possibilité réaliste de libération conditionnelle</i>	96	96
(c) <i>Dignity and Imprisonment for Life Without the Possibility of Parole: International and Comparative Law Perspectives</i>	(c) <i>La dignité et l'emprisonnement à perpétuité sans possibilité de libération conditionnelle : perspectives en droit international et en droit comparé</i>	98	98
(d) <i>Does the Judicial Discretion to Impose Consecutive Parole Ineligibility Periods Affect the Constitutionality of the Impugned Provision?</i>	(d) <i>Le pouvoir discrétionnaire du tribunal de cumuler les périodes d'inadmissibilité à la libération conditionnelle a-t-il une incidence sur la constitutionnalité de la disposition contestée?</i>	109	109
(e) <i>Can the Royal Prerogative of Mercy Save the Impugned Provision?</i>	(e) <i>La prérogative royale de clémence peut-elle sauvegarder la disposition contestée?</i>	112	112
F. <i>Is the Infringement of Section 12 of the Charter Justified Under Section 1 of the Charter?</i>	F. <i>L'atteinte à l'art. 12 de la Charte est-elle justifiée au regard de l'article premier de la Charte?</i>	120	120
G. <i>Appropriate Remedy</i>	G. <i>La réparation convenable</i>	122	122
V. <u>Conclusion</u>	V. <u>Conclusion</u>	139	139

English version of the judgment of the Court
delivered by

THE CHIEF JUSTICE —

I. Introduction

[1] The crimes committed by the respondent in the Great Mosque of Québec on the fateful day of January 29, 2017 were of unspeakable horror and left deep and agonizing scars in the heart of the Muslim community and of Canadian society as a whole. We cannot help but feel sympathy for the victims and their loved ones for their irreparable losses and their indescribable pain.

[2] It is in the context of those crimes that this Court must rule on the constitutional limits on the state's power to punish offenders. The appeal requires us to weigh fundamental values of our society enshrined in the *Canadian Charter of Rights and Freedoms* and to reaffirm our commitment to upholding the rights it guarantees to every individual, including the vilest of criminals.

[3] More specifically, the question before the Court is whether s. 745.51 of the *Criminal Code*, R.S.C. 1985, c. C-46 (“Cr. C.”), which was introduced in 2011 by the *Protecting Canadians by Ending Sentence Discounts for Multiple Murders Act*, S.C. 2011, c. 5, s. 5, is contrary to ss. 7 and 12 of the *Charter*. The impugned provision authorizes the imposition of consecutive parole ineligibility periods in cases involving multiple murders. In the context of first degree murders, the application of this provision allows a court to impose a sentence of imprisonment without eligibility for parole for a period of 50, 75, 100 or even 150 years. In practice, the exercise of the court's discretion will inevitably result in imprisonment for life without a realistic possibility of parole for every offender concerned who has been convicted of multiple first degree murders. Such a criminal sentence is one whose severity is without precedent

Le jugement de la Cour a été rendu par

LE JUGE EN CHEF —

I. Introduction

[1] Les crimes commis à la Grande Mosquée de Québec par l'intimé le jour funeste du 29 janvier 2017 sont d'une horreur indicible et ont laissé de profondes et douloureuses cicatrices dans le cœur de la communauté musulmane et de la société canadienne dans son ensemble. Nous ne pouvons qu'éprouver de la sympathie envers les victimes et leurs proches pour leurs pertes irréparables et leurs souffrances indescriptibles.

[2] C'est dans le contexte de ces crimes que notre Cour est appelée à se prononcer sur les limites constitutionnelles du pouvoir de l'État d'infliger des châtements aux contrevenants. Le pourvoi requiert que l'on soupèse des valeurs fondamentales de notre société qui sont inscrites dans la *Charte canadienne des droits et libertés* et que l'on réaffirme notre engagement envers la protection des droits que celle-ci garantit à toute personne, y compris aux criminels les plus vils.

[3] Plus particulièrement, notre Cour est saisie de la question de savoir si l'art. 745.51 du *Code criminel*, L.R.C. 1985, c. C-46 (« C. cr. »), introduit en 2011 par la *Loi protégeant les Canadiens en mettant fin aux peines à rabais en cas de meurtres multiples*, L.C. 2011, c. 5, art. 5, contrevient aux art. 7 et 12 de la *Charte*. La disposition contestée autorise le cumul de périodes d'inadmissibilité à la libération conditionnelle en cas de meurtres multiples. Lorsqu'il s'agit de meurtres au premier degré, l'application de cette disposition permet au tribunal d'infliger une peine d'emprisonnement sans possibilité de libération conditionnelle pour une période de 50, 75, 100, voire 150 ans. En réalité, l'exercice du pouvoir discrétionnaire du tribunal résulte inévitablement en un emprisonnement à vie sans possibilité réaliste de libération conditionnelle pour tout contrevenant visé qui a été reconnu coupable de meurtres multiples au

in this country's history since the abolition of the death penalty and corporal punishment in the 1970s.

[4] For the reasons that follow, I conclude that s. 745.51 *Cr. C.* is contrary to s. 12 of the *Charter* and is not saved under s. 1. In light of this conclusion, it will not be necessary to consider the alleged infringement of s. 7 of the *Charter*.

[5] Section 12 of the *Charter* guarantees the right not to be subjected to cruel and unusual punishment or treatment. In essence, its purpose is to protect human dignity and ensure respect for the inherent worth of each individual. This Court recently affirmed, albeit in a different context, that human dignity transcends the interests of the individual and concerns society at large (*Sherman Estate v. Donovan*, 2021 SCC 25, [2021] 2 S.C.R. 75, at para. 33). In this sense, the significance of this appeal extends well beyond its particular facts.

[6] Section 12 of the *Charter* prohibits the state from imposing a punishment that is grossly disproportionate in relation to the situation of a particular offender and from having recourse to punishments that, by their very nature, are intrinsically incompatible with human dignity.

[7] The provision challenged in this case allows the imposition of a sentence that falls into this latter category of punishments that are cruel and unusual by nature. All offenders subjected to stacked 25-year ineligibility periods under s. 745.51 *Cr. C.* are doomed to be incarcerated for the rest of their lives without a realistic possibility of being granted parole. The impugned provision, taken to its extreme, authorizes a court to order an offender to serve an ineligibility period that exceeds the life expectancy of any human being, a sentence so absurd that it would bring the administration of justice into disrepute.

[8] A sentence of imprisonment for life without a realistic possibility of parole is intrinsically incompatible with human dignity. Such a sentence is degrading insofar as it negates, in advance and irreversibly, the

premier degré. Il s'agit d'une peine pour des infractions criminelles dont la sévérité est sans précédent dans l'histoire du pays depuis l'abolition de la peine de mort et des châtiments corporels dans les années 1970.

[4] Pour les motifs qui suivent, je conclus que l'art. 745.51 *C. cr.* est contraire à l'art. 12 de la *Charte* et n'est pas sauvegardé par l'article premier. Vu cette conclusion, il n'est pas nécessaire d'examiner l'allégation de violation de l'art. 7 de la *Charte*.

[5] L'article 12 de la *Charte* confère une protection contre les peines et traitements cruels et inusités. Fondamentalement, cette disposition a pour objet de protéger la dignité humaine et d'assurer le respect de la valeur inhérente à chaque personne. Notre Cour a récemment affirmé, dans un contexte différent, que la dignité humaine transcende les intérêts individuels et concerne la société en général (*Sherman (Succession) c. Donovan*, 2021 CSC 25, [2021] 2 R.C.S. 75, par. 33). En ce sens, la portée du présent pourvoi dépasse largement les faits qui lui sont propres.

[6] L'article 12 de la *Charte* interdit à l'État d'infliger des peines qui sont exagérément disproportionnées par rapport à la situation d'un contrevenant en particulier et de recourir à des peines qui s'avèrent, par leur nature même, intrinsèquement incompatibles avec la dignité humaine.

[7] La disposition contestée dans la présente affaire permet l'infliction d'une peine qui entre dans cette dernière catégorie de peines cruelles et inusitées par nature. Tous les contrevenants assujettis à un cumul de périodes d'inadmissibilité de 25 ans chacune en vertu de l'art. 745.51 *C. cr.* sont destinés à être incarcérés pour le restant de leurs jours, sans possibilité réaliste d'obtenir une libération conditionnelle. Poussée à l'extrême, la disposition contestée autorise le tribunal à ordonner à un contrevenant de purger un temps d'épreuve qui dépasse l'espérance de vie de toute personne humaine, une peine dont l'absurdité est de nature à déconsidérer l'administration de la justice.

[8] La peine d'emprisonnement à vie sans possibilité réaliste de libération conditionnelle est intrinsèquement incompatible avec la dignité humaine. Une telle peine est dégradante dans la mesure où elle

penological objective of rehabilitation. This objective is intimately linked to human dignity in that it conveys the conviction that every individual is capable of repenting and re-entering society. This conclusion that a sentence of imprisonment for life without a realistic possibility of parole is incompatible with human dignity is not only reinforced by the effects that such a sentence may have on all offenders on whom it is imposed, but also finds support in international and comparative law.

[9] To ensure respect for the inherent dignity of every individual, s. 12 of the *Charter* requires that Parliament leave a door open for rehabilitation, even in cases where this objective is of secondary importance. In practical terms, this means that every inmate must have a realistic possibility of applying for parole, at the very least earlier than the expiration of an ineligibility period of 50 years, which is the minimum ineligibility period resulting from the exercise of judicial discretion under the impugned provision in cases involving first degree murders.

II. Background and Judicial History

A. *Facts*

[10] Given that these reasons concern the constitutionality of s. 745.51 *Cr. C.* and that the resulting principles will apply to many multiple murder cases, I do not think it would be appropriate to refer at length to the horrible circumstances of this case, which were summarized well by the trial judge and widely publicized in the media. However, out of respect for the victims of this tragedy, it must be said that hatred, racism, ignorance and Islamophobia were behind the appalling acts committed by the respondent on that fateful day of January 29, 2017, when he sowed terror and death in the Great Mosque of Québec.

[11] Forty-six people, including four children, had gathered in that place of worship for evening

anéantit, de manière anticipée et irréversible, l'objectif pénologique de réinsertion sociale. Cet objectif est intimement lié à la dignité humaine en ce qu'il véhicule la conviction que chaque individu possède la capacité nécessaire pour se repentir et réintégrer la société. Cette conclusion selon laquelle la peine d'emprisonnement à vie sans possibilité réaliste de libération conditionnelle est contraire à la dignité humaine est non seulement renforcée par les effets que sont susceptibles d'engendrer une telle peine sur l'ensemble des contrevenants qui y sont assujettis, mais elle trouve également appui en droit international et en droit comparé.

[9] Pour assurer le respect de la dignité inhérente à chaque individu, l'art. 12 de la *Charte* commande que le Parlement laisse entrouverte la porte donnant accès à la réhabilitation, et ce, même dans les situations où cet objectif revêt une importance secondaire. Sur le plan pratique, cela signifie que tout détenu doit bénéficier d'une possibilité réaliste de demander la libération conditionnelle à tout le moins avant l'expiration d'un temps d'épreuve de 50 ans, lequel correspond à la période d'inadmissibilité minimale résultant de l'exercice du pouvoir discrétionnaire du tribunal en vertu de la disposition contestée en cas de meurtres au premier degré.

II. Contexte et historique judiciaire

A. *Contexte factuel*

[10] Comme les présents motifs concernent la constitutionnalité de l'art. 745.51 *C. cr.* et que leurs enseignements s'appliqueront à de nombreuses affaires de meurtres multiples, je considère qu'il ne serait pas approprié de rappeler longuement les circonstances odieuses de l'espèce qu'a bien résumées le premier juge et qui ont été amplement médiatisées. Toutefois, par respect pour les victimes de cette tragédie, il importe de souligner que la haine, le racisme, l'ignorance et l'islamophobie sont au cœur des gestes révoltants commis par l'intimé ce funeste jour du 29 janvier 2017, lorsqu'il a semé la terreur et la mort dans la Grande Mosquée de Québec.

[11] Quarante-six personnes, dont quatre enfants, s'étaient réunies dans ce lieu de culte pour la prière

prayer. The respondent burst in and, armed with a semi-automatic rifle and a pistol, opened fire on the worshippers. In less than two minutes, he caused the death of six innocent people, Khaled Belkacemi, Ibrahima and Mamadou Tanou Barry, Abdelkrim Hassane, Azzeddine Soufiane and Aboubaker Thabti, seriously injured five others and left the survivors of the killings, and the victims' loved ones, with deep and permanent psychological scars.

[12] On March 26, 2018, the respondent pleaded guilty to the 12 charges laid against him, including 6 counts of first degree murder, an indictable offence provided for in ss. 231(2) and 235 *Cr. C.* As a consequence, he was automatically sentenced to imprisonment for life. The Crown then asked the court to apply s. 745.51 *Cr. C.* and sentence the respondent to 6 consecutive parole ineligibility periods of 25 years, for a total of 150 years. The trial judge thus had to determine the length of the parole ineligibility period to be imposed on the respondent, and also had to rule on the constitutionality of s. 745.51 *Cr. C.*

B. *Quebec Superior Court, 2019 QCCS 354 (Huot J.)*

[13] In particularly detailed reasons, the trial judge held that s. 745.51 *Cr. C.* infringed ss. 12 and 7 of the *Charter* and that it could not be saved under s. 1. As a remedy for the unconstitutionality of the provision, he applied the technique of reading in and ordered the respondent to serve an ineligibility period of 40 years before applying for parole.

[14] Before ruling on the constitutionality of the impugned provision, the trial judge first asked [TRANSLATION] “whether there is a factual basis in this case to justify” such a constitutional analysis and concluded that there was (para. 472 (CanLII)). In his view, a certain parole ineligibility period had to be served consecutively having regard to the character of the respondent, the nature of the offences, the circumstances surrounding their commission, and the principles of sentencing. In this case, a period of

du soir. L'intimé y a fait irruption et, armé d'une carabine semi-automatique et d'un pistolet, il a fait feu en direction des fidèles. En moins de deux minutes, l'assaillant a provoqué la mort de six personnes innocentes, Khaled Belkacemi, Ibrahima et Mamadou Tanou Barry, Abdelkrim Hassane, Azzeddine Soufiane et Aboubaker Thabti, en plus d'en blesser grièvement cinq autres et de causer des séquelles psychologiques profondes et permanentes chez les survivants de la tuerie, ainsi que chez les proches des victimes.

[12] Le 26 mars 2018, l'intimé a plaidé coupable aux 12 chefs d'accusation portés contre lui, notamment 6 meurtres au premier degré, des actes criminels prévus au par. 231(2) et à l'art. 235 *C. cr.* En conséquence, il a écopé automatiquement d'une peine d'emprisonnement à perpétuité. Le ministère public a alors demandé au tribunal d'appliquer l'art. 745.51 *C. cr.* et de condamner l'intimé à 6 périodes consécutives d'inadmissibilité à la libération conditionnelle de 25 ans, pour un total de 150 ans. Il incombait donc au juge du procès de déterminer la durée de la période d'inadmissibilité à la libération conditionnelle à infliger à l'intimé, et de se prononcer sur la constitutionnalité de l'art. 745.51 *C. cr.*

B. *Cour supérieure du Québec, 2019 QCCS 354 (le juge Huot)*

[13] Dans une décision particulièrement étoffée, le premier juge conclut que l'art. 745.51 *C. cr.* viole les art. 12 et 7 de la *Charte* et qu'il ne peut être sauvegardé par l'article premier. Pour remédier à l'inconstitutionnalité de la disposition, le juge recourt à l'interprétation large et ordonne à l'intimé de purger un temps d'épreuve de 40 ans avant de demander la libération conditionnelle.

[14] Avant de se pencher sur la constitutionnalité de la disposition en litige, le premier juge se demande d'abord « s'il existe, en l'espèce, un fondement factuel justifiant » une telle analyse constitutionnelle et conclut par l'affirmative (par. 472 (CanLII)). De l'avis du juge, une certaine période d'inadmissibilité à la libération conditionnelle doit être purgée de façon consécutive, compte tenu du caractère de l'intimé, de la nature des infractions, des circonstances entourant leur perpétration et des principes de détermination de

more than 25 but less than 50 years would be appropriate. The judge noted, however, that s. 745.51 *Cr. C.* limited his exercise of discretion to the imposition of consecutive periods of 25 years each. He found that, in the circumstances, he had to review the constitutionality of the provision under ss. 7 and 12 of the *Charter*.

[15] To determine whether s. 745.51 *Cr. C.* created a sentence that constituted cruel and unusual punishment within the meaning of s. 12, the trial judge applied the analytical framework developed in *R. v. Nur*, 2015 SCC 15, [2015] 1 S.C.R. 773, although he observed that the impugned provision did not impose a minimum sentence (para. 810). He concluded at the first step of that analysis that, in the absence of the impugned provision, a total parole ineligibility period of between 35 and 42 years would be just and appropriate in this case (para. 843). At the second step of the analysis, which involves considering the effect of the prescribed sentence on the offender, he found that the imposition of 2 consecutive ineligibility periods of 25 years each would violate the respondent's s. 12 rights and held that [TRANSLATION] “[s]uch sentences are grossly disproportionate and totally incompatible with human dignity” (para. 980). In his view, Canadian society would consider any sentence that denied the offender a reasonable prospect of conditional release in the last years of his life to be abhorrent and intolerable. Section 745.51 *Cr. C.* would therefore result in the imposition of a grossly disproportionate sentence on the respondent and, for this reason, constituted cruel and unusual punishment.

[16] The trial judge then turned to the analysis under s. 7 of the *Charter* and concluded that the impugned provision was overbroad and had effects that were grossly disproportionate to its objective, thereby infringing the respondent's liberty and security interests in a manner contrary to the principles of fundamental justice. In his analysis, he rejected the protection of hope as a principle of fundamental justice but found that fundamental justice does include the protection of human dignity, a principle that s. 745.51 *Cr. C.* violated.

la peine. En l'occurrence, une période supérieure à 25 ans, mais inférieure à 50 ans, serait indiquée. Le juge constate toutefois que l'art. 745.51 *C.cr.* limite l'exercice de son pouvoir discrétionnaire à l'infliction de périodes consécutives de 25 ans chacune. Dans les circonstances, le juge considère qu'il lui incombe d'analyser la constitutionnalité de la disposition au regard des art. 7 et 12 de la *Charte*.

[15] Pour déterminer si l'art. 745.51 *C. cr.* crée une peine cruelle et inusitée au sens de l'art. 12, le premier juge applique le cadre d'analyse élaboré dans l'arrêt *R. c. Nur*, 2015 CSC 15, [2015] 1 R.C.S. 773, bien qu'il constate que la disposition contestée n'impose pas de peine minimale (par. 810). Au terme de la première étape de cette analyse, le juge conclut qu'une période totale d'inadmissibilité à la libération conditionnelle variant entre 35 et 42 ans serait juste et appropriée en l'espèce, abstraction faite de la disposition contestée (par. 843). Concernant la deuxième étape de l'analyse, qui consiste à examiner l'effet de la peine prescrite sur le contrevenant, le juge statue que l'infliction de 2 périodes d'inadmissibilité consécutives de 25 ans chacune viole les droits garantis à l'intimé par l'art. 12. Le juge estime que « [d]e telles peines sont exagérément disproportionnées et totalement incompatibles avec la dignité humaine » (par. 980). À son avis, toute peine qui nie au contrevenant une possibilité raisonnable de mise en liberté sous condition dans les dernières années de sa vie serait considérée odieuse et intolérable par la société canadienne. En conséquence, l'art. 745.51 *C. cr.* a pour effet d'infliger à l'intimé une peine exagérément disproportionnée et, de ce fait, constitue une peine cruelle et inusitée.

[16] Le premier juge procède ensuite à l'analyse fondée sur l'art. 7 de la *Charte* et conclut que la disposition contestée a une portée excessive et produit des effets exagérément disproportionnés par rapport à son objet, de sorte qu'elle porte atteinte aux droits à la liberté et à la sécurité de l'intimé d'une manière non conforme aux principes de justice fondamentale. Dans son analyse, le juge rejette la protection de l'espoir comme principe de justice fondamentale, mais il inclut à ce chapitre la protection de la dignité humaine, un principe avec lequel l'art. 745.51 *C. cr.* est en porte-à-faux.

[17] Regarding s. 1 of the *Charter*, the judge found that the Crown had not shown that the limits on the s. 7 and 12 rights were reasonable and justified in a free and democratic society.

[18] In the end, the judge noted that the appropriate remedy where a declaration of unconstitutionality is made is generally the invalidity of the legislative provision in question. However, he found that the impugned provision was substantially constitutional and peripherally problematic, so the defect could be remedied by applying the technique of reading in. In his view, because the violation stemmed from an omission from the provision, the essential conditions for reading in were met in this case. He therefore interpreted s. 745.51 *Cr. C.* as granting courts a discretion to choose the length of the additional ineligibility period to impose on an offender, which could be less than 25 years.

[19] The trial judge accordingly imposed on the respondent the mandatory minimum sentence of imprisonment for life for the 6 counts of first degree murder and, applying the technique of reading in to s. 745.51 *Cr. C.*, ordered that the respondent serve a 25-year parole ineligibility period on each of the first 5 counts of which he had been convicted and that these periods be served concurrently. For the sixth count, the judge ordered that the respondent serve a minimum period of 15 years before being able to apply for parole and that this period be consecutive to the other periods he had ordered, for a total ineligibility period of 40 years.

C. *Quebec Court of Appeal, 2020 QCCA 1585, 405 C.C.C. (3d) 524 (Doyon, Gagnon and Bélanger JJA.)*

[20] In a unanimous decision, the Court of Appeal allowed the respondent's appeal, declared s. 745.51 *Cr. C.* invalid on the basis that it was contrary to ss. 12 and 7 of the *Charter* and found that the trial judge had erred by arrogating the discretion to reformulate

[17] En ce qui concerne l'article premier de la *Charte*, le juge considère que le ministère public n'a pas réussi à démontrer que les restrictions apportées aux droits prévus aux art. 7 et 12 sont raisonnables et justifiées dans le cadre d'une société libre et démocratique.

[18] En définitive, le juge rappelle que l'invalidité de la disposition de la loi est généralement la réparation convenable en cas de déclaration d'inconstitutionnalité. Cependant, il estime que la disposition contestée est substantiellement constitutionnelle et marginalement problématique, et qu'elle peut en conséquence être corrigée en recourant à la technique de l'interprétation large. Selon le juge, les conditions essentielles pour recourir à l'interprétation large sont réunies en l'espèce, puisque la violation découle d'une omission dans le texte de la disposition. Le premier juge interprète donc l'art. 745.51 *C. cr.* comme ayant pour effet de conférer au tribunal le pouvoir discrétionnaire de choisir la durée de la période d'inadmissibilité additionnelle à infliger au contrevenant, période qui pourrait être inférieure à 25 ans.

[19] Le premier juge inflige donc à l'intimé la peine minimale obligatoire d'emprisonnement à perpétuité à l'égard des 6 chefs d'accusation de meurtre au premier degré et, conformément à l'interprétation large qu'il donne à l'art. 745.51 *C. cr.*, il assortit chacune des déclarations de culpabilité relatives aux 5 premiers chefs d'une période d'inadmissibilité à la libération conditionnelle de 25 ans, périodes qui devront être purgées concurremment par l'intimé. Pour ce qui est du sixième chef, le juge condamne l'intimé à purger une période minimale de 15 ans avant de pouvoir demander une libération conditionnelle, de manière consécutive aux autres périodes ordonnées, et ce, pour un temps d'épreuve total de 40 ans.

C. *Cour d'appel du Québec, 2020 QCCA 1585, 68 C.R. (7th) 1 (les juges Doyon, Gagnon et Bélanger)*

[20] Dans un arrêt unanime, la Cour d'appel accueille le pourvoi de l'intimé, déclare l'art. 745.51 *C. cr.* invalide parce que contraire aux art. 12 et 7 de la *Charte* et conclut que le premier juge a fait erreur en s'arrogeant le pouvoir discrétionnaire de reformuler

s. 745.51 *Cr. C.* and, in so doing, ordering that the respondent serve a parole ineligibility period that had no basis in law.

[21] In its analysis under s. 12 of the *Charter*, the Court of Appeal began by considering the constitutionality of the provision by looking at various scenarios that might arise as a result of the application of s. 745.51 *Cr. C.* It concluded that the imposition of a parole ineligibility period that greatly exceeds the life expectancy of any human being is degrading because of its absurdity, and hence incompatible with human dignity. The Court of Appeal reached the same conclusion regarding the imposition of consecutive ineligibility periods totalling 75 years, an order that is unlikely to be carried out given that the minimum age at which an offender who started a sentence at the age of 18 could apply for parole would be 93. Likewise, the imposition of a sentence of imprisonment without eligibility for parole for 50 years does not satisfy the fundamental test of proportionality in sentencing. Although the Court of Appeal rejected the argument that loss of hope entails the unconstitutionality of the provision, it expressed the opinion that an individual who is rehabilitated after 25 years in prison must be able to apply for parole; if not, the sentence would have all the attributes of a totally disproportionate sentence. In the Court of Appeal's view, the fact that the imposition of consecutive ineligibility periods is discretionary could not save s. 745.51 *Cr. C.*, because in almost every case the sentence authorized by the section will be either grossly disproportionate or unacceptable by nature.

[22] Regarding s. 7 of the *Charter*, the Court of Appeal found that the impugned provision was overbroad and that its effects were disproportionate, as could be seen from the s. 12 analysis. However, the court declined to answer the question whether the protection of human dignity is a principle of fundamental justice.

[23] The possibility of imposing consecutive 25-year periods was not a minimal impairment of the *Charter* rights and was not justified in a free and democratic

le texte de l'art. 745.51 *C. cr.* et en ordonnant, par le fait même, que l'intimé purge un temps d'épreuve non prévu par la loi.

[21] Dans son analyse fondée sur l'art. 12 de la *Charte*, la Cour d'appel se penche d'abord sur la constitutionnalité de la disposition en observant différents scénarios susceptibles de se produire par suite de l'application de l'art. 745.51 *C. cr.* La cour conclut que l'infliction d'une période d'inadmissibilité à la libération conditionnelle dépassant largement l'espérance de vie de toute personne humaine est dégradante par son absurdité et, partant, contraire à la dignité humaine. La cour parvient au même résultat en ce qui concerne le cumul de périodes d'inadmissibilité totalisant 75 ans, une ordonnance qui est peu probable de se réaliser, considérant que, pour un contrevenant âgé de 18 ans au début de sa peine, l'âge minimal auquel ce dernier pourrait demander une libération conditionnelle serait 93 ans. De même, l'infliction d'une peine d'emprisonnement sans possibilité de libération conditionnelle avant 50 ans ne permet pas de respecter le critère fondamental de la proportionnalité des peines. Bien que la Cour d'appel écarte l'argument voulant que la perte d'espoir entraîne l'inconstitutionnalité de la disposition, elle exprime l'opinion que l'individu réhabilité après 25 ans d'emprisonnement doit pouvoir demander sa libération conditionnelle, sans quoi la peine posséderait tous les attributs d'une peine totalement disproportionnée. Selon la Cour d'appel, le fait que le cumul des périodes d'inadmissibilité constitue une peine discrétionnaire ne peut sauvegarder l'art. 745.51 *C. cr.*, car dans presque tous les cas de figure la peine autorisée par cette disposition sera soit exagérément disproportionnée, soit par nature inacceptable.

[22] En ce qui concerne l'art. 7 de la *Charte*, la Cour d'appel est d'avis que la disposition attaquée a une portée excessive et produit des effets disproportionnés, comme le démontre l'analyse fondée sur l'art. 12. La cour refuse toutefois de se prononcer sur la question de savoir si la protection de la dignité humaine constitue un principe de justice fondamentale.

[23] La possibilité de cumuler des périodes de 25 ans ne constitue pas une atteinte minimale aux droits protégés par la *Charte* et n'est pas justifiée

society within the meaning of s. 1. Given the constitutional invalidity of the provision, the Court of Appeal addressed the appropriate remedy and concluded that reading in was inappropriate in this case. The means chosen by Parliament — the fixed periods of 25 years — were so inextricably bound up with the legislative objectives that they could not be disregarded without unduly intruding on the legislative sphere. In the Court of Appeal's view, the trial judge had usurped Parliament's role in interpreting the provision as granting courts a discretion to choose the appropriate parole ineligibility period.

[24] The Court of Appeal accordingly declared s. 745.51 *Cr. C.* unconstitutional, noting that the declaration was to take effect immediately, and ordered that the respondent serve a 25-year parole ineligibility period on each count and that these periods be served concurrently.

III. Issues

[25] This appeal raises the following issues:

1. Does s. 745.51 *Cr. C.* infringe s. 12 of the *Charter*?
2. Does s. 745.51 *Cr. C.* infringe s. 7 of the *Charter*?
3. If s. 12 or s. 7 is infringed, can the impugned provision be saved under s. 1 of the *Charter*?
4. In the event that the impugned provision cannot be saved under s. 1 of the *Charter*, what is the appropriate remedy?

[26] For the reasons that follow, I am of the view that s. 745.51 *Cr. C.* infringes s. 12 of the *Charter* and cannot be saved under s. 1. In light of this conclusion, there is no need to consider the alleged infringement of s. 7 of the *Charter*. The provision must be declared to be of no force or effect retroactively to the time it was enacted.

dans le cadre d'une société libre et démocratique au sens de son article premier. Vu l'inconstitutionnalité de la disposition, la Cour d'appel se prononce sur la réparation convenable et conclut que le recours à la technique de l'interprétation large est inapproprié en l'espèce. Les périodes fixes de 25 ans, moyen retenu par le législateur, sont si inextricablement liées aux objectifs législatifs qu'elles ne peuvent être mises de côté sans empiéter indûment sur le domaine législatif. Selon la Cour d'appel, le premier juge a usurpé le rôle du législateur en interprétant la disposition comme ayant pour effet d'octroyer aux tribunaux le pouvoir discrétionnaire de fixer la période appropriée d'inadmissibilité à la libération conditionnelle.

[24] En conséquence, la Cour d'appel déclare l'art. 745.51 *C. cr.* inconstitutionnel, précisant que cette déclaration prend effet immédiatement, et elle ordonne que l'intimé purge de façon concurrente une période de temps d'épreuve de 25 ans pour chacun des chefs.

III. Questions en litige

[25] Les questions en litige soulevées par le présent pourvoi sont les suivantes :

1. L'article 745.51 *C. cr.* contrevient-il à l'art. 12 de la *Charte*?
2. L'article 745.51 *C. cr.* contrevient-il à l'art. 7 de la *Charte*?
3. S'il y a violation de l'art. 12 ou de l'art. 7, la disposition contestée peut-elle être sauvegardée par application de l'article premier de la *Charte*?
4. Dans l'éventualité où la disposition attaquée ne peut être sauvegardée par l'article premier de la *Charte*, quelle est la réparation convenable?

[26] Pour les motifs qui suivent, je suis d'avis que l'art. 745.51 *C. cr.* contrevient à l'art. 12 de la *Charte* et ne peut être sauvegardé par l'article premier. Vu cette conclusion, il est inutile d'examiner l'allégation de violation de l'art. 7 de la *Charte*. La disposition doit être déclarée rétroactivement inopérante au moment de son adoption.

IV. AnalysisA. *History of Section 745.51 Cr. C.*

[27] It is helpful to begin the analysis by outlining the manner in which the treatment of people convicted of murder in Canada has changed over time, since these changes inform our understanding of the impugned provision.

[28] Until 1961, there was no legal classification of types of murder in this country. Any person convicted of murder was sentenced to death, and the sentence was carried out unless the Governor General, acting on the advice of Cabinet, commuted it to life imprisonment. In actual fact, the royal prerogative of mercy was exercised frequently and operated flexibly at that time (Library of Parliament, *Bill S-6: An Act to amend the Criminal Code and another Act*, Legislative Summary 40-3-S6-E, April 30, 2010, at pp. 4-5; Correctional Service of Canada, *A review and estimate of time spent in prison by offenders sentenced for murder*, November 2002 (online)).

[29] In 1961, Parliament established a distinction between capital murder and non-capital murder. The former, which included murder that was planned and deliberate, was punishable by death by hanging in the case of an offender 18 years of age or older. The latter, which was similar to second degree murder, was punishable by imprisonment for life (*Act to amend the Criminal Code (Capital Murder)*, S.C. 1960-61, c. 44, ss. 1 and 2; Library of Parliament, at pp. 5-6).

[30] From 1961 to 1976, offenders whose sentences had been commuted and those whose crimes fell into the second category — non-capital murder — could apply for parole following a minimum period of incarceration (Correctional Service of Canada).

[31] In July 1976, Parliament abolished the death penalty for *Criminal Code* offences (*Criminal Law Amendment Act (No. 2)*, 1976, S.C. 1974-75-76,

IV. AnalyseA. *L'histoire de l'art. 745.51 C. cr.*

[27] Il convient de débiter l'analyse en retraçant la manière dont le traitement réservé aux personnes condamnées pour meurtre au Canada a évolué au fil du temps, car cette évolution éclaire notre compréhension de la disposition contestée.

[28] Jusqu'en 1961, il n'existait en droit aucune catégorisation de types de meurtres au pays. Tout individu reconnu coupable de meurtre était condamné à la peine de mort et la sentence était exécutée, à moins que le gouverneur général, sur recommandation du conseil des ministres, ne la commue en emprisonnement à perpétuité. De fait, la prérogative royale de clémence était utilisée fréquemment et avec souplesse à cette époque (Bibliothèque du Parlement, *Projet de loi S-6 : Loi modifiant le Code criminel et une autre loi*, Résumé législatif 40-3-S6-F, 30 avril 2010, p. 5; Service correctionnel du Canada, *Examen et estimation de la durée de la détention chez les délinquants condamnés pour meurtre*, novembre 2002 (en ligne)).

[29] En 1961, le Parlement a établi une distinction entre les meurtres qualifiés et les meurtres non qualifiés. Les premiers, qui incluent les meurtres prémédités et commis de propos délibéré, étaient passibles de la peine de mort par pendaison lorsque l'infraction était perpétrée par une personne âgée de 18 ans ou plus. Les seconds, qui s'apparentaient aux meurtres au deuxième degré, étaient punissables de l'emprisonnement à perpétuité (*Loi modifiant le Code criminel (Meurtre qualifié)*, S.C. 1960-1961, c. 44, art. 1 et 2; Bibliothèque du Parlement, p. 6).

[30] De 1961 à 1976, les contrevenants dont la peine avait été commuée et ceux dont le crime relevait de la seconde catégorie — les meurtres non qualifiés — pouvaient demander une libération conditionnelle après une période minimale d'incarcération (Service correctionnel du Canada).

[31] En juillet 1976, le Parlement a aboli la peine de mort à l'égard des infractions prévues au *Code criminel* (*Loi de 1976 modifiant le droit pénal*,

c. 105).¹ As a result of a political compromise, it replaced the death penalty with a mandatory minimum life sentence for the two categories of murder now defined in the *Criminal Code*: first degree murder and second degree murder. In the case of second degree murder, the parole ineligibility period varied from 10 to 25 years. For first degree murder, the parole ineligibility period was 25 years without regard to the number of victims. There was no provision at that time concerning the imposition of consecutive ineligibility periods in cases involving multiple murders.

[32] The mandatory 25-year parole ineligibility period for first degree murder was presumably established to satisfy proponents of the death penalty (A. Manson, “The Easy Acceptance of Long Term Confinement in Canada” (1990), 79 C.R. (3d) 265, at p. 266). Indeed, it was particularly severe when compared with the ineligibility periods provided for in other Western countries at the time for similar offences (Manson, at pp. 266-67). Moreover, from 1961 to 1976, the average time served in prison for the offence of capital murder had been 15.8 years, well below the newly enacted 25-year period of imprisonment (Correctional Service of Canada).

[33] When the death penalty was abolished, Parliament also established a right to judicial review of the parole ineligibility period, commonly known as the “faint hope” clause (*Criminal Law Amendment Act (No. 2)*, 1976, s. 21). This clause allowed persons who had been sentenced to life in prison for first or second degree murder without eligibility for parole for more than 15 years to apply for a review of their parole ineligibility period once they had been incarcerated for at least 15 years. The clause was added to the *Criminal Code* in the hope of encouraging the rehabilitation of offenders serving long prison sentences and, as a result, of creating a safer prison

n° 2, S.C. 1974-1975-1976, c. 105)¹. Aux termes d’un compromis politique, le législateur a remplacé la peine de mort par une peine minimale obligatoire d’emprisonnement à perpétuité pour les deux catégories de meurtres définies au *Code criminel* que nous connaissons aujourd’hui : les meurtres au premier degré et les meurtres au deuxième degré. En ce qui concerne les meurtres au deuxième degré, la période d’inadmissibilité à la libération conditionnelle variait entre 10 et 25 ans. Pour ce qui était des meurtres au premier degré, la période d’inadmissibilité à la libération conditionnelle était de 25 ans, sans égard au nombre de victimes. Aucune disposition ne prévoyait alors l’infliction de périodes d’inadmissibilité consécutives en cas de meurtres multiples.

[32] La période obligatoire d’inadmissibilité à la libération conditionnelle de 25 ans pour les meurtres au premier degré a vraisemblablement été instaurée pour satisfaire les partisans de la peine de mort (A. Manson, « The Easy Acceptance of Long Term Confinement in Canada » (1990), 79 C.R. (3d) 265, p. 266). En effet, elle est particulièrement sévère si on la compare aux périodes d’inadmissibilité prévues à l’époque dans les autres pays occidentaux à l’égard d’infractions similaires (Manson, p. 266-267). En outre, de 1961 à 1976, la durée de détention moyenne pour l’infraction de meurtre qualifié s’élevait à 15,8 ans, une durée bien inférieure à la période d’emprisonnement de 25 ans nouvellement édictée (Service correctionnel du Canada).

[33] Lors de l’abolition de la peine de mort, le Parlement a également établi un droit à la révision judiciaire de la période d’inadmissibilité à la libération conditionnelle, communément appelé la disposition de la « dernière chance » (*Loi de 1976 modifiant le droit pénal*, n° 2, art. 21). Cette disposition permettait aux personnes qui avaient été condamnées à une peine d’emprisonnement à perpétuité pour meurtre au premier ou au deuxième degré, sans possibilité de libération conditionnelle pendant plus de 15 ans, de demander la révision de leur période d’inadmissibilité à la libération conditionnelle, à la condition que ces personnes soient incarcérées depuis au moins

¹ The death penalty continued to apply for service offences until 1999 (*An Act to amend the National Defence Act and to make consequential amendments to other Acts*, S.C. 1998, c. 35).

¹ La peine de mort est demeurée en vigueur à l’égard d’infractions d’ordre militaire jusqu’en 1999 (*Loi modifiant la Loi sur la défense nationale et d’autres lois en conséquence*, L.C. 1998, c. 35).

environment. As well, it tempered the increased harshness of parole ineligibility periods (Department of Justice Canada, *An Analysis of the Use of the Faint Hope Clause* (2010), at p. 1; Library of Parliament, at pp. 3-4).

[34] In 1996, Parliament amended the faint hope clause such that, among other things, persons convicted of multiple murders would no longer be able to apply for judicial review (*An Act to amend the Criminal Code (judicial review of parole ineligibility) and another Act*, S.C. 1996, c. 34). Then, in 2011, Parliament passed legislation that abolished the clause for all intents and purposes by making it inapplicable to anyone who committed a murder on or after the day on which the legislation came into force (*An Act to amend the Criminal Code and another Act*, S.C. 2011, c. 2).

[35] The impugned provision was also introduced into the *Criminal Code* in 2011 (*Protecting Canadians by Ending Sentence Discounts for Multiple Murders Act*, s. 5). The relevant subsection of s. 745.51 *Cr. C.* reads as follows:

745.51 (1) At the time of the sentencing under section 745 of an offender who is convicted of murder and who has already been convicted of one or more other murders, the judge who presided at the trial of the offender or, if that judge is unable to do so, any judge of the same court may, having regard to the character of the offender, the nature of the offence and the circumstances surrounding its commission, and the recommendation, if any, made pursuant to section 745.21, by order, decide that the periods without eligibility for parole for each murder conviction are to be served consecutively.

[36] Given the fact that the impugned provision concerns the imposition of consecutive parole ineligibility periods, a discussion of the parole system is in order. It should be noted, however, that this appeal does not

15 ans. Cette disposition de la dernière chance avait été ajoutée au *Code criminel* dans l'espoir de favoriser la réadaptation des contrevenants purgeant de longues peines d'emprisonnement et, par voie de conséquence, de créer un environnement carcéral plus sécuritaire. Au surplus, elle tempérait la sévérité accrue des périodes d'inadmissibilité à la libération conditionnelle (Ministère de la Justice du Canada, *Une analyse de l'utilisation de la disposition de la dernière chance* (2010), p. 5; Bibliothèque du Parlement, p. 3-4).

[34] En 1996, le Parlement a modifié la disposition de la dernière chance, notamment pour retirer aux personnes déclarées coupables de meurtres multiples la possibilité de demander une révision judiciaire (*Loi modifiant le Code criminel (révision judiciaire de l'inadmissibilité à la libération conditionnelle) et une autre loi en conséquence*, L.C. 1996, c. 34). Puis, en 2011, le Parlement a édicté une loi qui a, à toutes fins utiles, aboli la disposition de la dernière chance en la rendant inapplicable aux personnes commettant un meurtre à partir de la date d'entrée en vigueur de cette loi (*Loi modifiant le Code criminel et une autre loi*, L.C. 2011, c. 2).

[35] La disposition contestée a elle aussi été introduite dans le *Code criminel* en 2011 (*Loi protégeant les Canadiens en mettant fin aux peines à rabais en cas de meurtres multiples*, art. 5). Le paragraphe pertinent de l'art. 745.51 *C. cr.* est rédigé ainsi :

745.51 (1) Au moment de prononcer la peine conformément à l'article 745, le juge qui préside le procès du délinquant qui est déclaré coupable de meurtre et qui a été déclaré coupable d'un ou plusieurs autres meurtres — ou en cas d'empêchement, tout juge du même tribunal — peut, compte tenu du caractère du délinquant, de la nature de l'infraction et des circonstances entourant sa perpétration ainsi que de toute recommandation formulée en vertu de l'article 745.21, ordonner que les périodes d'inadmissibilité à la libération conditionnelle pour chaque condamnation pour meurtre soient purgées consécutivement.

[36] Étant donné que la disposition contestée concerne le cumul de périodes d'inadmissibilité à la libération conditionnelle, une présentation du système de libération conditionnelle s'impose. Il convient

relate to the process by which an offender may apply for parole at the end of the ineligibility period.

B. *The Parole System in Canada*

[37] The parole system involves a process that is independent of and distinct from the sentencing process (*Canada (Attorney General) v. Whaling*, 2014 SCC 20, [2014] 1 S.C.R. 392, at para. 1). Before this system was set up in the last century, there was no general sentence review mechanism in Canada. During the pre-Confederation period, the only relief an offender could obtain was the reduction of a prison sentence or commutation of a death sentence by way of the royal prerogative of mercy (D. P. Cole and A. Manson, *Release from Imprisonment: The Law of Sentencing, Parole and Judicial Review* (1990), at p. 159).

[38] In 1868, *The Penitentiary Act of 1868*, S.C. 1868, c. 75, s. 62, introduced a sentence remission mechanism that enabled prisoners to obtain a reduction in the length of their sentence upon proof of good behaviour (Cole and Manson, at p. 163). But it was not until 1899 that the first administrative parole mechanism came into existence through the enactment of what was known as the *Ticket of Leave Act* (*An Act to provide for the Conditional Liberation of Penitentiary Convicts*, S.C. 1899, c. 49), under which prisoners who met the eligibility criteria could be conditionally released (Cole and Manson, at pp. 164-66).

[39] In the 1950s, Parliament appointed an advisory committee to inquire into the use of the royal prerogative of mercy and into the parole system (Department of Justice Canada, *Report of a Committee Appointed to Inquire Into the Principles and Procedures Followed in the Remission Service of the Department of Justice of Canada* (1956) (“Fauteux Report”). The committee made its recommendations in 1956, and the most important of them were implemented in 1958 through the enactment of the first modern parole legislation, the *Parole Act*, S.C. 1958, c. 38. That Act created an independent agency, now known as the Parole Board of Canada (“Board”), that had the power to review

cependant de préciser que le présent pourvoi ne porte pas sur le processus permettant au contrevenant de demander une telle libération à la fin de la période d’inadmissibilité.

B. *Le système de libération conditionnelle au Canada*

[37] Le système de libération conditionnelle met en place un processus indépendant et distinct de celui de la détermination de la peine (*Canada (Procureur général) c. Whaling*, 2014 CSC 20, [2014] 1 R.C.S. 392, par. 1). Avant sa mise en place, au cours du siècle dernier, il n’existait aucun mécanisme général de révision de la peine au Canada. Lors de la période précédant la Confédération, un contrevenant pouvait seulement voir sa peine d’emprisonnement réduite ou sa peine de mort commuée par l’exercice de la prérogative royale de clémence (D. P. Cole et A. Manson, *Release from Imprisonment : The Law of Sentencing, Parole and Judicial Review* (1990), p. 159).

[38] En 1868, l’*Acte des pénitenciers de 1868*, S.C. 1868, c. 75, art. 62, instaure un mécanisme de remise de peine qui permet aux détenus de réduire la durée de leur peine sur preuve de bonne conduite (Cole et Manson, p. 163). Ce n’est toutefois qu’en 1899 que le premier mécanisme administratif de libération conditionnelle voit le jour par suite de l’édiction de ce qu’on appelait le « *Ticket of Leave Act* » (*Acte relatif à la libération conditionnelle des détenus aux pénitenciers*, S.C. 1899, c. 49). Cette loi permettait aux détenus qui satisfaisaient aux critères d’admissibilité d’obtenir une libération sous réserve de conditions (Cole et Manson, p. 164-166).

[39] Durant les années 1950, le Parlement a mandaté un comité consultatif pour enquêter sur l’usage de la prérogative royale de clémence et sur le régime de la mise en liberté sous condition (Ministère de la Justice du Canada, *Rapport d’un comité institué pour faire enquête sur les principes et les méthodes suivis au Service des pardons du ministère de la Justice du Canada* (1956) (« Rapport Fauteux »)). En 1956, le comité a présenté ses recommandations, dont les plus importantes se sont concrétisées par l’adoption, en 1958, de la première loi moderne en matière de libération conditionnelle, la *Loi sur la libération conditionnelle de détenus*, S.C. 1958, c. 38 (« *Loi*

and vary conditions for release. Major amendments were made to the *Parole Act* in 1977, the year after the death penalty was abolished. The Board's role and functions were expanded at that time (*Criminal Law Amendment Act, 1977*, S.C. 1976-77, c. 53). Finally, the *Corrections and Conditional Release Act*, S.C. 1992, c. 20 ("*Conditional Release Act*"), was passed in 1992 to replace, among others, the *Parole Act*. The *Conditional Release Act* defines the purpose of and principles underlying conditional release, and gives particular prominence to the protection of society by making it the paramount consideration.

[40] The Board is an independent administrative tribunal whose primary role is to make decisions on conditional release (*Conditional Release Act*, ss. 103 and 107). It has exclusive jurisdiction to grant day parole and full parole to persons serving a sentence of two years or more in Canada (ss. 122 and 123(1)). Offenders with fixed-term sentences are generally eligible to apply for full parole after serving the lesser of one third of their sentence and seven years (s. 120(1)). That being said, offenders who have been convicted of first or second degree murder are not eligible for full parole until they have served 25 years or 10 to 25 years, respectively, of their sentence (s. 745(a) and (c) *Cr. C.*).

[41] There is no guarantee that offenders will be granted parole when their ineligibility period expires (*R. v. Shropshire*, [1995] 4 S.C.R. 227, at para. 34; M. E. Campbell and D. Cole, "Sentencing and Parole for Persons Convicted of Murder", in D. Cole and J. Roberts, eds., *Sentencing in Canada: Essays in Law, Policy, and Practice* (2020), 183, at pp. 185-87). Offenders must prove to the Board that they no longer represent a danger to society and that it is therefore no

sur la libération conditionnelle »). Cette loi a créé un organisme indépendant investi du pouvoir d'examiner et de modifier les conditions de mise en liberté sous condition, organisme qui porte aujourd'hui le nom de Commission des libérations conditionnelles du Canada (« Commission »). En 1977, l'année qui a suivi l'abolition de la peine de mort, d'importantes modifications ont été apportées à la *Loi sur la libération conditionnelle*. Le rôle et les fonctions de la Commission ont alors été élargis (*Loi de 1977 modifiant le droit pénal*, S.C. 1976-1977, c. 53). En 1992, la *Loi sur le système correctionnel et la mise en liberté sous condition*, L.C. 1992, c. 20 (« *Loi sur la mise en liberté sous condition* ») est finalement adoptée, remplaçant notamment la *Loi sur la libération conditionnelle*. La *Loi sur la mise en liberté sous condition* définit l'objectif et les principes qui sous-tendent la mise en liberté sous condition, et met à l'avant-plan la protection de la société en en faisant son critère prépondérant.

[40] La Commission est un tribunal administratif indépendant, dont la fonction principale consiste à prendre des décisions en matière de mise en liberté sous condition (*Loi sur la mise en liberté sous condition*, art. 103 et 107). Elle a compétence exclusive pour accorder la semi-liberté et la libération conditionnelle totale aux personnes qui purgent une peine de deux ans ou plus au Canada (art. 122 et par. 123(1)). Un contrevenant qui purge une peine d'une durée déterminée est, de manière générale, admis à présenter une demande de libération conditionnelle totale après qu'il a purgé le tiers de sa peine à concurrence de sept ans (par. 120(1)). Cela dit, les contrevenants déclarés coupables de meurtre au premier ou au deuxième degré ne sont admissibles à une libération conditionnelle totale qu'après un temps d'épreuve de 25 ans ou de 10 à 25 ans respectivement (al. 745a) et c) *C. cr.*).

[41] À l'expiration du temps d'épreuve, la libération conditionnelle n'est pas garantie au contrevenant (*R. c. Shropshire*, [1995] 4 R.C.S. 227, par. 34; M. E. Campbell et D. Cole, « Sentencing and Parole for Persons Convicted of Murder », dans D. Cole et J. Roberts, dir., *Sentencing in Canada : Essays in Law, Policy, and Practice* (2020), 183, p. 185-187). Ce dernier doit prouver à la Commission qu'il ne représente plus un danger pour la société et que, en

longer necessary to keep them in custody (*Conditional Release Act*, s. 102). Parole is a statutory privilege and not a right (*Nur*, at para. 98).

[42] The Board exercises a discretion when it makes a decision with respect to parole. In exercising that discretion, the Board is guided by its purpose: “to contribute to the maintenance of a just, peaceful and safe society by means of decisions on the timing and conditions of release that will best facilitate the rehabilitation of offenders and their reintegration into the community as law-abiding citizens” (*Conditional Release Act*, s. 100; see also *Nur*, at para. 98). The *Conditional Release Act*’s primary emphasis is on protecting the public (see *R. v. Zinck*, 2003 SCC 6, [2003] 1 S.C.R. 41, at para. 19), and since 2012 this concern has been formally recognized as the paramount consideration in decisions on release (*Safe Streets and Communities Act*, S.C. 2012, c. 1; *Conditional Release Act*, s. 100.1).

[43] The Board’s broad discretion means that it may attach conditions to an offender’s release (*Conditional Release Act*, s. 133(3)), including to protect victims who have safety concerns (s. 133(3.1)). The Board may also suspend or revoke the parole of an offender who breaches the conditions imposed (s. 135). Where the Board decides not to grant parole, it generally reviews the case every two years (s. 123(5)). However, this is done only every five years in the case of offenders who have been convicted of murder or another offence involving violence (s. 123(5.01)).

[44] Victims are taken into consideration in the parole process. To determine whether an offender presents an “undue risk to society” (*Conditional Release Act*, s. 102), the Board is to consider, among other things, the nature and gravity of the offence as well as information obtained from victims (s. 101(a)). Victims may apply to attend parole hearings and may

conséquence, son maintien en détention n’est plus requis (*Loi sur la mise en liberté sous condition*, art. 102). La libération conditionnelle est un privilège d’origine législative et non un droit (*Nur*, par. 98).

[42] La Commission exerce un pouvoir discrétionnaire lorsqu’elle prend une décision en matière de libération conditionnelle. L’exercice de ce pouvoir est guidé par l’objectif de la Commission, soit « contribuer au maintien d’une société juste, paisible et sûre en favorisant, par la prise de décisions appropriées quant au moment et aux conditions de leur mise en liberté, la réadaptation et la réinsertion sociale des délinquants en tant que citoyens respectueux des lois » (*Loi sur la mise en liberté sous condition*, art. 100; voir aussi *Nur*, par. 98). La *Loi sur la mise en liberté sous condition* insiste principalement sur la protection du public (voir *R. c. Zinck*, 2003 CSC 6, [2003] 1 R.C.S. 41, par. 19) et, depuis 2012, cette préoccupation est formellement reconnue comme étant le critère prépondérant dans la prise de décisions en matière de mise en liberté (*Loi sur la sécurité des rues et des communautés*, L.C. 2012, c. 1; *Loi sur la mise en liberté sous condition*, art. 100.1).

[43] En vertu de son large pouvoir discrétionnaire, la Commission peut assortir la mise en liberté de conditions (*Loi sur la mise en liberté sous condition*, par. 133(3)), notamment pour protéger les victimes ayant des préoccupations quant à leur sécurité (par. 133(3.1)). La Commission peut également suspendre ou révoquer la libération conditionnelle d’un contrevenant qui ne respecte pas les conditions auxquelles il est assujéti (art. 135). Lorsque la Commission refuse la libération conditionnelle, elle procède de manière générale au réexamen du dossier aux deux ans (par. 123(5)). Toutefois, cet examen a lieu aux cinq ans seulement dans le cas des contrevenants condamnés pour meurtre ou pour une autre infraction accompagnée de violence (par. 123(5.01)).

[44] Les victimes sont prises en compte dans le processus de libération conditionnelle. Pour déterminer si le contrevenant présente un « risque inacceptable pour la société » (*Loi sur la mise en liberté sous condition*, art. 102), la Commission considère notamment la nature et la gravité de l’infraction, ainsi que les renseignements obtenus des victimes (al. 101a)). Les

present statements to the Board (s. 140(4), (5.1), (5.2) and (10) to (12)). Although such hearings can awaken painful memories for victims and for their loved ones, they do serve to reiterate the suffering an offender has caused and to condemn the acts committed once again (D. Spencer, “How Multiple Murder Sentencing Provisions May Violate the *Charter*” (2019), 55 C.R. (7th) 165).

C. Sentencing Objectives in Canadian Law

[45] Before I begin the s. 12 analysis, an overview of the objectives of sentencing will be essential to the adjudication of the case before the Court. In Canadian law, the fundamental purpose of sentencing is to protect society and 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 objectives, including denunciation, deterrence and rehabilitation, which it will be helpful to discuss (s. 718 *Cr. C.*).

[46] First of all, the penological objective of denunciation requires that a sentence express society’s condemnation of the offence that was committed. The sentence is the means by which society communicates its moral values (*R. v. M. (C.A.)*, [1996] 1 S.C.R. 500, at para. 81). This objective must be weighed carefully, as it could, on its own, be used to justify sentences of unlimited severity (C. C. Ruby, *Sentencing* (10th ed. 2020), at §1.22).

[47] As for the objective of deterrence, it has two forms. The first, specific deterrence, is meant to discourage the offender before the court from reoffending. The second, general deterrence, is intended to discourage members of the public who might be tempted to engage in the criminal activity for which the offender has been convicted (*R. v. B.W.P.*, 2006 SCC 27, [2006] 1 S.C.R. 941, at para. 2). When this objective is being pursued, the offender is punished more harshly in order to send a message to the public or, in other words, to serve as an example. General deterrence is an objective that must be weighed by a court, but the effectiveness of which

victimes peuvent demander d’assister aux audiences sur la mise en liberté et déposer une déclaration à la Commission (par. 140(4), (5.1), (5.2) et (10) à (12)). Si ces audiences sont susceptibles d’éveiller des souvenirs douloureux chez les victimes et leurs proches, elles permettent toutefois de rappeler les souffrances causées par le contrevenant, et de condamner à nouveau les actes commis (D. Spencer, « How Multiple Murder Sentencing Provisions May Violate the *Charter* » (2019), 55 C.R. (7th) 165).

C. Les objectifs de la peine en droit canadien

[45] Avant d’entreprendre l’analyse fondée sur l’art. 12, un survol des objectifs de la peine s’impose pour trancher le litige dont notre Cour est saisie. En droit canadien, le prononcé des peines a pour objectif essentiel de protéger la société et 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 qui visent un ou plusieurs objectifs, dont la dénonciation, la dissuasion et la réinsertion sociale, sur lesquels il convient de se pencher (art. 718 *C. cr.*).

[46] Tout d’abord, l’objectif pénologique de dénonciation exige que la peine exprime la réprobation de la société à l’égard de l’infraction commise. La peine représente le moyen par lequel la société communique ses valeurs morales (*R. c. M. (C.A.)*, [1996] 1 R.C.S. 500, par. 81). Cet objectif doit être soupesé avec prudence, car il pourrait, à lui seul, justifier des peines dont la sévérité est sans limites (C. C. Ruby, *Sentencing* (10^e éd. 2020), §1.22).

[47] L’objectif de dissuasion, pour sa part, se décline en deux formes. La première, la dissuasion spécifique, vise à décourager le contrevenant lui-même de récidiver. La deuxième, la dissuasion générale, a pour but de décourager les membres du public qui pourraient être tentés de se livrer à l’activité criminelle dont le contrevenant a été déclaré coupable (*R. c. B.W.P.*, 2006 CSC 27, [2006] 1 R.C.S. 941, par. 2). Dans la poursuite de cet objectif, le contrevenant est puni plus sévèrement afin de communiquer un message à la population, en d’autres termes pour servir d’exemple. La dissuasion générale est un objectif qui doit être soupesé par le tribunal, mais dont l’efficacité a souvent été remise

has often been questioned. These legitimate reservations notwithstanding, the fact remains that the certainty of punishment, together with the entire range of criminal sanctions, does produce a certain deterrent effect, albeit one that is difficult to evaluate, on possible offenders (Ruby, at §1.31; Canadian Sentencing Commission, *Sentencing Reform: A Canadian Approach* (1987), at pp. 136-38).

[48] Lastly, the objective of rehabilitation is designed to reform offenders with a view to their reintegration into society so that they can become law-abiding citizens. This penological objective presupposes that offenders are capable of gaining control over their lives and improving themselves, which ultimately leads to a better protection of society. M. Manning and P. Sankoff note that rehabilitation “is probably the most economical in the long run and the most humanitarian objective of punishment” (*Manning, Mewett & Sankoff: Criminal Law* (5th ed. 2015), at ¶1.155). Along the same lines, I would reiterate my comment in *R. v. Lacasse*, 2015 SCC 64, [2015] 3 S.C.R. 1089, that “[r]ehabilitation is one of the fundamental moral values that distinguish Canadian society from the societies of many other nations in the world” (para. 4).

[49] The relative importance of each of the sentencing objectives varies with the nature of the crime and the characteristics of the offender (*R. v. Lyons*, [1987] 2 S.C.R. 309, at p. 329). There is no mathematical formula for determining what constitutes a just and appropriate sentence. That is why this Court has described sentencing as a “delicate art which attempts to balance carefully the societal goals of sentencing against the moral blameworthiness of the offender and the circumstances of the offence, while at all times taking into account the needs and current conditions of and in the community” (*M. (C.A.)*, at para. 91).

[50] But sentencing must in all circumstances be guided by the cardinal principle of proportionality. The sentence must be severe enough to denounce the offence but must not exceed “what is just and appropriate, given the moral blameworthiness of the offender and the gravity of the offence” (*R. v.*

en question. En dépit de ces réserves légitimes, il demeure que la certitude d’être puni, de même que l’ensemble des sanctions pénales, produisent néanmoins un certain effet dissuasif, quoique difficilement mesurable, chez les contrevenants potentiels (Ruby, §1.31; Commission canadienne sur la détermination de la peine, *Réformer la sentence : une approche canadienne* (1987), p. 150-151).

[48] Enfin, l’objectif de réinsertion sociale vise à réformer le contrevenant en vue de sa réintégration dans la société, afin qu’il devienne un citoyen respectueux des lois. Cet objectif pénologique présuppose chez l’individu une capacité de prendre sa vie en main et de s’améliorer, avec pour conséquence ultime une meilleure protection de la société. Les auteurs M. Manning et P. Sankoff soulignent que la réhabilitation [TRADUCTION] « constitue probablement à long terme la solution la plus économique sur le plan financier et l’objectif pénologique le plus humain » (*Manning, Mewett & Sankoff : Criminal Law* (5^e éd. 2015), ¶1.155). Dans ce même ordre d’idées, je réitère, comme je l’ai affirmé dans l’arrêt *R. c. Lacasse*, 2015 CSC 64, [2015] 3 R.C.S. 1089, que « [c]et objectif fait partie des valeurs morales fondamentales qui distinguent la société canadienne de nombreuses autres nations du monde » (par. 4).

[49] L’importance relative de chacun des objectifs de la peine varie selon la nature du crime et les particularités du contrevenant (*R. c. Lyons*, [1987] 2 R.C.S. 309, p. 329). Il n’existe aucune formule mathématique permettant de déterminer ce qui constitue une peine juste et appropriée. C’est pourquoi notre Cour a décrit la détermination de la peine comme un « art délicat, où l’on tente de doser soigneusement les divers objectifs sociétaux de la détermination de la peine, eu égard à la culpabilité morale du délinquant et aux circonstances de l’infraction, tout en ne perdant jamais de vue les besoins de la communauté et les conditions qui y règnent » (*M. (C.A.)*, par. 91).

[50] Cependant, la détermination de la peine doit en toutes circonstances être guidée par le principe cardinal de la proportionnalité. La peine doit être suffisamment sévère pour dénoncer l’infraction, sans excéder « ce qui est juste et approprié compte tenu de la culpabilité morale du délinquant et de la

Nasogaluak, 2010 SCC 6, [2010] 1 S.C.R. 206, at para. 42; see also *R. v. Ipeelee*, 2012 SCC 13, [2012] 1 S.C.R. 433, at para. 37). Proportionality in sentencing is considered to be an essential factor in maintaining public confidence in the fairness and rationality of the criminal justice system. The application of this principle assures the public that the offender deserves the punishment received (*Re B.C. Motor Vehicle Act*, [1985] 2 S.C.R. 486, at p. 533, per Wilson J., concurring).

[51] It follows that “a person cannot be made to suffer a grossly disproportionate punishment simply to send a message to discourage others from offending” (*Nur*, at para. 45). In a similar vein, Vauclair J.A. aptly stated that [TRANSLATION] “striving for exemplarity to the detriment of evidence of the merit of rehabilitation objectives is incompatible with the principle of individualization” (*Lacelle Belec v. R.*, 2019 QCCA 711, at para. 30 (CanLII), citing *R. v. Paré*, 2011 QCCA 2047, at para. 48 (CanLII), per Doyon J.A.). Proportionality has a restraining function, and in this sense serves to guarantee that a sentence is individualized, just and appropriate.

[52] The principle of proportionality is so fundamental that it has a constitutional dimension under s. 12 of the *Charter*, which forbids the imposition of a sentence that is so grossly disproportionate as to be incompatible with human dignity (*Nasogaluak*, at para. 41; *Ipeelee*, at para. 36). However, proportionality as a sentencing principle has no constitutional status as such, since it is not recognized to be a principle of fundamental justice under s. 7 of the *Charter* (*R. v. Malmo-Levine*, 2003 SCC 74, [2003] 3 S.C.R. 571, at para. 160; *R. v. Safarzadeh-Markhali*, 2016 SCC 14, [2016] 1 S.C.R. 180, at para. 71).

[53] Nor do the other sentencing principles and objectives have their own constitutional status. It follows that “Parliament is entitled to modify and abrogate them as it sees fit, subject only to s. 12 of the *Charter*” (*Safarzadeh-Markhali*, at para. 71).

gravité de l’infraction » (*R. c. Nasogaluak*, 2010 CSC 6, [2010] 1 R.C.S. 206, par. 42; voir aussi *R. c. Ipeelee*, 2012 CSC 13, [2012] 1 R.C.S. 433, par. 37). La proportionnalité des peines est considérée comme un facteur essentiel au maintien de la confiance du public dans l’équité et la rationalité du système de justice pénal et criminel. L’application de ce principe permet d’assurer au public que le contrevenant mérite la punition qui lui a été infligée (*Renvoi relatif à la Motor Vehicle Act (C.-B.)*, [1985] 2 R.C.S. 486, p. 533, la juge Wilson, motifs concordants).

[51] Ainsi, « on ne peut infliger à une personne une peine totalement disproportionnée à la seule fin de dissuader ses concitoyens de désobéir à la loi » (*Nur*, par. 45). De même, le juge Vauclair affirme avec justesse que « la recherche de l’exemplarité au détriment des éléments de preuve qui démontrent le mérite des objectifs de réhabilitation est incompatible avec le principe d’individualisation » (*Lacelle Belec c. R.*, 2019 QCCA 711, par. 30 (CanLII), citant *R. c. Paré*, 2011 QCCA 2047, par. 48 (CanLII), le juge Doyon). La proportionnalité joue un rôle restrictif et, en ce sens, elle est garante d’une peine qui est individualisée, juste et appropriée.

[52] Le principe de la proportionnalité est si fondamental qu’il possède une dimension constitutionnelle consacrée à l’art. 12 de la *Charte*, lequel interdit l’infliction d’une peine exagérément disproportionnée au point de ne pas être compatible avec la dignité humaine (*Nasogaluak*, par. 41; *Ipeelee*, par. 36). En tant que principe de détermination de la peine, le principe de proportionnalité ne bénéficie toutefois d’aucune protection constitutionnelle en tant que tel, n’étant pas reconnu comme un principe de justice fondamentale visé à l’art. 7 de la *Charte* (*R. c. Malmo-Levine*, 2003 CSC 74, [2003] 3 R.C.S. 571, par. 160; *R. c. Safarzadeh-Markhali*, 2016 CSC 14, [2016] 1 R.C.S. 180, par. 71).

[53] Les autres principes et objectifs de la détermination de la peine ne font pas non plus l’objet d’une protection constitutionnelle autonome. Il s’ensuit que « [l]e législateur peut les modifier et les abroger à son gré, sous réserve du seul respect de l’art. 12 de la *Charte* » (*Safarzadeh-Markhali*, par. 71).

D. *The Right Under Section 12 of the Charter Not to Be Subjected to Cruel and Unusual Punishment*

[54] Section 12 of the *Charter*, which appears under the heading “Legal Rights”, provides that “[e]veryone has the right not to be subjected to any cruel and unusual treatment or punishment.” Although these reasons apply to both punishment and treatment, I will, for the sake of brevity, refer solely to punishment.

[55] It will therefore be appropriate, first, to determine whether the parole ineligibility period constitutes punishment and, second, to clarify the two prongs of the protection afforded by this constitutional guarantee.

(1) The Parole Ineligibility Period Constitutes Punishment

[56] Section 12 of the *Charter* grants individuals a right not to be subjected to cruel and unusual punishment. A precondition for applying this section is therefore that the impugned action constitute punishment. Such is the case here.

[57] State action is considered to be punishment for the purposes of s. 12 if it “(1) . . . is a consequence of conviction that forms part of the arsenal of sanctions to which an accused may be liable in respect of a particular offence, and either (2) . . . is imposed in furtherance of the purpose and principles of sentencing, or (3) . . . has a significant impact on an offender’s liberty or security interests” (*R. v. Boudreault*, 2018 SCC 58, [2018] 3 S.C.R. 599, at para. 39, quoting *R. v. K.R.J.*, 2016 SCC 31, [2016] 1 S.C.R. 906, at para. 41).

[58] The length of parole ineligibility is part of an offender’s punishment (*Shropshire*, at para. 23; see also *Zinck*, at para. 31). It is a consequence of conviction and has a significant impact on the offender’s interests in liberty and security of the person. What is more, the parole ineligibility period furthers the objectives of denunciation and deterrence that underlie a sentence (*Shropshire*, at paras. 21-23; *M. (C.A.)*, at para. 64; *R. v. Simmonds*, 2018 BCCA 205, 362 C.C.C. (3d) 215, at para. 10). It follows that the imposition of consecutive parole ineligibility periods

D. *La protection contre les peines cruelles et inusitées garantie par l’art. 12 de la Charte*

[54] L’article 12 de la *Charte*, qui figure au chapitre des garanties juridiques, prévoit que « [c]haque un a droit à la protection contre tous traitements ou peines cruels et inusités. » Bien que les présents motifs s’appliquent tant aux peines qu’aux traitements, par souci de concision, je ferai uniquement référence aux peines.

[55] Il convient donc, dans un premier temps, de déterminer si la période d’inadmissibilité à la libération conditionnelle est une peine, puis, dans un deuxième temps, de clarifier les deux volets de la protection conférée par cette garantie constitutionnelle.

(1) La période d’inadmissibilité à la libération conditionnelle est une peine

[56] L’article 12 de la *Charte* protège les individus contre les peines cruelles et inusitées. La condition préalable à l’application de cette disposition est donc que la mesure contestée constitue une peine. C’est le cas en l’espèce.

[57] Une mesure imposée par l’État est considérée comme une peine visée à l’art. 12 lorsqu’elle « (1) [. . .] est une conséquence d’une déclaration de culpabilité qui fait partie des sanctions dont est passible un accusé pour une infraction donnée et (2) soit elle est conforme à l’objectif et aux principes de la détermination de la peine, (3) soit elle a une grande incidence sur le droit du contrevenant à la liberté ou à la sécurité » (*R. c. Boudreault*, 2018 CSC 58, [2018] 3 R.C.S. 599, par. 39, citant *R. c. K.R.J.*, 2016 CSC 31, [2016] 1 R.C.S. 906, par. 41).

[58] La durée de l’inadmissibilité à la libération conditionnelle fait partie du châtime (*Shropshire*, par. 23; voir aussi *Zinck*, par. 31). Elle découle de la déclaration de culpabilité et a des conséquences importantes sur le droit du contrevenant à la liberté et à la sécurité de sa personne. Au surplus, la période d’inadmissibilité à la libération conditionnelle répond aux objectifs de dénonciation et de dissuasion qui sous-tendent une peine (*Shropshire*, par. 21-23; *M. (C.A.)*, par. 64; *R. c. Simmonds*, 2018 BCCA 205, 362 C.C.C. (3d) 215, par. 10). Il s’ensuit que le cumul

authorized by s. 745.51 *Cr. C.* constitutes punishment, the constitutionality of which must be determined under s. 12 of the *Charter*.

(2) The Two Prongs of the Right Not to Be Subjected to Cruel and Unusual Punishment

[59] For a proper understanding of the two prongs of the protection afforded by s. 12 of the *Charter*, it is necessary to refocus the analysis on the purpose of this provision. This Court recently stated that the purpose of s. 12 is “to prevent the state from inflicting physical or mental pain and suffering through degrading and dehumanizing treatment or punishment. It is meant to protect human dignity and respect the inherent worth of individuals” (*Quebec (Attorney General) v. 9147-0732 Québec inc.*, 2020 SCC 32, [2020] 3 S.C.R. 426, at para. 51; the Court was unanimous on this point). Although dignity is not recognized as an independent constitutional right, it is a fundamental value that serves as a guide for the interpretation of all *Charter* rights (*Blencoe v. British Columbia (Human Rights Commission)*, 2000 SCC 44, [2000] 2 S.C.R. 307, at para. 77). Generally speaking, the concept of dignity evokes the idea that every person has intrinsic worth and is therefore entitled to respect (*Ward v. Québec (Commission des droits de la personne et des droits de la jeunesse)*, 2021 SCC 43, [2021] 3 S.C.R. 176, at para. 56; *Quebec (Public Curator) v. Syndicat national des employés de l’hôpital St-Ferdinand*, [1996] 3 S.C.R. 211, at para. 105). This respect is owed to every individual, irrespective of their actions (see C. Brunelle, “La dignité dans la *Charte des droits et libertés de la personne*: de l’ubiquité à l’ambiguïté d’une notion fondamentale”, [2006] *R. du B.* (numéro thématique) 143, at pp. 150-51).

[60] Against this backdrop, the two prongs of the right not to be subjected to cruel and unusual punishment may now be considered. Section 12 protects, first, against the imposition of a punishment that is so excessive as to be incompatible with human dignity and, second, against the imposition of a punishment that is intrinsically incompatible with human dignity (*R. v. Smith*, [1987] 1 S.C.R. 1045, at pp. 1072-74; L. Kerr and B. L. Berger, “Methods and Severity: The

de périodes d’inadmissibilité à la libération conditionnelle autorisé par l’art. 745.51 *C. cr.* constitue une peine, dont la constitutionnalité doit être évaluée au regard de l’art. 12 de la *Charte*.

(2) Les deux volets de la protection contre les peines cruelles et inusitées

[59] Pour bien saisir les deux volets de la protection offerte par l’art. 12 de la *Charte*, il est nécessaire de recentrer l’analyse sur l’objet de cette disposition. Notre Cour a récemment dit de l’art. 12 qu’il a pour objet « d’interdire à l’État d’infliger des douleurs et des souffrances physiques ou psychologiques par des traitements ou peines dégradants et déshumanisants. Cette disposition vise à protéger la dignité humaine et à assurer le respect de la valeur inhérente de chaque personne » (*Québec (Procureure générale) c. 9147-0732 Québec inc.*, 2020 CSC 32, [2020] 3 R.C.S. 426, par. 51, unanime sur ce point). Bien que la dignité ne soit pas reconnue comme un droit constitutionnel autonome, cette valeur fondamentale guide l’interprétation de l’ensemble des droits garantis par la *Charte* (*Blencoe c. Colombie-Britannique (Human Rights Commission)*, 2000 CSC 44, [2000] 2 R.C.S. 307, par. 77). De manière générale, la notion de dignité évoque l’idée selon laquelle chaque personne possède une valeur intrinsèque et a, de ce fait, droit au respect (*Ward c. Québec (Commission des droits de la personne et des droits de la jeunesse)*, 2021 CSC 43, [2021] 3 R.C.S. 176, par. 56; *Québec (Curateur public) c. Syndicat national des employés de l’hôpital St-Ferdinand*, [1996] 3 R.C.S. 211, par. 105). Ce respect est dû à chaque individu, sans égard à ses agissements (voir C. Brunelle, « La dignité dans la *Charte des droits et libertés de la personne* : de l’ubiquité à l’ambiguïté d’une notion fondamentale », [2006] *R. du B.* (numéro thématique) 143, p. 150-151).

[60] Sur cette toile de fond, il convient maintenant de se pencher sur les deux volets de la protection contre les peines cruelles et inusitées. L’article 12 protège contre l’infliction d’une peine excessive au point de ne pas être compatible avec la dignité humaine, d’une part, et contre l’infliction d’une peine intrinsèquement incompatible avec la dignité humaine, d’autre part (*R. c. Smith*, [1987] 1 R.C.S. 1045, p. 1072-1074; L. Kerr et B. L. Berger, « Methods and

Two Tracks of Section 12” (2020), 94 *S.C.L.R.* (2d) 235, at pp. 235-36). This distinction is often blurred, and it would be helpful in the context of this appeal to clarify certain points in this regard.

[61] The first form of cruel and unusual punishment involves punishment whose effect is grossly disproportionate to what would have been appropriate (*Smith*, at p. 1072). A punishment oversteps constitutional limits when it is grossly disproportionate, and not merely excessive (*Smith*, at p. 1072). A grossly disproportionate sentence is cruel and unusual in that it shows the state’s complete disregard for the specific circumstances of the sentenced individual and for the proportionality of the punishment inflicted on them.

[62] Determining whether a punishment is grossly disproportionate requires a contextual and comparative analysis: a punishment is found to be so in the specific circumstances of a particular case, in relation to the punishment that would have been just and appropriate having regard to the offender’s personal characteristics and the circumstances surrounding the commission of the offence. However, the nature of the punishment inflicted is not problematic from a constitutional perspective. For example, it is accepted that the state may have recourse to fixed-term imprisonment or to the imposition of a fine as punishment. Such punishment is therefore not in itself cruel and unusual, but can become so if its effects make it grossly disproportionate.

[63] The case law on grossly disproportionate punishment has been developed in the context of mandatory sentences imposed without regard for the offender’s particular circumstances (e.g., mandatory minimum prison sentences in *R. v. Lloyd*, 2016 SCC 13, [2016] 1 S.C.R. 130; *Nur*; *R. v. Ferguson*, 2008 SCC 6, [2008] 1 S.C.R. 96; *R. v. Luxton*, [1990] 2 S.C.R. 711; *Smith*; a mandatory victim surcharge in *Boudreault*; a mandatory weapons prohibition order in *R. v. Wiles*, 2005 SCC 84, [2005] 3 S.C.R. 895). In *Nur*, this Court noted that, to determine whether a minimum sentence is grossly disproportionate, a court must first consider “what constitutes a proportionate sentence for the offence having regard to the objectives and principles of sentencing in the

Severity : The Two Tracks of Section 12 » (2020), 94 *S.C.L.R.* (2d) 235, p. 235-236). Cette distinction est souvent occultée et il convient d’y apporter certaines précisions dans le cadre du présent pourvoi.

[61] La première forme de peines cruelles et inusitées concerne les peines dont l’effet est exagérément disproportionné par rapport à ce qui aurait été approprié (*Smith*, p. 1072). Une peine outrepassé les limites constitutionnelles lorsqu’elle est exagérément disproportionnée et non simplement excessive (*Smith*, p. 1072). Une peine exagérément disproportionnée est cruelle et inusitée dans la mesure où elle démontre un mépris total de l’État envers les circonstances propres à l’individu condamné et la proportionnalité du châtiment qu’il subit.

[62] Déterminer si une peine est exagérément disproportionnée requiert une analyse contextuelle et comparative : une peine est jugée telle dans les circonstances particulières d’un cas donné, en rapport avec la peine qui aurait été juste et appropriée au regard des caractéristiques propres au contrevenant et des circonstances entourant la commission de l’infraction. En revanche, la nature de la peine infligée ne pose pas problème d’un point de vue constitutionnel. À titre d’exemple, il est reconnu que l’État peut recourir à l’emprisonnement à durée déterminée ou à l’infliction d’une amende comme mesures punitives. De telles peines ne sont donc pas en soi cruelles et inusitées, mais elles peuvent le devenir lorsque leurs effets les rendent exagérément disproportionnées.

[63] La jurisprudence sur les peines exagérément disproportionnées s’est développée dans le domaine des peines obligatoires, infligées sans égard aux circonstances particulières du contrevenant (p. ex. : des peines d’emprisonnement minimales obligatoires dans *R. c. Lloyd*, 2016 CSC 13, [2016] 1 R.C.S. 130; *Nur*; *R. c. Ferguson*, 2008 CSC 6, [2008] 1 R.C.S. 96; *R. c. Luxton*, [1990] 2 R.C.S. 711; *Smith*; une suramende compensatoire obligatoire dans *Boudreault*; une ordonnance obligatoire interdisant à l’intéressé d’avoir une arme en sa possession dans *R. c. Wiles*, 2005 CSC 84, [2005] 3 R.C.S. 895). Dans l’arrêt *Nur*, notre Cour a rappelé que, pour déterminer si une peine minimale est exagérément disproportionnée, le tribunal doit d’abord se demander « ce qui constituerait

Criminal Code” (para. 46). The court must then ask whether the impugned provision requires it to impose a sentence that is grossly disproportionate to one that would be just and appropriate for the offender or for another offender in a reasonable hypothetical case; if the provision does so, it infringes s. 12 of the *Charter* (*Nur*, at para. 46). The *Nur* framework does not apply to discretionary sentences. Where there is no mandatory minimum sentence, the imposition of a sentence that is acceptable by its nature but that proves to be disproportionate in a particular case can be rectified by way of an appeal against sentence rather than a declaration of unconstitutionality (*Malmo-Levine*, at paras. 167-68).

[64] The second prong of the protection afforded by s. 12 concerns a narrow class of punishments that are cruel and unusual by nature; these punishments will “always be grossly disproportionate” because they are intrinsically incompatible with human dignity (*Smith*, at p. 1073). These punishments are in themselves contrary to human dignity because of their “degrading and dehumanizing” nature, as this Court put it in 9147-0732 *Québec inc.* (para. 51; the Court was unanimous on this point). A degrading or dehumanizing punishment, by its very nature, outrages “our standards of decency” (*Luxton*, at p. 724).

[65] Since a society’s standards of decency are not frozen in time, what constitutes punishment that is cruel and unusual by nature will necessarily evolve, in accordance with the principle that our Constitution is a living tree capable of growth and expansion within its natural limits so as to meet the new social, political and historical realities of the modern world (*Reference re Same-Sex Marriage*, 2004 SCC 79, [2004] 3 S.C.R. 698, at para. 22; *Hunter v. Southam Inc.*, [1984] 2 S.C.R. 145, at pp. 155-56; *Edwards v. Attorney-General for Canada*, [1930] A.C. 124 (P.C.), at p. 136). As Cory J. pointed out more than 30 years ago while dissenting on another point in *Kindler v. Canada (Minister of Justice)*, [1991] 2 S.C.R. 779, “[w]hat is acceptable as punishment to a society will vary with the nature of that society, its degree of stability and its level of maturity” (p. 818).

une peine proportionnée à l’infraction eu égard aux objectifs et aux principes de détermination de la peine établis par le *Code criminel* » (par. 46). Il doit ensuite décider si la disposition contestée le contraint à infliger une peine totalement disproportionnée par rapport à la peine juste et appropriée pour le contrevenant ou un autre contrevenant placé dans une situation hypothétique raisonnable, auquel cas la disposition viole l’art. 12 de la *Charte* (*Nur*, par. 46). Le cadre d’analyse de l’arrêt *Nur* ne s’applique pas aux peines discrétionnaires. En l’absence de peine minimale obligatoire, l’infliction d’une peine dont la nature est acceptable, mais qui s’avère disproportionnée dans un cas particulier, peut être corrigée par un appel visant la justesse de la peine plutôt que par une déclaration d’inconstitutionnalité (*Malmo-Levine*, par. 167-168).

[64] Le deuxième volet de la protection conférée par l’art. 12 vise une catégorie restreinte de peines cruelles et inusitées par nature, des peines qui sont « toujours exagérément disproportionné[es] » parce qu’intrinsèquement incompatibles avec la dignité humaine (*Smith*, p. 1074). De telles peines sont, en soi, incompatibles avec la dignité humaine en raison de leur caractère « dégradan[t] et déshumanisan[t] », pour reprendre les termes utilisés par notre Cour dans 9147-0732 *Québec inc.* (par. 51, unanime sur ce point). De par sa nature même, une peine dégradante ou déshumanisante porte atteinte « à nos normes de décence » (*Luxton*, p. 724).

[65] Comme les normes de décence d’une société ne sont pas figées dans le temps, ce qui constitue une peine cruelle et inusitée par nature est appelé à évoluer, conformément au principe selon lequel notre Constitution est un arbre vivant capable de croître et de se développer à l’intérieur de ses limites naturelles, de manière à répondre aux nouvelles réalités sociales, politiques et historiques du monde contemporain (*Renvoi relatif au mariage entre personnes du même sexe*, 2004 CSC 79, [2004] 3 R.C.S. 698, par. 22; *Hunter c. Southam Inc.*, [1984] 2 R.C.S. 145, p. 155-156; *Edwards c. Attorney-General for Canada*, [1930] A.C. 124 (C.P.), p. 136). Comme le soulignait le juge Cory il y a plus de 30 ans, alors dissident sur un autre point dans l’affaire *Kindler c. Canada (Ministre de la Justice)*, [1991] 2 R.C.S. 779, « [c]e qui est une peine acceptable pour une société dépend de la nature

Punishments that we regard as incompatible with human dignity today were common and accepted in the past. Professor A. N. Doob rightly states that “[t]he reason we no longer whip or hang people is not that we ran out of leather or rope. Rather, it is because those punishments are no longer congruent with Canadian values” (Department of Justice Canada, *A Values and Evidence Approach to Sentencing Purposes and Principles* (2017), at p. 4).

de cette dernière, de son degré de stabilité et de son niveau de maturité » (p. 818). Les châtimens que nous considérons aujourd’hui comme incompatibles avec la dignité humaine étaient répandus et acceptés à une autre époque. Le professeur A. N. Doob affirme avec justesse que « [l]a raison pour laquelle nous ne fouettons et ne pendons plus les gens n’est pas le manque de cuir ou de corde. C’est plutôt parce que ces châtimens ne sont plus en adéquation avec les valeurs canadiennes » (Ministère de la Justice du Canada, *Une approche des objectifs et des principes de détermination de la peine basée sur les valeurs et sur les preuves* (2017), p. 4).

[66] Among the punishments and treatments that have so far been held to be intrinsically incompatible with human dignity are “the infliction of corporal punishment, such as the lash, irrespective of the number of lashes imposed . . . the lobotomisation of certain dangerous offenders or the castration of sexual offenders” (*Smith*, at p. 1074). Torture also falls into this category, for it has as its end “the denial of a person’s humanity” (*Suresh v. Canada (Minister of Citizenship and Immigration)*, 2002 SCC 1, [2002] 1 S.C.R. 3, at para. 51).

[66] Parmi les peines et traitements reconnus à ce jour comme intrinsèquement incompatibles avec la dignité humaine, mentionnons « l’imposition d’un châtiment corporel comme la peine du fouet, sans égard au nombre de coups de fouet imposé [. . .], la lobotomie de certains criminels dangereux, ou la castration d’auteurs de crimes sexuels » (*Smith*, p. 1074). La torture appartient également à cette catégorie, le but ultime de ce supplice étant « de priver une personne de son humanité » (*Suresh c. Canada (Ministre de la Citoyenneté et de l’Immigration)*, 2002 CSC 1, [2002] 1 R.C.S. 3, par. 51).

[67] A punishment is cruel and unusual by nature if the court is convinced that, having regard to its nature and effects, it could never be imposed in a manner consonant with human dignity in the Canadian criminal context. A punishment that is cruel and unusual by nature is “so inherently repugnant that it could never be an appropriate punishment, however egregious the offence” (*Suresh*, at para. 51). To determine whether a punishment is intrinsically incompatible with dignity, the court must determine whether the punishment is, by its very nature, degrading or dehumanizing. The effects that the punishment may have on all offenders on whom it is imposed can also inform the court and provide support for its analysis of the nature of the punishment.

[67] Une peine est cruelle et inusitée par nature si le tribunal est convaincu que, compte tenu de sa nature et de ses effets, cette peine ne pourrait jamais être infligée d’une manière conforme à la dignité humaine dans le contexte pénal canadien. Une peine cruelle et inusitée par nature est « si intrinsèquement répugnante qu’elle ne saurait jamais constituer un châtiment approprié, aussi odieuse que soit l’infraction » (*Suresh*, par. 51). Pour déterminer si une peine est intrinsèquement incompatible avec la dignité, le tribunal doit évaluer si la peine est, par sa nature, dégradante ou déshumanisante. Les effets susceptibles d’être causés à l’ensemble des contrevenants condamnés à un tel châtiment peuvent également éclairer le tribunal et appuyer son analyse de la nature de la peine.

[68] The court’s analysis must remain focused on the nature of the punishment rather than on considerations of proportionality between the punishment and the offender’s moral culpability. A punishment that is cruel and unusual by nature will by definition “always

[68] L’analyse du tribunal doit demeurer centrée sur la nature de la peine plutôt que sur des considérations de proportionnalité entre la peine et la culpabilité morale du contrevenant. En effet, une peine cruelle et inusitée par nature est, par définition, « toujours

be grossly disproportionate” (*Smith*, at p. 1073). Such a punishment must quite simply be excluded from the arsenal of sanctions available to the state, which means that the state cannot circumvent s. 12 by providing for specific exemptions for the imposition of the punishment or by making its imposition subject to judicial discretion. In other words, the mere possibility that a punishment that is cruel and unusual by nature may be imposed is enough to infringe s. 12 of the *Charter*.

[69] In sum, a punishment may infringe s. 12 for two distinct reasons, either because it is grossly disproportionate in a given case or because it is intrinsically incompatible with human dignity. Where both prongs of the protection of s. 12 are in issue in the same case, the analysis of the nature of the punishment must precede that of gross disproportionality. If the punishment that might be imposed is cruel and unusual by nature, and hence intrinsically incompatible with human dignity, it will be unnecessary — and I would even say pointless — to consider whether it is grossly disproportionate in a given case, because a punishment that is cruel and unusual by nature will “always be grossly disproportionate” (*Smith*, at p. 1073; see also Kerr and Berger, at p. 238).

[70] In their analysis under s. 12 of the *Charter*, the courts must show deference to Parliament’s policy decisions with respect to sentencing (*Lloyd*, at para. 45). The limit set by the Constitution for a sentence to be found grossly disproportionate is intended to be demanding and will be attained only rarely (*Boudreault*, at para. 45; *Lloyd*, at para. 24; *Steele v. Mountain Institution*, [1990] 2 S.C.R. 1385, at p. 1417; *Lyons*, at p. 345). Likewise, the courts must be cautious and deferential when a sentence is contested on the basis that it falls into the narrow category of punishment that is cruel and unusual by nature. Nevertheless, “the final judgment as to whether a punishment exceeds constitutional limits set by the Charter is properly a judicial function” (*Lloyd*, at para. 45, quoting *R. v. Guiller* (1985), 48 C.R. (3d) 226 (Ont. Dist. Ct.), at p. 238). That is the analysis we must now undertake.

exagérément disproportionné[e] » (*Smith*, p. 1074). Une peine cruelle et inusitée par nature doit tout simplement être exclue de l’arsenal de sanctions à la disposition de l’État, ce qui signifie que ce dernier ne peut contourner les prescriptions de l’art. 12 en prévoyant certaines exemptions à l’infliction de cette peine ou en assujettissant celle-ci à la discrétion du tribunal. En d’autres termes, la simple possibilité qu’une peine cruelle et inusitée par nature puisse être infligée suffit pour enfreindre l’art. 12 de la *Charte*.

[69] En résumé, une peine peut violer l’art. 12 pour deux motifs distincts, soit parce qu’elle est exagérément disproportionnée dans un cas donné, soit parce qu’elle est intrinsèquement incompatible avec la dignité humaine. Lorsque les deux volets de la protection de l’art. 12 sont en cause dans une même affaire, l’analyse de la nature de la peine doit précéder celle de la disproportion exagérée. En effet, si la peine susceptible d’être infligée est cruelle et inusitée par nature, et donc intrinsèquement incompatible avec la dignité humaine, il n’est pas nécessaire — et je dirais même inutile — de s’interroger sur son caractère exagérément disproportionné dans un cas donné, puisqu’une peine cruelle et inusitée par nature est « toujours exagérément disproportionné[e] » (*Smith*, p. 1074; voir aussi Kerr et Berger, p. 238).

[70] Dans leur analyse de l’art. 12 de la *Charte*, les tribunaux doivent faire preuve de déférence envers les décisions de politique générale du législateur en matière de peines (*Lloyd*, par. 45). La limite fixée par la Constitution pour qu’une peine soit jugée exagérément disproportionnée se veut exigeante et ne sera atteinte qu’en de rares occasions (*Boudreault*, par. 45; *Lloyd*, par. 24; *Steele c. Établissement Mountain*, [1990] 2 R.C.S. 1385, p. 1417; *Lyons*, p. 345). De la même manière, les tribunaux doivent faire montre de prudence et de retenue lorsqu’une peine est contestée au motif qu’elle fait partie de la catégorie restreinte de peines cruelles et inusitées par nature. Cependant, [TRADUCTION] « le jugement définitif quant à savoir si une peine excède les limites constitutionnelles fixées par la Charte constitue à bon droit une fonction judiciaire » (*Lloyd*, par. 45, citant *R. c. Guiller* (1985), 48 C.R. (3d) 226 (C. dist. Ont.), p. 238). C’est l’analyse qu’il nous incombe maintenant d’effectuer.

E. *Does Section 745.51 Cr. C. Infringe Section 12 of the Charter?*

[71] I will begin by observing that this appeal concerns only the constitutionality, under s. 12 of the *Charter*, of a provision that allows a court to impose consecutive parole ineligibility periods in a context involving multiple murders. Specifically, in the case of first degree murders, the court is authorized, through the combined effect of ss. 745.51 and 745(a) *Cr. C.*, to add up ineligibility periods of 25 years for each murder. Whether it is unconstitutional for a court to impose any ineligibility period greater than 25 years is therefore not at issue in this case.

[72] To answer the question before the Court, I will begin by defining the scope of s. 745.51 *Cr. C.* and the punishment that flows from it. I will then inquire into the nature of that punishment to determine whether it is intrinsically incompatible with human dignity and thus cruel and unusual by nature. To support my analysis of the nature of the punishment, I will consider the potential effects of the punishment on all offenders and I will also look at international and comparative law. I will finish on this topic by discussing whether the judicial discretion and the royal prerogative of mercy affect the constitutionality of the impugned provision.

[73] For the reasons that follow, I conclude that, by allowing consecutive 25-year parole ineligibility periods to be imposed in cases involving first degree murders, s. 745.51 *Cr. C.* authorizes the imposition of sentences of imprisonment for life without a realistic possibility of parole before death for all offenders who must serve such periods consecutively. Such sentences are degrading in nature and thus incompatible with human dignity, because they deny offenders any possibility of reintegration into society, which presupposes, definitively and irreversibly, that they lack the capacity to reform and re-enter society. The conclusion that a sentence of imprisonment without a realistic possibility of parole is incompatible with human dignity is supported by an analysis of the effects that such a sentence may have on all offenders on whom it is imposed, as well as by a review of

E. *L'article 745.51 C. cr. contrevient-il à l'art. 12 de la Charte?*

[71] D'entrée de jeu, le présent pourvoi concerne uniquement la constitutionnalité, au regard de l'art. 12 de la *Charte*, d'une disposition qui permet au tribunal de cumuler des périodes d'inadmissibilité à la libération conditionnelle dans un contexte de meurtres multiples. Plus particulièrement, en cas de meurtres au premier degré, le tribunal est autorisé, par le jeu de l'art. 745.51 et de l'al. 745a) *C. cr.*, à additionner des périodes d'inadmissibilité de 25 ans pour chaque meurtre. En conséquence, il ne s'agit pas en l'espèce de décider si l'infliction de toute période d'inadmissibilité supérieure à 25 ans est inconstitutionnelle.

[72] Pour répondre à la question dont notre Cour est saisie, je vais d'abord circonscrire la portée de l'art. 745.51 *C. cr.* et la peine qui en découle. Je procéderai ensuite à l'examen de la nature de cette peine pour déterminer si elle est intrinsèquement incompatible avec la dignité humaine et donc cruelle et inusitée par nature. Pour appuyer l'analyse de la nature de la peine, je vais me pencher sur les effets susceptibles d'être causés par le châtiment sur l'ensemble des contrevenants, ainsi que sur le droit international et le droit comparé. Enfin, je vais examiner l'incidence du pouvoir discrétionnaire du tribunal et de la prérogative royale de clémence sur la constitutionnalité de la disposition contestée.

[73] Pour les motifs qui suivent, je conclus que, par le cumul de périodes d'inadmissibilité à la libération conditionnelle de 25 ans en cas de meurtres au premier degré, l'art. 745.51 *C. cr.* autorise l'infliction de peines d'emprisonnement à vie sans possibilité réaliste de libération conditionnelle avant la mort de tous les contrevenants qui sont assujettis à un tel cumul. De telles peines sont de nature dégradante, et donc contraires à la dignité humaine, puisqu'elles retirent aux contrevenants toute possibilité de réinsertion sociale, ce qui présuppose, de manière finale et irréversible, que ces derniers ne possèdent pas la capacité de s'amender et de réintégrer la société. L'analyse des effets susceptibles d'être causés à l'ensemble des contrevenants assujettis à une peine d'emprisonnement sans possibilité réaliste de libération conditionnelle, ainsi qu'un tour d'horizon du

international and comparative law. Finally, the judicial discretion cannot save the impugned provision, and the royal prerogative of mercy does not offer a realistic possibility of release for an individual serving a sentence of imprisonment for which there is no other review mechanism.

(1) Scope of Section 745.51 Cr. C.

[74] An accused who is convicted of first or second degree murder will be sentenced to imprisonment for life (s. 235(2) *Cr. C.*) and will be eligible for full parole only after serving an ineligibility period of, respectively, 25 years or 10 to 25 years (s. 745(a) and (c) *Cr. C.*). Section 745.51 *Cr. C.* provides that the judge who presided at the trial may, by order, decide that the periods without eligibility for parole for each murder conviction are to be served consecutively, in a departure from the general principle that parole ineligibility periods are to be served concurrently (ss. 718.2(c) and 718.3(4) *Cr. C.*). According to the interpretation proposed by the parties — which we will assume to be correct for the purposes of this appeal, insofar as it is not determinative — s. 745.51 *Cr. C.* applies regardless of whether the multiple murders were committed at the same time or during separate events, and it applies in the absence of a previous conviction.

[75] I agree with the trial judge and the Court of Appeal in this case that s. 745.51 *Cr. C.* does not authorize a court to order that an offender convicted of first degree murder serve only a portion of a 25-year ineligibility period consecutively to another period imposed for another first degree murder (Sup. Ct. reasons, at para. 824; C.A. reasons, at para. 64). The provision in question allows only the imposition of consecutive 25-year periods. Parliament's intention, which I will discuss below, was clear on this point. I would add that s. 745.51 *Cr. C.* sets no ceiling for the total length of the ineligibility period a court may impose. This provision merely states the criteria that

droit international et du droit comparé, appuient la conclusion selon laquelle une telle peine est contraire à la dignité humaine. Enfin, le pouvoir discrétionnaire du tribunal ne peut sauvegarder la disposition contestée et la prérogative royale de clémence ne constitue pas une possibilité réaliste de remise en liberté pour l'individu purgeant une peine d'emprisonnement qui n'est assortie d'aucun autre mécanisme de révision.

(1) La portée de l'art. 745.51 C. cr.

[74] Lorsqu'un accusé est déclaré coupable de meurtre au premier degré ou de meurtre au deuxième degré, il est condamné à une peine d'emprisonnement à perpétuité (par. 235(2) *C. cr.*) et il ne devient admissible à une libération conditionnelle totale qu'après un temps d'épreuve de 25 ans ou de 10 à 25 ans respectivement (al. 745a) et c) *C. cr.*). L'article 745.51 *C. cr.* permet au juge qui préside le procès d'ordonner que les périodes d'inadmissibilité à la libération conditionnelle pour chaque condamnation pour meurtre soient purgées consécutivement, par dérogation au principe général selon lequel les périodes d'inadmissibilité à la libération conditionnelle doivent être purgées concurremment (al. 718.2c) et par. 718.3(4) *C. cr.*). Suivant l'interprétation proposée par les parties — et que nous tiendrons pour acquise pour les besoins du présent pourvoi, dans la mesure où elle n'est pas déterminante — l'art. 745.51 *C. cr.* s'applique indépendamment du fait que les meurtres multiples ont été commis lors d'une même occasion ou lors d'événements distincts, ainsi qu'en l'absence d'une condamnation antérieure.

[75] À l'instar du premier juge et de la Cour d'appel en l'espèce, je suis d'avis que l'art. 745.51 *C. cr.* n'habilite pas le tribunal à ordonner qu'un contrevenant condamné pour meurtre au premier degré purge seulement une partie de la période d'inadmissibilité de 25 ans de manière consécutive à une autre période imposée pour un autre meurtre au premier degré (motifs de la C.S., par. 824; motifs de la C.A., par. 64). La disposition en question autorise uniquement le cumul de périodes de 25 ans. L'intention du législateur, sur laquelle je reviendrai, était claire sur ce point. Je souligne d'ailleurs que l'art. 745.51 *C. cr.* ne fixe aucun plafond en ce qui concerne la

are to guide the court in exercising its discretion, to which I will return later in these reasons.

[76] In the case of multiple first degree murders, the impugned provision authorizes the imposition of sentences of imprisonment that effectively deprive all offenders who receive such sentences of a realistic possibility of being granted parole. In the scenario that is most favourable to the Crown, but that would in fact be quite rare, an 18-year-old offender who goes to prison and remains there for the next 50 years of their life could theoretically be paroled at the age of 68. For reference, it should be noted that the average life expectancy of inmates who die of natural causes is about 60 years (Office of the Correctional Investigator of Canada and Canadian Human Rights Commission, *Aging and Dying in Prison: An Investigation into the Experiences of Older Individuals in Federal Custody* (2019), at p. 57), which is far lower than the average life expectancy of the general public (for context, the average life expectancy of Canadians, both sexes combined, was 81.7 years in 2020; see Statistics Canada, “Deaths, 2020”, in *The Daily*, January 24, 2022 (online)).

[77] Therefore, at the end of the 50-year period of incarceration, some offenders will have died, while others will perhaps be released after the significant years of their life are over, making them what some authors have called “virtual lifers” (A. Iftene, “R. c. Bissonnette and the (Un)Constitutionality of Consecutive Periods of Parole Ineligibility for a Life Sentence: Why the QCCA Got It Right and Why Section 745.51 Should Never Be Re-Written” (2021), 69 *Crim. L.Q.* 312, at p. 331). For the purposes of analyzing the constitutionality of the impugned provision, this situation can be likened to a sentence of imprisonment for life without a realistic possibility of parole, in that the individual in question will never be able to re-enter society and contribute to it as an active citizen, especially given the fact that long prison sentences impair, more than they favour, the

durée totale du temps d’épreuve que peut infliger le tribunal. Cette disposition se limite à énoncer les critères guidant l’exercice du pouvoir discrétionnaire du tribunal, pouvoir sur lequel je reviendrai.

[76] En cas de meurtres multiples au premier degré, la disposition contestée permet l’infliction de peines d’emprisonnement qui, dans les faits, privent tous les contrevenants visés d’une possibilité réaliste d’obtenir une libération conditionnelle. Dans le scénario le plus favorable au ministère public, mais par ailleurs rarissime, un contrevenant âgé de 18 ans qui prend le chemin de la prison et qui y demeure durant les 50 années suivantes de sa vie pourrait, en théorie, obtenir sa libération conditionnelle alors qu’il sera âgé de 68 ans. À titre d’information, il convient de signaler que l’espérance de vie moyenne des détenus qui décèdent de causes naturelles est d’environ 60 ans (Bureau de l’enquêteur correctionnel du Canada et Commission canadienne des droits de la personne, *Vieillir et mourir en prison : enquête sur les expériences vécues par les personnes âgées sous garde fédérale* (2019), p. 67), chiffre qui est nettement inférieur à l’espérance de vie moyenne au sein de la population générale (à titre indicatif, l’espérance de vie moyenne au Canada, tous sexes confondus, était de 81,7 ans en 2020; voir Statistique Canada, « Décès, 2020 », dans *Le Quotidien*, 24 janvier 2022 (en ligne)).

[77] Ainsi, au terme de 50 ans d’incarcération, certains contrevenants seront décédés, tandis que d’autres seront peut-être libérés une fois les années significatives de leur vie écoulées, faisant d’eux ce que certains auteurs appellent de [TRADUCTION] « véritables condamnés à perpétuité » (A. Iftene, « R. c. Bissonnette and the (Un)Constitutionality of Consecutive Periods of Parole Ineligibility for a Life Sentence : Why the QCCA Got It Right and Why Section 745.51 Should Never Be Re-Written » (2021), 69 *Crim. L.Q.* 312, p. 331). Pour les besoins de l’analyse de la constitutionnalité de la disposition contestée, cette dernière situation est assimilable à une peine d’emprisonnement à perpétuité sans possibilité réaliste de libération conditionnelle, dans la mesure où l’individu ne pourra jamais réintégrer la société et y contribuer en tant que citoyen actif, surtout lorsque

reintegration of offenders into society (*R. v. Gladue*, [1999] 1 S.C.R. 688, at paras. 54-57; Ruby, at §1.63).

[78] As for the other possible cases, which involve the imposition of a sentence of imprisonment for life without eligibility for parole for 75, 100, 125 or even 800 years, the conclusion is self-evident: the individual is sentenced to die in prison, deprived of any possibility of one day recovering a portion of their liberty.

[79] Such cases are far from being hypothetical, as can be seen from the jurisprudence. In *R. v. Bourque*, 2014 NBQB 237, 427 N.B.R. (2d) 259, for example, a 24-year-old accused was sentenced to imprisonment for life with no possibility of applying for parole before the expiration of a 75-year ineligibility period (see also *R. v. Saretzky*, 2017 ABQB 496; *R. v. Ostamas*, 2016 MBQB 136, 329 Man. R. (2d) 203).

[80] I will therefore analyze the constitutionality of the impugned provision on the basis that it effectively authorizes the imposition of a sentence of imprisonment for life without a realistic possibility of parole.

(2) Imprisonment for Life Without a Realistic Possibility of Parole Constitutes Punishment That Is Cruel and Unusual by Nature

[81] An examination of the nature of a sentence of imprisonment for life without a realistic possibility of parole leads to the conclusion that it is incompatible with human dignity, a value that underlies the protection conferred by s. 12 of the *Charter*. This punishment is degrading in nature in that it presupposes at the time of its imposition, in a definitive and irreversible way, that the offender is beyond redemption and lacks the moral autonomy needed for rehabilitation. This alone justifies the conclusion that this punishment is cruel and unusual by nature. It will nonetheless be helpful to review in addition the effects that this sentence may have on all offenders on whom it is imposed.

l'on considère que les longues peines d'emprisonnement nuisent à la réinsertion sociale des contrevenants plus qu'elles ne la favorisent (*R. c. Gladue*, [1999] 1 R.C.S. 688, par. 54-57; Ruby, §1.63).

[78] En ce qui concerne les autres hypothèses, c'est-à-dire l'infliction d'une peine d'emprisonnement à vie sans possibilité de libération conditionnelle avant 75, 100, 125, voire 800 ans, la conclusion s'impose d'elle-même. L'individu est condamné à mourir en prison, privé de toute possibilité de regagner un jour une partie de sa liberté.

[79] De telles hypothèses sont loin d'être théoriques, comme en témoigne la jurisprudence. À titre d'exemple, dans l'affaire *R. c. Bourque*, 2014 NBQB 237, 427 R.N.-B. (2e) 259, un accusé âgé de 24 ans a été condamné à une peine d'emprisonnement à vie sans possibilité de demander une libération conditionnelle avant l'expiration d'un temps d'épreuve de 75 ans (voir aussi *R. c. Saretzky*, 2017 ABQB 496; *R. c. Ostamas*, 2016 MBQB 136, 329 Man. R. (2d) 203).

[80] J'entreprends donc l'analyse de la constitutionnalité de la disposition contestée en postulant qu'elle autorise, dans les faits, l'infliction d'une peine d'emprisonnement à perpétuité sans possibilité réaliste de libération conditionnelle.

(2) L'emprisonnement à perpétuité sans possibilité réaliste de libération conditionnelle constitue une peine cruelle et inusitée par nature

[81] L'examen de la nature de la peine d'emprisonnement à perpétuité sans possibilité réaliste de libération conditionnelle mène à la conclusion qu'elle est incompatible avec la dignité humaine, valeur qui sous-tend la protection conférée par l'art. 12 de la *Charte*. Cette peine est de nature dégradante en ce qu'elle présuppose, dès l'infliction de la peine, et ce, de manière finale et irréversible, que le contrevenant est irrécupérable et ne possède pas l'autonomie morale nécessaire pour se réhabiliter. À lui seul, ce constat permet de conclure qu'il s'agit d'une peine cruelle et inusitée par nature. Il est néanmoins pertinent de procéder, de manière complémentaire, à l'analyse des effets susceptibles d'être causés par cette peine sur l'ensemble des contrevenants qui y sont assujettis.

(a) *Examination of the Nature of a Sentence of Imprisonment for Life Without a Realistic Possibility of Parole*

[82] A sentence of imprisonment for life without a realistic possibility of parole is different in nature from a sentence of incarceration for which a review mechanism exists, in that the former deprives the offender of any prospect of reforming and re-entering society (see *Lyons*, at pp. 340-41; I. Grant, C. Choi and D. Parkes, “The Meaning of Life: A Study of the Use of Parole Ineligibility for Murder Sentencing” (2020), 52 *Ottawa L. Rev.* 133, at p. 172, citing A. Liebling, “Moral performance, inhuman and degrading treatment and prison pain” (2011), 13 *Punishm. & Soc.* 530, at p. 536). A variety of expressions, all of which allude to the fact that the offender will inevitably die behind bars, have been used to describe the nature of a sentence of life in prison without the possibility of parole (e.g., “living death sentence”, “death by incarceration”, “virtual death sentence”, “prolonged death penalty”, “delayed death penalty”, “death sentence without an execution date” and “the other death penalty”; see J. S. Henry, “Death-in-Prison Sentences: Overutilized and Underscrutinized”, in C. J. Ogletree, Jr. and A. Sarat, eds., *Life without Parole: America’s New Death Penalty?* (2012), 66, at p. 66). Once behind prison walls, the offender is doomed to remain there until death regardless of any efforts at rehabilitation, despite the devastating effects that this causes.

[83] The objective of rehabilitation is intimately linked to human dignity in that it reflects the conviction that all individuals carry within themselves the capacity to reform and re-enter society. As J. Desrosiers and C. Bernard aptly write, criminal law is based, and must be based, [TRANSLATION] “on a conception of the human being as an agent who is free and autonomous and, as a result, capable of change” (“L’emprisonnement à perpétuité sans possibilité de libération conditionnelle: une peine inconstitutionnelle?” (2021), 25 *Can. Crim. L.R.* 275, at p. 303).

a) *L’examen de la nature de la peine d’emprisonnement à perpétuité sans possibilité réaliste de libération conditionnelle*

[82] La nature de la peine d’emprisonnement à perpétuité sans possibilité réaliste de libération conditionnelle est différente de celle d’une peine d’incarcération assortie d’un mécanisme de révision, en ce que la première prive le contrevenant de toute possibilité de s’amender et de réintégrer la société (voir *Lyons*, p. 340-341; I. Grant, C. Choi et D. Parkes, « The Meaning of Life : A Study of the Use of Parole Ineligibility for Murder Sentencing » (2020), 52 *R.D. Ottawa* 133, p. 172, citant A. Liebling, « Moral performance, inhuman and degrading treatment and prison pain » (2011), 13 *Punishm. & Soc.* 530, p. 536). Diverses expressions, qui évoquent toutes la mort inévitable du contrevenant derrière les barreaux, ont été employées pour décrire la nature de la peine de prison à vie sans possibilité de libération conditionnelle (p. ex. : [TRADUCTION] « condamnation à mourir à petit feu », « mort par incarcération », « sentence de mort virtuelle », « peine de mort lente », « peine de mort suspendue », « peine de mort sans date d’exécution », et « l’autre peine de mort »; voir J. S. Henry, « Death-in-Prison Sentences : Overutilized and Underscrutinized », dans C. J. Ogletree, Jr. et A. Sarat, dir., *Life without Parole : America’s New Death Penalty?* (2012), 66, p. 66). En effet, une fois entre les murs de l’établissement carcéral, le contrevenant est destiné à y rester jusqu’à son décès, et ce, sans égard à ses efforts de réhabilitation, malgré les effets dévastateurs que cela entraîne.

[83] L’objectif de réinsertion sociale est intimement lié à la dignité humaine en ce qu’il exprime la conviction que chaque individu porte en lui la capacité de se réhabiliter et de réintégrer la société. Comme l’écrivent avec justesse les auteures J. Desrosiers et C. Bernard, le droit criminel se construit, et doit se construire, « sur une conception de l’être humain comme agent libre et autonome et partant, capable de changement » (« L’emprisonnement à perpétuité sans possibilité de libération conditionnelle : une peine inconstitutionnelle? » (2021), 25 *Rev. can. D.P.* 275, p. 303).

[84] It is difficult if not impossible to predict an offender's capacity for reform over a period of 50 years or more, let alone to predict whether the offender will actually be able to reform during their many years of incarceration. By depriving offenders in advance of any possibility of reintegration into society, the impugned provision shakes the very foundations of Canadian criminal law. It thereby negates the objective of rehabilitation from the time of sentencing, which has the effect of denying offenders any autonomy and imposing on them a degrading punishment that is incompatible with human dignity.

[85] To ensure respect for human dignity, Parliament must leave a door open for rehabilitation, even in cases where this objective is of minimal importance. Offenders who are by chance able to rehabilitate themselves must have access to a sentence review mechanism after having served a period of incarceration that is sufficiently long to denounce the gravity of their offence. This last point is important, as Parliament has latitude to establish sentences whose severity expresses society's condemnation of the offence committed, and while such sentences may in some circumstances have the effect of dooming offenders to die behind bars, they are not necessarily contrary to s. 12 of the *Charter*.

[86] As an illustration, in *Luxton*, this Court rejected the argument that the mandatory sentence for first degree murder infringes s. 12 of the *Charter*. The Court considered it proper for Parliament to treat this crime — the most serious of all — with an appropriate degree of severity. The 25-year parole ineligibility period reflects society's condemnation of the commission of such a crime and does not outrage our standards of decency (*Luxton*, at pp. 724-25). Because of the 25-year mandatory ineligibility period, an elderly offender who is convicted of first degree murder will thus have little or no hope of getting out of prison. As was decided in *Luxton*, that sentence is nonetheless compatible with s. 12 of the *Charter*, since it is within the purview of Parliament to sanction the most heinous crime with a sentence that sufficiently denounces the gravity of the offence, but that does

[84] Il est difficile, voire impossible de prédire la capacité d'un contrevenant de s'amender dans un horizon de 50 ans ou plus, et encore davantage de prédire s'il sera effectivement en mesure de le faire durant ses nombreuses années d'incarcération. En retirant à l'avance aux contrevenants toute possibilité de réintégrer la société, la disposition contestée ébranle les fondements mêmes du droit criminel canadien. La disposition réduit ainsi à néant l'objectif de réhabilitation dès le moment de l'infliction de la peine, ce qui a pour effet de nier toute autonomie aux contrevenants et de leur infliger une peine dégradante incompatible avec la dignité humaine.

[85] Pour respecter la dignité humaine, le Parlement doit laisser la porte entrouverte à la réhabilitation, même dans les cas où cet objectif revêt une importance minime. Si d'aventure un contrevenant parvenait à se réhabiliter, ce dernier doit avoir accès à un mécanisme de réexamen de sa peine, après avoir purgé une période d'incarcération qui est suffisamment longue pour dénoncer la gravité de l'infraction. Cette dernière précision est importante, car le Parlement dispose d'une latitude pour établir des peines dont la sévérité exprime la réprobation de la société à l'égard de l'infraction commise et, bien que ces peines puissent dans certaines circonstances avoir pour effet de condamner un contrevenant à mourir derrière les barreaux, elles ne constituent pas nécessairement une violation de l'art. 12 de la *Charte*.

[86] À titre d'illustration, dans l'arrêt *Luxton*, notre Cour a rejeté la prétention selon laquelle la peine obligatoire en cas de meurtre au premier degré viole l'art. 12 de la *Charte*. De l'avis de la Cour, le Parlement peut à bon droit traiter ce crime — le plus grave qui soit — avec un degré approprié de sévérité. La période d'inadmissibilité à la libération conditionnelle de 25 ans exprime la réprobation de la société à l'égard de la perpétration d'un tel crime et ne constitue pas une atteinte à nos normes de décence (*Luxton*, p. 724-725). Un contrevenant reconnu coupable de meurtre au premier degré à un âge avancé n'aura donc que peu ou pas d'espoir de sortir de prison, vu la période de temps d'épreuve obligatoire de 25 ans. Mais, comme il a été jugé dans l'arrêt *Luxton*, cette peine demeure conforme à l'art. 12 de la *Charte*, car elle relève du pouvoir du Parlement de sanctionner le

not exceed constitutional limits by depriving every offender of any possibility of parole from the outset.

[87] In the case at bar, on the other hand, the impugned provision authorizes the imposition of consecutive parole ineligibility periods of 25 years each, for each first degree murder, which has the result of depriving every offender who must serve such periods of the possibility of reforming and re-entering society. J. S. Henry rightly states that “[death-in-prison] sentences are severe and degrading because, like capital sentences, they fail to recognize the intrinsic worth of the incarcerated person. The absence of all redemptive possibility denies human dignity” (p. 76). As Martin J. observed in *Boudreault*, in which the Court struck down the victim surcharge provision, “[t]he inability of offenders to repay their full debt to society and to apply for reintegration and forgiveness strikes at the very foundations of our criminal justice system” (para. 79). Although the context of that case was different from the present one, the principle it lays down that every offender should have the opportunity to reform and be reintegrated into society is of general application. The foundations of our criminal justice system, as discussed in *Boudreault*, require respect for the inherent worth of every individual, including the vilest of criminals.

[88] Contrary to what the appellants argue, the intent here is not to have the objective of rehabilitation prevail over all the others, but rather to preserve a certain place for it in a penal system based on respect for the inherent dignity of every individual. Where the offence of first degree murder is concerned, rehabilitation is already subordinate to the objectives of denunciation and deterrence, as can be seen from the severity of the punishment.

[89] The objectives of denunciation and deterrence are already attained by imposing the harshest mandatory minimum sentence provided for in the *Criminal*

crime le plus odieux par une peine qui dénonce suffisamment la gravité de l’infraction, sans toutefois que cette peine outre passe les limites constitutionnelles en privant d’emblée tous les contrevenants d’une possibilité de libération conditionnelle.

[87] Par contraste, la disposition contestée en l’espèce autorise le cumul de périodes d’inadmissibilité à la libération conditionnelle d’une durée de 25 ans chacune pour chaque meurtre au premier degré, ce qui a pour résultat de priver tout contrevenant visé de la possibilité de s’amender et de réintégrer la société. L’auteur Henry dit avec justesse que [TRADUCTION] « les peines [d’emprisonnement jusqu’à ce que mort s’ensuive] sont sévères et dégradantes parce que, tout comme la peine capitale, elles ne reconnaissent pas la valeur intrinsèque de la personne incarcérée. L’absence de toute possibilité de rédemption nie la dignité humaine » (p. 76). Comme le souligne la juge Martin dans l’arrêt *Boudreault*, dans lequel la Cour a invalidé la disposition portant sur la suramende compensatoire, « [l]’incapacité des contrevenants de s’acquitter entièrement de leur dette envers la société, d’obtenir la réinsertion sociale et de demander pardon va à l’encontre des fondements mêmes de notre système de justice pénale » (par. 79). Bien que le contexte de cet arrêt diffère de celui en l’espèce, son enseignement selon lequel chaque contrevenant doit bénéficier de la possibilité de s’amender et de réintégrer la société est d’application générale. Les fondements de notre système de justice pénale, dont il est question dans l’arrêt *Boudreault*, commandent de respecter la valeur inhérente de chaque individu, incluant les criminels les plus vils.

[88] Contrairement aux prétentions des parties appelantes, il ne s’agit pas ici de faire primer l’objectif de réhabilitation sur tous les autres, mais bien de lui préserver une certaine place dans un système pénal fondé sur le respect de la dignité inhérente à chaque individu. Dans le contexte de l’infraction de meurtre au premier degré, la réhabilitation est déjà subordonnée aux objectifs de dénonciation et de dissuasion, comme en témoigne la sévérité de la peine.

[89] Les objectifs de dénonciation et de dissuasion sont déjà réalisés par l’infliction de la peine minimale obligatoire la plus sévère que prévoit le *Code criminel* :

Code: imprisonment for life (s. 235 *Cr. C.*). The idea that parole puts an end to an offender's sentence is a myth. Conditional release only alters the conditions under which a sentence is served; the sentence itself remains in effect for its entire term, that is, until the offender's death (*M. (C.A.)*, at para. 57). An offender who is granted parole "still carries the societal stigma of being a convicted offender who is serving a criminal sentence" (*M. (C.A.)*, at para. 62). Moreover, an offender who is granted parole on the basis that they no longer pose a danger to society remains "under the strict control of the parole system, and the offender's liberty remains significantly curtailed" (*M. (C.A.)*, at para. 62). The threat of reincarceration — should a condition be breached — hangs over the offender at all times (*Conditional Release Act*, s. 135). Contrary to popular belief, "[a] person on parole is not a free man" (*R. v. Wilmott*, [1967] 1 C.C.C. 171 (Ont. C.A.), at p. 181).

[90] The 25-year parole ineligibility period must also be placed in perspective in order to clearly illustrate its severity. It must be borne in mind that this 25-year period, although constitutional, is far from lenient. In a report published in 1987, the Canadian Sentencing Commission noted that "[t]here has been extensive criticism of the 25 year term of custody without the possibility of parole. Many see it as inhumane: inmates have no opportunity to mitigate their sentences" (p. 262). Furthermore, inmates on whom this term is imposed have no incentive to conform to prison rules (p. 262).

[91] To put this in context, in a number of countries similar to Canada — countries governed by the rule of law where the sentence of imprisonment for life exists — there is a sentence review mechanism that is accessible to life prisoners following a minimum ineligibility period shorter than the one provided for in Canadian law for first degree murder. Some European

l'emprisonnement à perpétuité (art. 235 *C. cr.*). Le fait de croire que la libération conditionnelle met fin à la peine du contrevenant relève du mythe. La mise en liberté sous condition a uniquement pour effet de modifier les conditions dans lesquelles la peine est purgée, mais la peine elle-même demeure en vigueur, et ce, pour toute la durée prévue, c'est-à-dire jusqu'à la mort du contrevenant (*M. (C.A.)*, par. 57). Le contrevenant qui obtient une libération conditionnelle « porte encore les stigmates sociétaux découlant de sa condition de condamné en train de purger une peine criminelle » (*M. (C.A.)*, par. 62). De surcroît, dans l'éventualité où le contrevenant obtient sa libération conditionnelle parce qu'il ne pose plus un danger pour la société, il demeure « assujéti à la surveillance stricte du système de libération conditionnelle, et sa liberté continue d'être considérablement restreinte » (*M. (C.A.)*, par. 62). La menace de réincarcération pèse toujours sur lui en cas de bris de condition (*Loi sur la mise en liberté sous condition*, art. 135). Contrairement à la croyance populaire, [TRADUCTION] « [l]a personne en liberté sous condition n'est pas une personne libre » (*R. c. Wilmott*, [1967] 1 C.C.C. 171 (C.A. Ont.), p. 181).

[90] La période d'inadmissibilité à la libération conditionnelle de 25 ans doit elle aussi être remise en perspective pour bien faire ressortir sa sévérité. En effet, il ne faut pas perdre de vue que, bien que constitutionnelle, cette période de 25 ans est loin d'être clémente. Dans un rapport publié en 1987, la Commission canadienne sur la détermination de la peine souligne que « [l]a période d'emprisonnement de 25 ans sans possibilité d'obtenir une libération conditionnelle a fait l'objet de vives critiques, beaucoup la jugeant inhumaine puisqu'elle prive les détenus de toute possibilité d'atténuer leur sentence » (p. 289). En outre, les détenus qui y sont assujettis ne sont pas incités à se conformer aux règles de l'établissement carcéral (p. 289).

[91] À titre indicatif, il existe dans plusieurs pays similaires au Canada — où règne la primauté du droit et où la peine d'emprisonnement à vie existe — un mécanisme de réexamen de la peine qui est accessible aux contrevenants condamnés à l'emprisonnement à perpétuité après un temps d'épreuve minimal inférieur à celui prescrit en droit canadien pour le

countries have adopted a sentence review mechanism that is available to offenders upon completion of various ineligibility periods: Denmark and Finland (12 years), Germany (15 years), Switzerland (15 years, exceptionally 10 years) and France (normally 18 years, up to 22 years in the case of legal recidivism, but 30 years for certain types of murder).² There are other European countries where life imprisonment quite simply does not exist. For example, Portugal's constitution includes an article that prohibits sentences of imprisonment for life (Constitution of the Portuguese Republic, art. 30(1); D. van Zyl Smit, "Outlawing Irreducible Life Sentences: Europe on the Brink?" (2010), 23 *Fed. Sentencing Rep.* 39, at p. 40), while Norway has provided that the longest prison sentence that can be imposed is 21 years, except with respect to the crime of genocide, crimes against humanity and war crimes, for which the maximum sentence is increased to 30 years.³

[92] This overview highlights the severity of Canada's mandatory minimum sentence for first degree murder. There can be no doubt that the preponderant objectives of this sentence are denunciation and deterrence and that the place of rehabilitation is secondary. The only effect of s. 745.51 *Cr. C.* is to completely negate the last of these objectives, which is incompatible with human dignity for the reasons set out above.

[93] The appellants stress the importance of denouncing multiple murders more strongly by imposing a sentence that reflects the value of each human life that was lost. Such a sentence is based on a retributivist approach that could, on its own, justify a sentence of unlimited severity, and even a sentence establishing a true correspondence between the crime and the punishment. However, as Desrosiers and Bernard put it, [TRANSLATION] "in a legal system based on respect for rights and freedoms, the 'eye for an eye' principle does not apply" (p. 292). The courts must establish

meurtre au premier degré. Certains pays européens ont adopté un mécanisme de réexamen des peines ouvert aux contrevenants au terme de différentes périodes d'inadmissibilité : le Danemark et la Finlande (12 ans), l'Allemagne (15 ans), la Suisse (15 ans, exceptionnellement 10 ans) et la France (18 ans en principe, jusqu'à 22 ans en cas de récidive légale, mais 30 ans pour certains types de meurtre)². Dans d'autres États européens, la peine d'emprisonnement à perpétuité n'existe tout simplement pas. À titre d'exemples, le Portugal a constitutionnalisé l'interdiction de la peine d'emprisonnement à vie (Constitution de la République portugaise, par. 30(1); D. van Zyl Smit, « Outlawing Irreducible Life Sentences : Europe on the Brink? » (2010), 23 *Fed. Sentencing Rep.* 39, p. 40), alors que la Norvège a prévu que la peine d'emprisonnement la plus sévère pouvant être infligée est de 21 ans, à l'exception du crime de génocide, des crimes contre l'humanité et des crimes de guerre où la peine maximale est portée à 30 ans³.

[92] Ce survol met en relief la sévérité de la peine minimale obligatoire pour meurtre au premier degré au Canada. La dénonciation et la dissuasion sont, sans l'ombre d'un doute, les objectifs prépondérants visés par cette peine, tandis que la réhabilitation occupe une place secondaire. L'article 745.51 *C. cr.* a pour seul effet d'anéantir complètement ce dernier objectif, ce qui est contraire à la dignité humaine pour les raisons énoncées précédemment.

[93] Les parties appelantes insistent sur l'importance de dénoncer avec plus de rigueur les meurtres multiples par l'infliction d'une peine qui reflète la valeur de chaque vie humaine perdue. Une telle peine repose sur une approche rétributiviste, approche qui pourrait à elle seule justifier une peine d'une sévérité illimitée, voire justifier une peine établissant une correspondance réelle entre le crime commis et le châtiment infligé. Mais, pour reprendre les termes des auteurs Desrosiers et Bernard, « dans un système juridique fondé sur le respect des droits et libertés,

² *Straffeloven* (Denmark), s. 41; *Rikoslaki* (Finland), c. 2(c), s. 10; *Strafgesetzbuch* (Germany), s. 57a; *Swiss Criminal Code*, art. 86 para. 5; *Code de procédure pénale* (France), art. 729 para. 4 and art. 720-4 para. 2.

³ *Straffeloven* (Norway), s. 43.

² *Straffeloven* (Danemark), art. 41; *Rikoslaki* (Finlande), c. 2(c), art. 10; *Strafgesetzbuch* (Allemagne), art. 57a; *Code pénal suisse*, art. 86 al. 5; *Code de procédure pénale* (France), art. 729 al. 4 et art. 720-4 al. 2.

³ *Straffeloven* (Norvège), art. 43.

a limit on the state's power to sanction offenders, in keeping with the *Charter*.

[94] Furthermore, the objectives of denunciation and deterrence are not better served by the imposition of excessive sentences. Beyond a certain threshold, these objectives lose all of their functional value, especially when the sentence far exceeds human life expectancy. The imposition of excessive sentences that fulfil no function, like the 150-year parole ineligibility period initially sought by the Crown in this case, does nothing more than bring the administration of justice into disrepute and undermine public confidence in the rationality and fairness of the criminal justice system. And this is leaving aside the fact that the imposition of extremely severe sentences tends to normalize such sentences and to have an inflationary effect on sentencing generally (Grant, Choi and Parkes, at p. 138, citing M. Hamilton, "Extreme Prison Sentences: Legal and Normative Consequences" (2016), 38 *Cardozo L. Rev.* 59, at pp. 106-11).

[95] As the Court of Appeal aptly stated, the imposition of a parole ineligibility period that exceeds human life expectancy [TRANSLATION] "is absurd. . . . A court must not make an order that can never be carried out" (para. 93). Although such a punishment could well be popular, it is contrary to the fundamental values of Canadian society. The thirst for vengeance that can drive us when a heinous crime is committed by one of our fellow citizens cannot justify imposing a sentence that, no matter how harsh it is, can never erase the horror of what the person has done.

(b) *Effects of a Sentence of Imprisonment for Life Without a Realistic Possibility of Parole*

[96] As far as effects are concerned, offenders who have no realistic possibility of parole are deprived of any incentive to reform. As early as 1956, the Fauteux Report clearly stated that "[a]t no time should any prisoner have reason to feel that he is a forgotten

la loi du talion est inapplicable » (p. 292). Les tribunaux doivent établir une limite au pouvoir de l'État de sanctionner les contrevenants, en conformité avec la *Charte*.

[94] Par ailleurs, les objectifs de dénonciation et de dissuasion ne sont pas mieux servis par l'infliction de peines excessives. En effet, passé un certain seuil, ces objectifs perdent toute leur valeur fonctionnelle, particulièrement lorsque la peine infligée dépasse largement l'espérance de vie humaine. L'infliction de peines excessives qui ne remplissent aucune fonction, par exemple le temps d'épreuve de 150 ans réclamé initialement par le ministère public en l'espèce, a uniquement pour effet de déconsidérer l'administration de la justice et de miner la confiance du public dans la rationalité et l'équité du système de justice criminelle. Et c'est sans compter le fait que l'infliction de peines extrêmement sévères tend à banaliser de telles peines et à entraîner un effet inflationniste sur l'ensemble des peines infligées (Grant, Choi et Parkes, p. 138, citant M. Hamilton, « Extreme Prison Sentences : Legal and Normative Consequences » (2016), 38 *Cardozo L. Rev.* 59, p. 106-111).

[95] Comme l'a affirmé à juste titre la Cour d'appel, l'infliction d'une période d'inadmissibilité à la libération conditionnelle qui dépasse l'espérance de vie humaine « relève de l'absurdité. [. . .] Un tribunal ne doit pas rendre une ordonnance qui ne peut jamais se réaliser » (par. 93). Bien qu'un tel châtiment soit susceptible de réjouir la galerie, il est contraire aux valeurs fondamentales de la société canadienne. La soif de vengeance qui peut nous animer lorsque nous sommes devant un crime atroce commis par l'un de nos semblables ne saurait justifier l'infliction d'une peine qui, aussi sévère soit-elle, ne pourra jamais effacer l'horreur de son geste.

(b) *Les effets de la peine d'emprisonnement à perpétuité sans possibilité réaliste de libération conditionnelle*

[96] Sur le plan des effets, les contrevenants qui n'ont aucune possibilité réaliste de libération conditionnelle sont privés de tout incitatif à se réformer. Déjà en 1956, le Rapport Fauteux énonçait clairement que « [j]amais le détenu ne devrait avoir

man. . . . Prisoners should have some hope that imprisonment will end and thereby have some incentive for reformation and rehabilitation” (pp. 48-49).

[97] The psychological consequences flowing from a sentence of imprisonment for life without a realistic possibility of parole are in some respects comparable to those experienced by inmates on death row, since only death will end their incarceration. In any event, “[w]hile there may not be universal agreement that [death-in-prison] sentences are *worse* than death, it is clear that [such] sentences are uniquely severe and degrading in their own right” (Henry, at p. 75 (emphasis in original)). For offenders who are sentenced to imprisonment for life without a realistic possibility of parole, the feeling of leading a monotonous, futile existence in isolation from their loved ones and from the outside world is very hard to tolerate. Some of them prefer to put an end to their lives rather than die slowly and endure suffering that seems endless to them (R. Johnson and S. McGunigall-Smith, “Life Without Parole, America’s Other Death Penalty” (2008), 88 *Prison J.* 328, at pp. 332-36; see also R. Kleinstuber and J. Coldsmith, “Is life without parole an effective way to reduce violent crime? An empirical assessment” (2020), 19 *Criminol. & Pub. Pol’y* 617, at p. 620). Effects like these support the conclusion that a sentence of imprisonment for life without a realistic possibility of parole is degrading in nature and thus intrinsically incompatible with human dignity. It is an inherently cruel and unusual punishment that infringes s. 12 of the *Charter*.

- (c) *Dignity and Imprisonment for Life Without the Possibility of Parole: International and Comparative Law Perspectives*

[98] Support for the conclusion that this sentence is unconstitutional can also be found in international and comparative law, under which a sentence of imprisonment for life without the possibility of parole is generally considered to be incompatible with human dignity. As Brown and Rowe JJ. noted recently in

un motif de se sentir oublié. [. . .] Les prisonniers devraient avoir l’espoir que leur emprisonnement prendra fin un jour, ce qui les encouragerait à se réformer et à se réhabiliter » (p. 52).

[97] Les conséquences psychologiques découlant d’une peine d’emprisonnement à vie sans possibilité réaliste de libération conditionnelle sont, à certains égards, comparables à celles vécues par les détenus dans le couloir de la mort, puisque seul le décès mettra fin à leur incarcération. En tout état de cause, [TRADUCTION] « [b]ien que tous ne s’accordent peut-être pas pour dire que les peines [d’emprisonnement jusqu’à ce que la mort s’ensuive] sont *pires* que la mort, il est clair que ces peines sont exceptionnellement sévères et dégradantes en soi » (Henry, p. 75 (en italique dans l’original)). Pour les contrevenants condamnés à une peine d’emprisonnement à perpétuité sans possibilité réaliste de libération conditionnelle, le sentiment de mener une existence monotone, futile et isolée de leurs proches et du monde extérieur est très difficile à supporter. Certains d’entre eux préfèrent mettre fin à leurs jours plutôt que de mourir à petit feu et endurer des souffrances qui leur paraissent interminables (R. Johnson et S. McGunigall-Smith, « Life Without Parole, America’s Other Death Penalty » (2008), 88 *Prison J.* 328, p. 332-336; voir aussi R. Kleinstuber et J. Coldsmith, « Is life without parole an effective way to reduce violent crime? An empirical assessment » (2020), 19 *Criminol. & Pub. Pol’y* 617, p. 620). De tels effets appuient la conclusion selon laquelle une peine d’emprisonnement à vie sans possibilité réaliste de libération conditionnelle est de nature dégradante et donc intrinsèquement incompatible avec la dignité humaine. Il s’agit d’une peine cruelle et inusitée par nature qui viole l’art. 12 de la *Charte*.

- c) *La dignité et l’emprisonnement à perpétuité sans possibilité de libération conditionnelle : perspectives en droit international et en droit comparé*

[98] Cette conclusion d’inconstitutionnalité trouve également appui en droit international et en droit comparé, la peine d’emprisonnement à perpétuité sans possibilité de libération conditionnelle y étant généralement considérée comme étant contraire à la dignité humaine. Comme l’ont récemment appelé les

9147-0732 *Québec inc.*, there is a role for international and comparative law in the interpretation of *Charter* rights (para. 28). However, “this role has properly been to *support* or *confirm* an interpretation arrived at through the [purposive] approach [established in *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295]; the Court has never relied on such tools to define the scope of *Charter* rights” (9147-0732 *Québec inc.*, at para. 28 (emphasis in original)).

[99] Human dignity has been the central focus in the development of the international system for the protection of human rights since the end of the Second World War. The atrocities committed during that war led to international recognition of the fundamental importance of human dignity (*Ward*, at para. 57). It was specifically stated in the preamble to the *Charter of the United Nations*, Can. T.S. 1945 No. 7, that the peoples of the United Nations were determined to “reaffirm faith in fundamental human rights, in the dignity and worth of the human person”. Two decades or so later, the *International Covenant on Civil and Political Rights*, Can. T.S. 1976 No. 47 (“ICCPR”), which Canada ratified in 1976, reiterated the importance of dignity as the foundation of fundamental rights and freedoms. The preamble to the ICCPR states that all the rights guaranteed therein “derive from the inherent dignity of the human person”. While the preamble is not binding as such in Canadian law, it does shed light on the way in which dignity is understood in relation to human rights, that is, as a value that underlies the recognized rights rather than as a right in itself.

[100] In the context of sentencing, in international law, the concept of dignity finds expression through the commitment to reintegrating offenders into society by offering them a possibility of being released. For example, art. 10 of the ICCPR states that “[a]ll persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person” (art. 10(1)) and that the “essential aim” of the penitentiary system is the “reformation” and “social rehabilitation” of prisoners (art. 10(3)). Because the

juges Brown et Rowe dans l’arrêt 9147-0732 *Québec inc.*, le droit international et le droit comparé jouent un rôle dans l’interprétation des droits garantis par la *Charte* (par. 28). Toutefois, « ce rôle a comme il se doit consisté à appuyer ou à confirmer une interprétation dégagée en appliquant la démarche [téléologique] établie dans [*R. c. Big M Drug Mart Ltd.*, [1985] 1 R.C.S. 295]; la Cour n’a jamais eu recours à de tels outils pour définir la portée des droits garantis par la *Charte* » (9147-0732 *Québec inc.*, par. 28 (en italique dans l’original)).

[99] La dignité humaine est au cœur du développement du régime international de protection des droits de la personne depuis la fin de la Seconde Guerre mondiale. Les atrocités commises pendant la guerre ont mené à la reconnaissance internationale de l’importance fondamentale de la dignité humaine (*Ward*, par. 57). Le préambule de la *Charte des Nations Unies*, R.T. Can. 1945 n° 7, énonce explicitement la résolution des peuples des Nations Unies de « proclamer à nouveau [leur] foi dans les droits fondamentaux de l’homme, dans la dignité et la valeur de la personne humaine ». Près de deux décennies plus tard, le *Pacte international relatif aux droits civils et politiques*, R.T. Can. 1976 n° 47 (« PIDCP »), ratifié par le Canada en 1976, a réitéré l’importance de la dignité à titre de fondement des droits et libertés fondamentaux. Le PIDCP énonce dans son préambule que l’ensemble des droits qu’il garantit « découlent de la dignité inhérente à la personne humaine ». Si le préambule n’a en soi aucune force contraignante en droit canadien, il nous éclaire toutefois sur la façon dont la dignité est comprise en droit de la personne, c’est-à-dire comme une valeur qui sous-tend les droits reconnus plutôt que comme un droit en soi.

[100] En matière de détermination de la peine, en droit international, la notion de dignité s’exprime par la volonté de réinsérer les contrevenants dans la société en leur offrant une possibilité de remise en liberté. À titre d’exemple, l’art. 10 du PIDCP précise que « [t]oute personne privée de sa liberté est traitée avec humanité et avec le respect de la dignité inhérente à la personne humaine » (par. 10(1)) et que le « but essentiel » du régime pénitentiaire est l’« amendement » et le « reclassement social » des

ICCPR is an international treaty ratified by Canada, Canadian law is presumed to be in conformity with the commitments set out in it (*Health Services and Support — Facilities Subsector Bargaining Assn. v. British Columbia*, 2007 SCC 27, [2007] 2 S.C.R. 391, at para. 70; *Saskatchewan Federation of Labour v. Saskatchewan*, 2015 SCC 4, [2015] 1 S.C.R. 245, at para. 64). The ICCPR is therefore a relevant source for the interpretation of the *Charter's* provisions (9147-0732 *Québec inc.*, at paras. 32-34).

[101] Moreover, although criminal law is, generally speaking, a matter of domestic law, it is appropriate in this case to consider the approach to reviewing sentences taken by the International Criminal Court (“ICC”) and set out in the *Rome Statute of the International Criminal Court*, Can. T.S. 2002 No. 13. Canada played an important role in the creation of that court and was the first country to incorporate the obligations flowing from that treaty into its national legislation. The ICC was established by the *Rome Statute*, which Canada ratified in July 2000. That international court conducts investigations and, where necessary, tries persons charged with “the most serious crimes of concern to the international community as a whole”: the crime of genocide, crimes against humanity, war crimes and the crime of aggression (*Rome Statute*, art. 5(1)). In June 2000, one month before the ratification of that treaty, Parliament enacted the *Crimes Against Humanity and War Crimes Act*, S.C. 2000, c. 24 (“*Crimes Against Humanity Act*”), which criminalized genocide, crimes against humanity and war crimes under domestic law.

[102] The *Crimes Against Humanity Act* sets out the sentences that apply in Canadian law and the rules on parole eligibility for these three types of crimes. If an intentional killing forms the basis of the offence, the sentence is the same as for the offence of first or second degree murder, namely imprisonment for life (s. 4(2) of the *Crimes Against Humanity Act*). In the case of parole, however, Parliament enacted rules that differ from the ones in the *Rome Statute*. The *Crimes Against Humanity Act* states that the same ineligibility periods as in the *Criminal Code* apply, that is, 25 years for first degree murder and 10 to 25

détenus (par. 10(3)). Comme le PIDCP est un traité international ratifié par le Canada, le droit canadien est présumé conforme aux engagements qu’il prévoit (*Health Services and Support — Facilities Subsector Bargaining Assn. c. Colombie-Britannique*, 2007 CSC 27, [2007] 2 R.C.S. 391, par. 70; *Saskatchewan Federation of Labour c. Saskatchewan*, 2015 CSC 4, [2015] 1 R.C.S. 245, par. 64). Il représente donc une source pertinente pour l’interprétation des dispositions de la *Charte* (9147-0732 *Québec inc.*, par. 32-34).

[101] En outre, bien que le droit criminel soit, de manière générale, une question de droit interne, il convient en l’espèce de se pencher sur l’approche qui a été adoptée par la Cour pénale internationale (« CPI ») en matière de révision des peines, approche inscrite dans le *Statut de Rome de la Cour pénale internationale*, R.T. Can. 2002 n° 13. Le Canada a joué un rôle important dans la création de cette cour et il a été le premier pays à incorporer dans sa législation nationale les obligations de ce traité. Le *Statut de Rome*, ratifié par le Canada en juillet 2000, a créé la CPI. Ce tribunal international mène des enquêtes et, le cas échéant, juge les personnes accusées des crimes « les plus graves qui touchent l’ensemble de la communauté internationale », soit le crime de génocide, les crimes contre l’humanité, les crimes de guerre et le crime d’agression (*Statut de Rome*, par. 5(1)). Un mois avant la ratification de ce traité en juin 2000, le législateur canadien a adopté la *Loi sur les crimes contre l’humanité et les crimes de guerre*, L.C. 2000, c. 24 (« *Loi sur les crimes contre l’humanité* »), qui a criminalisé dans le droit interne le crime de génocide, les crimes contre l’humanité et les crimes de guerre.

[102] La *Loi sur les crimes contre l’humanité* prévoit les peines applicables en droit canadien et les règles relatives à l’inadmissibilité à la libération conditionnelle à l’égard de ces trois types de crimes. Lorsque le meurtre intentionnel est à l’origine de l’infraction, la peine est la même que pour l’infraction de meurtre au premier ou au deuxième degré, soit l’emprisonnement à perpétuité (par. 4(2) de la *Loi sur les crimes contre l’humanité*). En matière de libération conditionnelle, le législateur a toutefois adopté un régime distinct de celui prévu par le *Statut de Rome*. La *Loi sur les crimes contre l’humanité* indique que les mêmes

years for second degree murder (s. 15(1) of the *Crimes Against Humanity Act*). In contrast, the *Rome Statute* establishes a mechanism for reviewing the sentences for these crimes: where the ICC has imposed a term of life imprisonment (art. 77), it must review that sentence after 25 years “to determine whether it should be reduced” (art. 110(3)). The ICC’s sentence review process has to do with sentence reduction, not with parole as is the case under Canadian law. In this context, the *Rome Statute* is relevant in the instant case only insofar as, like Canadian law, it recognizes the need to give offenders, including those who have committed the most serious crimes, an opportunity for rehabilitation.

périodes d’inadmissibilité énoncées dans le *Code criminel*, soit 25 ans pour le meurtre au premier degré et 10 à 25 ans pour le meurtre au deuxième degré, s’appliquent (par. 15(1) de la *Loi sur les crimes contre l’humanité*). Le *Statut de Rome*, au contraire, établit relativement à ces crimes un mécanisme de révision de la peine qui oblige la CPI à réévaluer après 25 ans la peine d’emprisonnement à perpétuité qu’elle inflige (art. 77), « pour déterminer s’il y a lieu de la réduire » (par. 110(3)). Le processus de révision des peines de la CPI porte sur la réduction de la peine plutôt que sur la libération conditionnelle comme c’est le cas en droit canadien. Dans ce contexte, le *Statut de Rome* n’est pertinent en l’espèce que dans la mesure où, à l’instar du droit canadien, il reconnaît la nécessité d’offrir une possibilité de réhabilitation aux contrevenants, y compris ceux ayant commis les crimes les plus graves.

[103] European law also provides useful guidance on the concept of dehumanizing and degrading punishments and on the importance of rehabilitation in criminal law. However, the weight to be given to the principles of European law is limited, because decisions of international and foreign courts are not binding sources in Canadian law (9147-0732 *Québec inc.*, at paras. 35 and 43).

[103] Le droit européen apporte lui aussi un éclairage intéressant sur la notion de peines déshumanisantes et dégradantes et l’importance de la réhabilitation en droit pénal. Le poids à accorder à ses enseignements est toutefois limité, puisque les décisions des tribunaux internationaux et étrangers ne sont pas des sources contraignantes en droit canadien (9147-0732 *Québec inc.*, par. 35 et 43).

[104] The decisions of the Grand Chamber of the European Court of Human Rights (“ECHR”) recognize the principle of rehabilitation in sentencing (*Vinter v. United Kingdom* [GC], No. 66069/09, at § 114, July 9, 2013 (HUDOC); *Murray v. Netherlands* [GC], No. 10511/10, at § 102, April 26, 2016 (HUDOC); *Hutchinson v. United Kingdom* [GC], No. 57592/08, at §§ 42-43, January 17, 2017 (HUDOC)). Article 3 of the *European Convention on Human Rights*, 213 U.N.T.S. 221, provides that “[n]o one shall be subjected . . . to inhuman or degrading treatment or punishment”. In a number of cases, the Grand Chamber has had to consider whether a sentence of imprisonment for life without the possibility of parole is contrary to art. 3. In general terms, it has accepted that a sentence of imprisonment for life is not in itself contrary to that provision (*Kafkaris v. Cyprus* [GC], No. 21906/04, at § 97, February 12, 2008 (HUDOC); *Murray*, at § 99; *Hutchinson*, at § 42). However, it has found that, to be compatible

[104] La jurisprudence de la Grande Chambre de la Cour européenne des droits de l’homme (« CEDH ») reconnaît le principe de réinsertion en matière de détermination de la peine (*Vinter c. Royaume-Uni* [GC], n° 66069/09, § 114, 9 juillet 2013 (HUDOC); *Murray c. Pays-Bas* [GC], n° 10511/10, § 102, 26 avril 2016 (HUDOC); *Hutchinson c. Royaume-Uni* [GC], n° 57592/08, §§ 42-43, 17 janvier 2017 (HUDOC)). L’article 3 de la *Convention européenne des droits de l’homme*, 213 R.T.N.U. 221, dispose que « [n]ul ne peut être soumis [. . .] à des peines ou traitements inhumains ou dégradants ». La Grande Chambre a eu à se pencher, dans différentes affaires, sur la question à savoir si la peine d’emprisonnement à perpétuité sans possibilité de libération conditionnelle est contraire à l’art. 3. De façon générale, elle admet qu’une peine d’emprisonnement à vie n’est pas en soi contraire à cette disposition (*Kafkaris c. Chypre* [GC], n° 21906/04, § 97, 12 février 2008 (HUDOC); *Murray*, § 99; *Hutchinson*, § 42). Toutefois, elle

with art. 3, such a sentence must be “*de jure* and *de facto* reducible”, which means that every prisoner must have a possibility of being released (*Vinter*, at § 108; *Hutchinson*, at § 42; see also *Bodein v. France*, No. 40014/10, at § 56, November 13, 2014 (HUDOC); *Murray*, at § 99). The review process “must take account of the progress that the prisoner has made towards rehabilitation, assessing whether such progress has been so significant that continued detention can no longer be justified on legitimate penological grounds” (*Hutchinson*, at § 43; see also *Vinter*, at §§ 113-16).

[105] Comparative law is relevant as well in showing the different perspectives that exist with respect to a sentence of imprisonment for life without the possibility of parole. While the domestic law of countries similar to Canada is instructive in this regard, it is not binding in Canadian law (9147-0932 *Québec inc.*, at para. 43). In this appeal, I will therefore refer to it only for the purposes of illustration.

[106] Germany, like France and Italy, has established that sentences of imprisonment for life without the possibility of release are unconstitutional (R. Hood and C. Hoyle, *The Death Penalty: A Worldwide Perspective* (5th ed. 2015), at p. 486). It was in 1977 that Germany’s Federal Constitutional Court considered the constitutionality of the sentence of life imprisonment for murder (*Life Imprisonment Case* (1977), 45 BVerfGE 187, translated into English in D. P. Kommers and R. A. Miller, *The Constitutional Jurisprudence of the Federal Republic of Germany* (3rd ed. 2012), at pp. 363-68). The Constitutional Court held in that case that a sentence of life imprisonment is not in itself unconstitutional (p. 367). However, it found that imprisonment without any “concrete and realistically attainable” chance to regain freedom at some later point in time is contrary to human dignity (p. 366). The state must regard each individual within society as equal in worth and may not “turn the offender into an object of crime prevention to the detriment of his or her constitutionally protected right to social worth and respect” (p. 365). The Constitutional Court maintained that rehabilitation is constitutionally required in any community that

considère que pour être compatible avec l’art. 3 une telle peine doit être « compressible *de jure* et *de facto* », c’est-à-dire que tout détenu doit avoir une possibilité de remise en liberté (*Vinter*, § 108; *Hutchinson*, § 42; voir aussi *Bodein c. France*, n° 40014/10, § 56, 13 novembre 2014 (HUDOC); *Murray*, § 99). La procédure de réexamen « doit prendre en compte les progrès du détenu sur le chemin de l’amendement et déterminer si le détenu a fait des progrès tels qu’aucun motif légitime d’ordre pénologique ne justifie plus son maintien en détention » (*Hutchinson*, § 43; voir aussi *Vinter*, §§ 113-116).

[105] Le droit comparé est lui aussi pertinent pour illustrer les différentes perspectives qui existent au sujet de la peine d’emprisonnement à perpétuité sans possibilité de libération conditionnelle. Bien que le droit interne de pays similaires au Canada offre un éclairage intéressant en la matière, il n’a aucune force contraignante en droit canadien (9147-0732 *Québec inc.*, par. 43). Dans le présent pourvoi, je m’y réfère donc uniquement à titre illustratif.

[106] Tout comme la France et l’Italie, l’Allemagne a établi que les peines d’emprisonnement à perpétuité sans possibilité de libération sont inconstitutionnelles (R. Hood et C. Hoyle, *The Death Penalty : A Worldwide Perspective* (5^e éd. 2015), p. 486). C’est en 1977 que la Cour constitutionnelle fédérale allemande s’est penchée sur la constitutionnalité de la peine d’emprisonnement à perpétuité pour meurtre (*Life Imprisonment Case* (1977), 45 BVerfGE 187, traduit vers l’anglais dans D. P. Kommers et R. A. Miller, *The Constitutional Jurisprudence of the Federal Republic of Germany* (3^e éd. 2012), p. 363-368). Dans cet arrêt, elle a conclu qu’une peine d’emprisonnement à perpétuité n’est pas inconstitutionnelle en soi (p. 367). Elle a toutefois statué que le fait d’emprisonner une personne sans lui offrir la possibilité [TRADUCTION] « concrète et réaliste » de regagner un jour sa liberté est contraire à la dignité humaine (p. 366). L’État doit reconnaître à chaque membre de la société une valeur égale, il ne peut [TRADUCTION] « transformer un contrevenant en outil de prévention du crime au préjudice du droit de cette personne au respect et à la reconnaissance de sa valeur au sein de la société qui lui est garanti par la Constitution » (p. 365). La

establishes human dignity as its centrepiece (p. 366). That decision has had a certain impact on the development of European law with respect to life sentences (*Vinter*, at §§ 69 and 113).

[107] In contrast, other countries similar to Canada that also respect the rule of law take a more restrictive approach to parole access. In the United States, for example, imprisonment for life without the possibility of parole is considered constitutional (*Harmelin v. Michigan*, 501 U.S. 957 (1991)) except in the case of juvenile offenders (*Graham v. Florida*, 560 U.S. 48 (2010)), including those convicted of murder (*Miller v. Alabama*, 567 U.S. 460 (2012)). However, the American approach differs from the one that exists under Canadian law, since that country applies the death penalty and has a narrower interpretation of the concept of cruel and unusual punishment (*Kindler*, at p. 812). Some other countries also have legislative schemes recognizing the possibility of imposing a sentence of imprisonment without the possibility of parole. In New Zealand, the minimum parole ineligibility period for an offender convicted of murder is 10 years, or 17 years in certain specific circumstances, but there is no maximum ineligibility period (*Sentencing Act 2002* (N.Z.), ss. 103 and 104). In Australia, this type of sentence is also permitted in the various states and territories (J. L. Anderson, “The Label of Life Imprisonment in Australia: A Principled or Populist Approach to an Ultimate Sentence” (2012), 35 *U.N.S.W.L.J.* 747, at pp. 751-53 and 759-64). England and Wales, for their part, take a distinctive approach. A court has the power to order that any person given a life sentence for murder serve a parole ineligibility period with a starting point of 15 years, or 30 years in specific circumstances, or to completely exclude any possibility of release for the person (D. Ormerod and K. Laird, *Smith, Hogan, and Ormerod’s Criminal Law* (16th ed. 2021), at pp. 536-37). However, it must be noted that courts in England and Wales, as well as the ECHR, take the view that there is an actual mechanism for reviewing life sentences in English law because of the existence of the Secretary of State’s release power under s. 30 of the *Crime (Sentences) Act 1997* (U.K.), 1997, c. 43 (*R. v. McLoughlin*, [2014] EWCA Crim 188, [2014]

Cour constitutionnelle soutient que la réhabilitation est un impératif constitutionnel pour toute société qui fait de la dignité humaine le pilier de son existence (p. 366). Cette décision a eu un certain écho dans le développement du droit européen relatif aux peines à perpétuité (*Vinter*, §§ 69 et 113).

[107] Cependant, d’autres pays similaires au Canada, qui respectent eux aussi la primauté du droit, adoptent une approche plus restrictive en matière d’accès à la libération conditionnelle. Aux États-Unis, par exemple, l’emprisonnement à perpétuité sans possibilité de libération conditionnelle est jugé constitutionnel (*Harmelin c. Michigan*, 501 U.S. 957 (1991)), sauf dans le cas des contrevenants juvéniles (*Graham c. Florida*, 560 U.S. 48 (2010)), y compris pour ceux condamnés pour homicide (*Miller c. Alabama*, 567 U.S. 460 (2012)). L’approche américaine se distingue toutefois de celle qui prévaut en droit canadien, dans la mesure où ce pays applique la peine de mort et interprète la notion de peine cruelle et inusitée plus restrictivement (*Kindler*, p. 812). D’autres pays reconnaissent également dans leur système législatif la possibilité d’infliger une peine d’emprisonnement sans possibilité de libération conditionnelle. En Nouvelle-Zélande, la période minimale d’inadmissibilité à la libération conditionnelle en cas de condamnation pour meurtre est de 10 ans, ou de 17 ans dans certaines circonstances particulières, mais il n’existe pas de temps d’épreuve maximal (*Sentencing Act 2002* (N.-Z.), art. 103 et 104). En Australie, ce type de peine est également permis dans les différents États et territoires (J. L. Anderson, « The Label of Life Imprisonment in Australia : A Principled or Populist Approach to an Ultimate Sentence » (2012), 35 *U.N.S.W.L.J.* 747, p. 751-753 et 759-764). L’Angleterre et le Pays de Galles adoptent quant à eux une approche particulière. Le tribunal a le pouvoir d’ordonner, à l’égard de toute personne condamnée à l’emprisonnement à perpétuité pour meurtre, soit une période d’inadmissibilité à la libération conditionnelle dont le point de départ est de 15 ans, ou encore de 30 ans dans des circonstances particulières, soit l’exclusion complète de toute possibilité de libération (D. Ormerod et K. Laird, *Smith, Hogan, and Ormerod’s Criminal Law* (16^e éd. 2021), p. 536-537). Cependant, il faut noter que les tribunaux d’Angleterre et du Pays de Galles

1 W.L.R. 3964, at paras. 31-35; *Hutchinson*, at §§ 70 and 72). I will come back to this point later.

[108] In summary, although s. 12, like any other *Charter* provision, must be interpreted primarily by reference to Canadian law and history (9147-0732 *Québec inc.*, at para. 20; see also *Kindler*, at p. 812), a parallel can be drawn between the approach taken in Canadian criminal law and the approaches taken in international law and in the law of various countries similar to Canada with respect to sentences of imprisonment for life without the possibility of parole, which are generally considered to be incompatible with human dignity.

(d) *Does the Judicial Discretion to Impose Consecutive Parole Ineligibility Periods Affect the Constitutionality of the Impugned Provision?*

[109] In support of its position that s. 745.51 *Cr. C.* is constitutional, the Crown stresses the discretionary nature of the power granted to courts by this provision (see to the same effect *R. v. Millard*, 2018 ONSC 1299; *R. v. Granados-Arana*, 2017 ONSC 6785, 356 C.C.C. (3d) 340; *R. v. Husbands*, [2015] O.J. No. 2673 (QL), 2015 CarswellOnt 7677 (WL) (S.C.J.), rev'd 2017 ONCA 607, 353 C.C.C. (3d) 317, but not on this point). According to this reasoning, the imposition of a disproportionate sentence results from an erroneous exercise of judicial discretion and can therefore be rectified by way of an appeal rather than a declaration of unconstitutionality.

[110] It is true that the imposition of consecutive parole ineligibility periods is not mandatory. Section 745.51 *Cr. C.* provides that a court *may* order that the parole ineligibility periods applicable for each murder conviction are to be served consecutively. In exercising

ainsi que la CEDH considèrent qu'il existe en droit anglais un mécanisme véritable de réexamen des peines à perpétuité du fait de l'existence du pouvoir de libération du ministre prévu à l'art. 30 de la loi intitulée *Crime (Sentences) Act 1997* (R.-U.), 1997, c. 43 (*R. c. McLoughlin*, [2014] EWCA Crim 188, [2014] 1 W.L.R. 3964, par. 31-35; *Hutchinson*, §§ 70 et 72). Je reviendrai sur ce point plus loin.

[108] En somme, bien que, comme toute autre disposition de la *Charte*, l'art. 12 doit d'abord et avant tout être interprété au regard du droit et de l'histoire du Canada (9147-0732 *Québec inc.*, par. 20; voir aussi *Kindler*, p. 812), un parallèle peut être établi entre l'approche du droit pénal canadien et celles du droit international et du droit de différents pays similaires au Canada en ce qui concerne les peines d'emprisonnement à perpétuité sans possibilité de libération conditionnelle, qui sont généralement considérées comme étant incompatibles avec à la dignité humaine.

d) *Le pouvoir discrétionnaire du tribunal de cumuler les périodes d'inadmissibilité à la libération conditionnelle a-t-il une incidence sur la constitutionnalité de la disposition contestée?*

[109] Au soutien de sa position selon laquelle l'art. 745.51 *C. cr.* est constitutionnel, le ministère public insiste sur la nature discrétionnaire du pouvoir conféré au tribunal par cette disposition (voir, dans le même sens, *R. c. Millard*, 2018 ONSC 1299; *R. c. Granados-Arana*, 2017 ONSC 6785, 356 C.C.C. (3d) 340; *R. c. Husbands*, [2015] O.J. No. 2673 (QL), 2015 CarswellOnt 7677 (WL) (C.S.J.), inf. par 2017 ONCA 607, 353 C.C.C. (3d) 317, mais non sur ce point). Suivant ce raisonnement, l'infliction d'une peine disproportionnée résulte d'une application erronée de ce pouvoir discrétionnaire par le tribunal et, partant, peut être corrigée au moyen d'un appel plutôt que d'une déclaration d'inconstitutionnalité.

[110] Il est vrai que l'infliction de périodes consécutives d'inadmissibilité à la libération conditionnelle n'est pas obligatoire. L'article 745.51 *C. cr.* indique en effet que le tribunal *peut* ordonner le cumul des périodes d'inadmissibilité à la libération conditionnelle

its discretion, the court must take into consideration the character of the offender, the nature of the offence and the circumstances surrounding its commission. In this regard, I note that the court's obligation to stack ineligibility periods in blocks of 25 years, if it chooses to exercise its discretion, is difficult to reconcile with the principles of proportionality and individualization in sentencing.

[111] In any event, I am of the view, as explained above, that the existence of a discretion cannot save a provision that authorizes the imposition of a punishment that is cruel and unusual by nature. No crime, no matter how appalling it might be, can justify imposing a punishment that is intrinsically incompatible with human dignity, like a sentence of imprisonment for life without a realistic possibility of parole. Since such a punishment must quite simply be excluded from the arsenal of punishments available to the state, the mere possibility that it may be imposed constitutes an infringement of s. 12 of the *Charter*. By way of analogy, a provision authorizing corporal punishment as a sentence for the commission of multiple murders — a sentence that would be imposed at a court's discretion and reserved for the vilest of criminals — could not, for obvious reasons, be held to be consistent with s. 12 of the *Charter*. The same conclusion must apply here.

(e) *Can the Royal Prerogative of Mercy Save the Impugned Provision?*

[112] Lastly, it is necessary to determine whether the impugned provision can be found to be constitutional based on the existence of the royal prerogative of mercy, since there is some debate over this question. In my view, the parole system is currently the only mechanism that offers a realistic possibility of release for individuals serving a sentence of life imprisonment under Canadian law. The royal prerogative of mercy cannot be considered a true sentence review mechanism, because it is exercised only in exceptional circumstances.

applicables pour chaque condamnation pour meurtre. Dans l'exercice de son pouvoir discrétionnaire, le tribunal prend en considération le caractère du contrevenant, la nature de l'infraction et les circonstances entourant sa perpétration. À cet égard, je souligne que l'obligation du tribunal de cumuler des périodes d'inadmissibilité par bonds de 25 ans, s'il choisit d'exercer son pouvoir discrétionnaire, se concilie mal avec le principe de la proportionnalité, ainsi que celui de l'individualisation des peines.

[111] Quoi qu'il en soit, je suis d'avis, comme il a été expliqué précédemment, que l'existence d'un pouvoir discrétionnaire ne saurait sauvegarder une disposition qui permet l'infliction d'une peine cruelle et inusitée par nature. En effet, aucun crime, aussi odieux soit-il, ne peut justifier l'infliction d'une peine intrinsèquement incompatible avec la dignité humaine, telle une peine d'emprisonnement à perpétuité sans possibilité réaliste de libération conditionnelle. Étant donné qu'une telle peine doit purement et simplement être exclue de l'arsenal des mesures punitives à la disposition de l'État, la simple possibilité qu'elle puisse être infligée constitue une violation de l'art. 12 de la *Charte*. Par analogie, une disposition qui prévoirait l'infliction d'un châtiment corporel à titre de peine pour la commission de meurtres multiples — peine qui serait infligée à la discrétion du tribunal et réservée aux criminels les plus ignobles — ne saurait, pour des raisons évidentes, être déclarée conforme à l'art. 12 de la *Charte*. La même conclusion s'impose ici.

e) *La prérogative royale de clémence peut-elle sauvegarder la disposition contestée?*

[112] En dernier lieu, il est nécessaire de trancher la question de savoir si la disposition contestée peut être jugée constitutionnelle en raison de l'existence de la prérogative royale de clémence, puisque cette question est l'objet d'un certain débat. À mon avis, le système de libération conditionnelle constitue actuellement le seul mécanisme offrant une possibilité réaliste de remise en liberté aux individus purgeant une peine d'emprisonnement à perpétuité en droit canadien. La prérogative royale de clémence ne peut être considérée comme un véritable mécanisme de révision de la peine, puisqu'elle n'est exercée que dans des circonstances exceptionnelles.

[113] The royal prerogative of mercy gives Her Majesty the Queen an absolute discretion to grant a remission of sentence to any individual sentenced by a court, regardless of the nature or seriousness of the crime committed (ss. 748 and 749 *Cr. C.*). This prerogative arises from the former absolute power of British monarchs to pardon their subjects. Historically, the royal prerogative has had two strands and two objectives: “to show compassion by relieving an individual of the full weight of his or her sentence” and “to correct miscarriages of justice such as wrongful convictions” (*Hinse v. Canada (Attorney General)*, 2015 SCC 35, [2015] 2 S.C.R. 621, at para. 28). Before the death penalty was abolished, the royal prerogative was often used to commute that sentence (C. Strange, “Mercy for Murderers? A Historical Perspective on the Royal Prerogative of Mercy” (2001), 64 *Sask. L. Rev.* 559, at p. 561).

[114] The power to exercise this prerogative has been conferred on the person holding office as Governor General of Canada by *Letters Patent (Letters Patent Constituting the Office of Governor General of Canada)* (1947), *Canada Gazette*, Part I, vol. 81, p. 3014, s. XII (reproduced in R.S.C. 1985, App. II, No. 31)). The Governor General acts only on the advice of the Minister of Public Safety and Emergency Preparedness Canada, or that of at least one other minister (Parole Board of Canada, *Royal Prerogative of Mercy Ministerial Guidelines*, October 31, 2014 (online), at p. 2). The Governor General may grant two types of pardons: a free pardon and a conditional pardon (s. 748(2) *Cr. C.*).

[115] The royal prerogative of mercy is exercised “only [in] rare cases in which consideration[s] of justice, humanity and compassion override the normal administration of justice” (*Ministerial Guidelines*, at pp. 4-5). For a pardon to be granted, there must be exceptional circumstances involving substantial injustice or undue hardship (pp. 3-5). The *Ministerial Guidelines* state that pardons are available only in “truly deserving cases” (p. 3). Although it is difficult to calculate how many applications for the exercise of the royal prerogative of mercy have been granted, it would seem that the number is very limited (as an illustration, from 2014-2015 to 2018-2019, 5 applications were granted, 3 were denied and 175 were

[113] La prérogative royale de clémence que possède Sa Majesté la Reine lui confère le pouvoir discrétionnaire absolu d’accorder une remise de peine à tout individu condamné par un tribunal, et ce, peu importe la nature ou la gravité du crime commis (art. 748 et 749 *C. cr.*). Cette prérogative découle de l’ancien pouvoir absolu qu’avaient les monarques britanniques de gracier leurs sujets. Historiquement, elle comportait deux volets et visait deux objectifs, soit « faire montre de compassion en libérant un individu du plein effet de sa peine » et « rectifier des erreurs judiciaires telles les condamnations erronées » (*Hinse c. Canada (Procureur général)*, 2015 CSC 35, [2015] 2 R.C.S. 621, par. 28). Avant l’abolition de la peine de mort, elle était fréquemment utilisée pour commuer cette peine (C. Strange, « Mercy for Murderers? A Historical Perspective on the Royal Prerogative of Mercy » (2001), 64 *Sask. L. Rev.* 559, p. 561).

[114] La personne qui occupe la charge de gouverneur général du Canada est investie du pouvoir d’exercer cette prérogative en vertu des *Lettres Patentes (Lettres patentes constituant la charge de Gouverneur général du Canada)* (1947), *Gazette du Canada*, partie I, vol. 81, p. 3109, art. XII (reproduites dans L.R.C. 1985, app. II, n° 31)). Elle agit seulement sur avis du ministre de la Sécurité publique et de la Protection civile du Canada ou d’au moins un autre ministre (Commission des libérations conditionnelles du Canada, *Directives ministérielles sur la prérogative royale de clémence*, 31 octobre 2014 (en ligne), p. 2). Elle peut octroyer deux types de pardon : un pardon absolu et un pardon conditionnel (par. 748(2) *C. cr.*).

[115] L’exercice de la prérogative royale de clémence est réservé « seulement [aux] rares situations dans lesquelles des raisons d’équité et des considérations humanitaires l’emportent sur l’administration normale de la justice » (*Directives ministérielles*, p. 5). Le pardon ne sera accordé que dans des situations exceptionnelles de grande injustice ou de châtiment trop sévère (p. 3-5). Les *Directives ministérielles* précisent qu’il ne peut être octroyé qu’aux « personnes qui le méritent vraiment » (p. 3). S’il est difficile de chiffrer le nombre de demandes d’exercice de la prérogative royale de clémence ayant été accordées, il semblerait que ce nombre soit très limité (à titre d’illustration, de 2014-2015 à 2018-2019, 5 demandes

discontinued (Parole Board of Canada, *Performance Monitoring Report 2018-2019*, at p. 170)).

[116] This Court has established that the royal prerogative of mercy is part of the array of mechanisms by which the principle of individualization in sentencing is given effect (*Luxton*, at p. 725). However, it has never found that this discretion on its own constitutes a true sentence review mechanism. On the contrary, in *Luxton*, to support its conclusion that the sentence of imprisonment for life without eligibility for parole for 25 years is constitutional, the Court simply stated that the royal prerogative, like escorted absences from custody for humanitarian purposes, demonstrates that “Parliament has been sensitive to the particular circumstances of each offender” (p. 725). In *R. v. Heywood*, [1994] 3 S.C.R. 761, which concerned the constitutionality of a provision that limited, for life, the freedom of offenders convicted of sexual offences to be in various public places, on pain of imprisonment, this Court held that the royal prerogative of mercy does not constitute an “acceptable review process” because it is used only exceptionally (p. 798). The Court has instead found this discretion to be a mechanism of last resort in the case of unjust imprisonment (*R. v. Sarson*, [1996] 2 S.C.R. 223, at para. 51; *R. v. Latimer*, 2001 SCC 1, [2001] 1 S.C.R. 3, at para. 89).

[117] The royal prerogative of mercy in Canadian law can be distinguished from the power of the Secretary of State in English law to release prisoners on compassionate grounds under s. 30 of the *Crime (Sentences) Act 1997*. In 2014, a special constitution of the Court of Appeal of England and Wales held in *McLoughlin* that the law of England provides life prisoners with a realistic possibility of release (para. 35). The court found that the term “compassionate grounds” must be interpreted broadly, in a manner compatible with art. 3 of the *European Convention on Human Rights*, and that these grounds are not restricted to the ones listed in the “Lifer Manual”

de clémence ont été octroyées, 3 ont été refusées et 175 ont été abandonnées (Commission des libérations conditionnelles du Canada, *Rapport de surveillance du rendement 2018-2019*, p. 128)).

[116] Notre Cour a établi que la prérogative royale de clémence faisait partie de l’arsenal des mécanismes permettant de respecter le principe de l’individualisation des peines (*Luxton*, p. 725). Toutefois, elle n’a jamais reconnu que ce pouvoir discrétionnaire constituait à lui-seul un mécanisme réel de révision des peines. Au contraire, dans *Luxton*, pour appuyer sa conclusion selon laquelle la peine d’emprisonnement à perpétuité sans possibilité de libération conditionnelle avant 25 ans est constitutionnelle, la Cour a simplement indiqué que la prérogative royale, tout comme les sorties sous surveillance pour raisons humanitaires, démontre que « le Parlement s’est montré conscient de la situation particulière de chaque délinquant » (p. 725). Dans *R. c. Heywood*, [1994] 3 R.C.S. 761, où il était question de la constitutionnalité d’une disposition restreignant à perpétuité la liberté des contrevenants déclarés coupables d’infractions sexuelles de se trouver dans divers espaces publics sous peine d’emprisonnement, notre Cour a jugé que la prérogative royale de clémence ne constituait pas un « processus acceptable de contrôle », puisqu’elle n’est utilisée qu’exceptionnellement (p. 798). Notre Cour a plutôt considéré que ce pouvoir discrétionnaire représente un mécanisme de dernier recours en cas d’emprisonnement injuste (*R. c. Sarson*, [1996] 2 R.C.S. 223, par. 51; *R. c. Latimer*, 2001 CSC 1, [2001] 1 R.C.S. 3, par. 89).

[117] La prérogative royale de clémence en droit canadien se distingue du pouvoir du ministre d’accorder une libération pour des motifs d’ordre humanitaire qui existe en droit anglais à l’art. 30 de la loi intitulée *Crime (Sentences) Act 1997*. En 2014, dans l’arrêt *McLoughlin*, une formation spéciale de la Cour d’appel de l’Angleterre et du Pays de Galles a conclu que le droit anglais offre une possibilité véritable de libération aux individus condamnés à des peines de prison à perpétuité (par. 35). La cour a statué que l’expression [TRADUCTION] « motifs d’ordre humanitaire » doit être interprétée largement, conformément à l’art. 3 de la *Convention européenne des droits de l’homme*,

(*McLoughlin*, at paras. 31-33; United Kingdom, Ministry of Justice, National Offender Management Service, *PSO 4700 — The Indeterminate Sentence Manual* (2010), at ch. 12). In 2017, the ECHR held in *Hutchinson* that English law is consistent with art. 3 of the *European Convention on Human Rights* because it establishes a true review mechanism that makes whole life prison sentences reducible (§§ 57, 70 and 72). The ECHR found that the Secretary of State has a duty to release a whole life prisoner where “continued detention can no longer be justified on legitimate penological grounds” (*Hutchinson*, at § 70). It would therefore seem that this discretion is broadly construed in English law. As a result, these principles are not relevant in interpreting the discretion conferred by the royal prerogative of mercy in Canadian law.

[118] In short, the royal prerogative of mercy, because of its exceptional nature, is at best a release mechanism based on compassion and on the existence of humanitarian grounds under Canadian law. Individuals suffering the normal consequences of a properly imposed sentence are in fact unlikely to obtain such a pardon. This is clear from the *Ministerial Guidelines*: “. . . an act of executive clemency will not be considered where the difficulties experienced by an individual applicant result from the normal consequences of the application of the law” (p. 4 (emphasis added); Sup. Ct. reasons, at paras. 963 and 967). The existence of the royal prerogative of mercy therefore creates no realistic possibility of parole for offenders serving a sentence of imprisonment for life for which there is no other review mechanism.

[119] Finally, in light of my conclusion concerning the infringement of s. 12 of the *Charter*, it will not be necessary to determine whether the impugned provision is also contrary to s. 7 (see *Lloyd*, at para. 38; *Nur*, at para. 110; *Boudreault*, at para. 95).

et que ces motifs ne se limitent pas à ceux énumérés dans le manuel sur les peines de durée indéterminée (*McLoughlin*, par. 31-33; Royaume-Uni, Ministry of Justice, National Offender Management Service, *PSO 4700 — The Indeterminate Sentence Manual* (2010), c. 12). En 2017, dans l’affaire *Hutchinson*, la CEDH a conclu que le droit anglais est conforme à l’art. 3 de la *Convention européenne des droits de l’homme*, puisqu’il établit un véritable mécanisme de réexamen qui rend compressibles les peines d’emprisonnement à perpétuité réelle (§§ 57, 70 et 72). La CEDH a considéré que le ministre a l’obligation de libérer un détenu condamné à une peine à perpétuité réelle lorsque « le maintien en détention ne peut plus se justifier par des motifs légitimes d’ordre pénologique » (*Hutchinson*, § 70). Il semblerait donc que le droit anglais interprète largement ce pouvoir discrétionnaire. En conséquence, ces enseignements ne sont pas pertinents aux fins d’interprétation du pouvoir discrétionnaire conféré par la prérogative royale de clémence en droit canadien.

[118] En somme, en raison de son caractère exceptionnel, la prérogative royale de clémence constitue, au mieux, un mécanisme de libération fondé sur la compassion et sur l’existence de motifs humanitaires en droit canadien. De fait, les individus qui subissent les conséquences normales d’une peine régulièrement infligée ne sont pas susceptibles d’obtenir un tel pardon. Les *Directives ministérielles* l’indiquent clairement : « . . . la prérogative royale ne peut être exercée si les difficultés du demandeur résultent des conséquences normales de l’application de la loi » (p. 4 (je souligne); motifs de la C.S., par. 963 et 967). L’existence de la prérogative royale de clémence ne crée donc aucune possibilité réaliste d’obtenir une libération conditionnelle pour les contrevenants assujettis à une peine d’emprisonnement à perpétuité qui n’est assortie d’aucun autre mécanisme de révision.

[119] Enfin, vu ma conclusion sur la violation de l’art. 12 de la *Charte*, il n’est pas nécessaire de déterminer si la disposition contestée contrevient également à l’art. 7 (voir *Lloyd*, par. 38; *Nur*, par. 110; *Boudreault*, par. 95).

F. *Is the Infringement of Section 12 of the Charter Justified Under Section 1 of the Charter?*

[120] In order to justify an infringement of a *Charter* right under s. 1, the state is required to show that the impugned law addresses a pressing and substantial objective and that the means chosen to achieve that objective are proportional to it (*R. v. Oakes*, [1986] 1 S.C.R. 103, at pp. 136-40; *Irwin Toy Ltd. v. Quebec (Attorney General)*, [1989] 1 S.C.R. 927, at p. 986). A law is proportionate when the following conditions are met: “(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” (*Nur*, at para. 111; *Oakes*, at pp. 139-40).

[121] In this case, since the appellants have made no arguments concerning the justification for the impugned provision, they have not discharged the onus resting on them. In any event, it is hard to imagine how a punishment that is cruel and unusual by nature could be justified in a free and democratic society. I note that, in *Nur*, this Court stated that it would be difficult to show that a “grossly disproportionate” punishment under s. 12 could be “proportionate as between the deleterious and salutary effects of the law under s. 1” (para. 111).

G. *Appropriate Remedy*

[122] Having found that the impugned provision is contrary to the *Charter*, I would declare s. 745.51 *Cr. C.* to be of no force or effect immediately under s. 52(1) of the *Constitution Act, 1982*. The appellants have proposed no alternative remedy in this Court.

[123] Under s. 52 of the *Constitution Act, 1982*, any law that is inconsistent with the provisions of the Constitution can be declared to be of no force or effect to the extent of the inconsistency. In *Schachter v. Canada*, [1992] 2 S.C.R. 679, the leading case on constitutional remedies, Lamer C.J. stated that, depending on the circumstances, a court may strike

F. *L’atteinte à l’art. 12 de la Charte est-elle justifiée au regard de l’article premier de la Charte?*

[120] Pour qu’une atteinte à un droit garanti par la *Charte* soit justifiée au regard de l’article premier, l’État a le fardeau de démontrer que le texte de loi contesté répond à un objectif réel et urgent et que le moyen choisi pour réaliser cet objectif est proportionné à celui-ci (*R. c. Oakes*, [1986] 1 R.C.S. 103, p. 136-140; *Irwin Toy Ltd. c. Québec (Procureur général)*, [1989] 1 R.C.S. 927, p. 986). Une loi est proportionnelle lorsque les conditions suivantes sont réunies : « (1) [...] il existe un lien rationnel entre le moyen choisi et cet objectif, (2) [...] le moyen choisi est de nature à porter le moins possible atteinte au droit en question et (3) [...] il y a proportionnalité entre les effets préjudiciables de ses dispositions et leurs effets bénéfiques » (*Nur*, par. 111; *Oakes*, p. 139-140).

[121] En l’espèce, les parties appelantes n’ayant présenté aucun argument sur la justification de la disposition attaquée, elles ne se sont pas acquittées du fardeau qui leur incombait. Quoi qu’il en soit, il est difficile de concevoir qu’une peine cruelle et inusitée par nature puisse se justifier dans le cadre d’une société libre et démocratique. Je note que, dans l’arrêt *Nur*, notre Cour a indiqué qu’il serait difficile de démontrer qu’une peine « totalement disproportionnée » au regard de l’art. 12 puisse être « proportionnelle pour ce qui est de ses effets préjudiciables et de ses effets bénéfiques aux fins de l’article premier » (par. 111).

G. *La réparation convenable*

[122] Ayant conclu que la disposition attaquée viole la *Charte*, je suis d’avis de déclarer l’art. 745.51 *C. cr.* immédiatement inopérant en application du par. 52(1) de la *Loi constitutionnelle de 1982*. Les parties appelantes n’ont par ailleurs proposé aucune solution de rechange devant notre Cour.

[123] L’article 52 de la *Loi constitutionnelle de 1982* permet de déclarer inopérante toute disposition incompatible avec la Constitution. Dans *Schachter c. Canada*, [1992] 2 R.C.S. 679, arrêt de principe en matière de réparations d’ordre constitutionnel, le juge en chef Lamer a précisé que le tribunal peut, selon les circonstances, invalider immédiatement la

down an inconsistent provision immediately, strike it down and temporarily suspend the declaration of invalidity, resort to the technique of reading in or that of reading down, or apply the doctrine of severance (see pp. 695-700). In exercising its discretion to determine an appropriate remedy, a court will consider not only the principle of constitutional supremacy in s. 52(1) but also the principles of the rule of law and the separation of powers (*R. v. Albashir*, 2021 SCC 48, [2021] 3 S.C.R. 531, at paras. 30 and 34; *R. v. Sullivan*, 2022 SCC 19, [2022] 1 S.C.R. 460, at para. 61).

[124] The trial judge found that the technique of reading in was appropriate in the circumstances. He therefore interpreted the provision as authorizing courts to impose consecutive ineligibility periods whose length is discretionary, [TRANSLATION] “notwithstanding the requirements of section 745 for any additional murder” (para. 1211 (emphasis deleted)). Because that interpretation allowed him to opt for an additional period of less than 25 years, he ordered that the respondent serve a total ineligibility period of 40 years before applying for parole.

[125] In this regard, I agree with the Court of Appeal that the trial judge erred in applying the technique of reading in as a remedy (para. 154).

[126] The technique of reading in allows a court to extend the reach of a statute so that it includes what was wrongly excluded from it (*Schachter*, at p. 698; *Ontario (Attorney General) v. G*, 2020 SCC 38, [2020] 3 S.C.R. 629, at para. 113). For example, where a statute unconstitutionally excludes a group of individuals, a court may find that the statute includes the group rather than striking it down (*Schachter*, at pp. 699-700; see also *Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143). Under the second technique, reading down, a court limits the reach of a statute by declaring it to be of no force or effect to a precisely defined extent (*G*, at para. 113). Severance, in turn, allows a court to declare something

disposition incompatible, l’invalider et suspendre temporairement l’effet de la déclaration d’invalidité ou encore appliquer les techniques d’interprétation large (« *reading in* ») ou d’interprétation atténuée (« *reading down* ») ou encore la doctrine de la dissociation (voir p. 695-700). Lorsque les tribunaux se penchent sur la réparation convenable, ils prennent non seulement en considération le principe de la suprématie de la Constitution énoncé au par. 52(1), mais également ceux de la primauté du droit et de la séparation des pouvoirs dans l’exercice de leur pouvoir discrétionnaire de réparation (*R. c. Albashir*, 2021 CSC 48, [2021] 3 R.C.S. 531, par. 30 et 34; *R. c. Sullivan*, 2022 CSC 19, [2022] 1 R.C.S. 460, par. 61).

[124] Le juge de première instance a statué que le recours à la technique de l’interprétation large était approprié dans les circonstances. Il a en conséquence interprété la disposition comme ayant pour effet d’autoriser le tribunal à cumuler des périodes d’inadmissibilité dont la durée est discrétionnaire, c’est-à-dire « nonobstant les prescriptions de l’article 745 pour tout meurtre additionnel » (par. 1211 (soulignement omis)). Cette interprétation lui permettant d’opter pour une période additionnelle inférieure à 25 ans, il a ainsi ordonné que l’intimé purge un temps d’épreuve total de 40 ans avant de demander la libération conditionnelle.

[125] À cet égard, à l’instar de la Cour d’appel, je suis d’avis que le juge de première instance a fait erreur en optant pour l’interprétation large en tant que réparation (par. 154).

[126] La technique de l’interprétation large permet au tribunal d’élargir la portée d’un texte de loi pour que celui-ci inclue ce qui en a été exclu à tort (*Schachter*, p. 698; *Ontario (Procureur général) c. G*, 2020 CSC 38, [2020] 3 R.C.S. 629, par. 113). À titre d’exemple, lorsqu’un texte de loi exclut un groupe d’individus de manière inconstitutionnelle, plutôt que d’invalider ce texte, le tribunal peut considérer que celui-ci inclut ce groupe (*Schachter*, p. 699-700; voir aussi *Andrews c. Law Society of British Columbia*, [1989] 1 R.C.S. 143). La seconde technique, soit l’interprétation atténuée, consiste pour un tribunal à limiter la portée d’un texte de loi en déclarant celui-ci inopérant dans une mesure qu’il définit avec précision (*G*, par. 113).

“improperly included in the statute which can be severed and struck down” to be of no force or effect (*Schachter*, at p. 698; *G*, at para. 113).

[127] A court may apply these techniques only “in the clearest of cases”, and to do so, it must be able to define the offending portion of the statute in a limited manner (*Schachter*, at p. 725; see also p. 697). In *R. v. Sharpe*, 2001 SCC 2, [2001] 1 S.C.R. 45, McLachlin C.J. stated that these alternatives to striking down are appropriate when a court is confronted with a “law that is substantially constitutional and peripherally problematic” (para. 111). It follows that it is frequently not appropriate to use any of these techniques (*G*, at para. 114).

[128] These interpretive techniques must be applied in a manner that respects Parliament’s role and is in keeping with the purpose of the statute in question. In *Schachter*, Lamer C.J. stated that “there are some cases in which to sever the offending portion would actually be more intrusive to the legislative purpose than the alternate course of striking down provisions which are not themselves offensive” (p. 697). This note of caution also applies to reading in (p. 725). In every case, the court must ensure that the interpretation it proposes is as faithful as possible to the scheme enacted by Parliament, within the requirements of the Constitution (p. 700). As this Court stated in *Ferguson*, when a court opts for one of these techniques, “it does so on the assumption that had Parliament been aware of the provision’s constitutional defect, it would likely have passed it with the alterations now being made by the court” (para. 51). Therefore, “[i]f it is not clear that Parliament would have passed the scheme with the modifications being considered by the court — or if it is probable that Parliament would *not* have passed the scheme with these modifications — then for the court to make these modifications would represent an inappropriate intrusion into the legislative sphere” (*Ferguson*, at para. 51 (emphasis in original); *G*, at para. 114). In such a context, striking down the unconstitutional provision is the least intrusive alternative (*Ferguson*, at paras. 51 and 65).

Pour ce qui est de la dissociation, cette technique permet au tribunal de déclarer inopérant un élément « que la loi inclut à tort et qui peut en être dissoci[é] et annul[é] » (*Schachter*, p. 698; *G*, par. 113).

[127] Le tribunal ne peut appliquer ces techniques que « dans les cas les plus clairs », et pour y recourir il doit être en mesure d’isoler la partie attentatoire du texte de loi (*Schachter*, p. 725; voir aussi p. 697). Dans l’arrêt *R. c. Sharpe*, 2001 CSC 2, [2001] 1 R.C.S. 45, la juge en chef McLachlin a indiqué que le recours à ces solutions de rechange à l’invalidation est approprié en présence d’une « disposition législative substantiellement constitutionnelle et marginalement problématique » (par. 111). Il s’ensuit que le recours à l’une ou l’autre de ces techniques n’est souvent pas approprié (*G*, par. 114).

[128] L’utilisation de ces techniques d’interprétation doit demeurer respectueuse du rôle du législateur et fidèle à l’objectif visé par le texte de loi en cause. Dans l’arrêt *Schachter*, le juge en chef Lamer a précisé que, « dans certains cas, la dissociation de la partie fautive sera plus attentatoire à l’objectif législatif que l’annulation possible des dispositions qui ne sont pas fautives » (p. 697). Cette mise en garde vaut également pour l’interprétation large (p. 725). Dans tous les cas, le tribunal doit s’assurer que l’interprétation qu’il propose est aussi fidèle que possible au texte de loi adopté par le législateur, le tout conformément aux exigences de la Constitution (p. 700). Comme l’a indiqué la Cour dans l’arrêt *Ferguson*, lorsque le tribunal choisit l’une de ces techniques, « il part du principe que, si le législateur avait su que la disposition était entachée d’un vice sur le plan constitutionnel, il l’aurait probablement édictée sous la forme modifiée que lui donne maintenant le tribunal » (par. 51). En conséquence, « [s]’il n’est pas clair que le législateur aurait édicté la disposition avec les modifications envisagées par le tribunal — ou s’il est probable qu’il *ne* l’aurait *pas* fait —, le tribunal empiéterait de façon injustifiée sur le domaine législatif en les introduisant » (*Ferguson*, par. 51 (en italique dans l’original); *G*, par. 114). Dans un tel contexte, l’invalidation de la disposition inconstitutionnelle représente la solution la moins attentatoire (*Ferguson*, par. 51 et 65).

[129] In this case, the trial judge found that because the inconsistency of s. 745.51 *Cr. C.* with the Constitution [TRANSLATION] “does not in any way affect the core of this provision” (para. 1187), reading in was an appropriate way to remedy its unconstitutionality. In his view, reading into the impugned provision would advance Parliament’s objectives, namely [TRANSLATION] “to promote proportionality, ensure that multiple murderers get their ‘just deserts’ for their crimes, reinforce the objective of denunciation and protect society” (para. 1172).

[130] I agree with the Court of Appeal that the trial judge overstepped the limits of his judicial functions. The impugned provision could not be saved through the technique of reading in. By broadening the discretion conferred on the courts, the trial judge undermined Parliament’s objective. He failed to consider the fact that the imposition of consecutive 25-year ineligibility periods is directly related to Parliament’s objective in enacting s. 745.51 *Cr. C.* In this regard, the words of the provision and the parliamentary debate are indicators that can shed light on the provision’s purpose (see *Mouvement laïque québécois v. Saguenay (City)*, 2015 SCC 16, [2015] 2 S.C.R. 3, at para. 81).

[131] First of all, the words of s. 745.51 *Cr. C.* are clear as regards the length of the ineligibility periods that a court may make consecutive: “At the time of the sentencing under section 745 . . . the judge who presided at the trial . . . may . . . by order, decide that the periods without eligibility for parole for each murder conviction are to be served consecutively”. For first degree murder, these periods must be 25 years under s. 745(a) *Cr. C.*

[132] Second, the parliamentary debate, which is very instructive in this case, clearly shows that Parliament’s intention was to authorize courts to make the ineligibility periods set out in s. 745 *Cr. C.* consecutive. For an offender convicted of more than one first degree murder, a court has no choice but to impose consecutive ineligibility periods in blocks

[129] En l’espèce, de l’avis du juge de première instance, comme l’incompatibilité constitutionnelle de l’art. 745.51 *C. cr.* « n’affecte en rien le cœur même de cette disposition » (par. 1187), le recours à l’interprétation large est approprié pour remédier à son inconstitutionnalité. Selon le premier juge, une interprétation large de la disposition contestée répond aux objectifs du législateur « [de] favoriser la proportionnalité, [de] s’assurer que les auteurs de meurtres multiples paient un “juste dû” pour leurs crimes, [de] renforcer l’objectif de dénonciation et [d’]assurer la protection de la société » (par. 1172).

[130] Tout comme la Cour d’appel, je considère que le premier juge a outrepassé les limites de ses fonctions judiciaires. La disposition contestée ne pouvait être sauvegardée par l’application de la technique de l’interprétation large. En élargissant le pouvoir discrétionnaire conféré au tribunal, le premier juge est allé à l’encontre de l’objectif du législateur. De fait, il a omis de considérer que le cumul de périodes d’inadmissibilité de 25 ans est directement lié à l’objectif poursuivi par le législateur par l’édiction de l’art. 745.51 *C. cr.* À cet égard, le texte de loi de même que les débats parlementaires constituent des indices qui nous éclairent sur l’objet de la disposition (voir *Mouvement laïque québécois c. Saguenay (Ville)*, 2015 CSC 16, [2015] 2 R.C.S. 3, par. 81).

[131] En premier lieu, le texte de l’art. 745.51 *C. cr.* est clair en ce qui concerne la durée des périodes d’inadmissibilité susceptibles d’être cumulées par le tribunal : « Au moment de prononcer la peine conformément à l’article 745, le juge qui préside le procès [. . .] peut [. . .] ordonner que les périodes d’inadmissibilité à la libération conditionnelle pour chaque condamnation pour meurtre soient purgées consécutivement ». Pour un meurtre au premier degré, ces périodes sont forcément de 25 ans en vertu de l’al. 745a) *C. cr.*

[132] En deuxième lieu, les débats parlementaires, qui sont fort instructifs en l’espèce, illustrent clairement que l’intention du législateur était de permettre au tribunal de cumuler les périodes d’inadmissibilité prescrites à l’art. 745 *C. cr.* Dans le cas du contrevenant déclaré coupable de plus d’un meurtre au premier degré, le tribunal n’a d’autre choix que de procéder

of 25 years (*House of Commons Debates*, vol. 145, No. 96, 3rd Sess., 40th Parl., November 15, 2010, at p. 5931; *House of Commons Debates*, vol. 145, No. 121, 3rd Sess., 40th Parl., February 1, 2011, at p. 7510). The interpretation urged by the trial judge was in fact specifically rejected by Parliament. An amendment to the bill had been proposed to give courts a discretion to determine the total length of the additional parole ineligibility period (*House of Commons Debates*, February 1, 2011, at p. 7515; see also House of Commons, Standing Committee on Justice and Human Rights, *Evidence*, No. 42, 3rd Sess., 40th Parl., December 9, 2010, at pp. 10-11). Despite that proposal, Parliament opted for ineligibility periods with a fixed length of 25 years each, leaving no room for tailoring by a court (Standing Senate Committee on Legal and Constitutional Affairs, *Proceedings of the Standing Senate Committee on Legal and Constitutional Affairs*, No. 22, 3rd Sess., 40th Parl., March 2, 2011, at pp. 10-11 and 23-24).

[133] Accordingly, because it is impossible to conclude that Parliament would likely have passed the impugned provision with the modifications proposed by the trial judge, reading in was inappropriate. Parliament deliberately chose to exclude the approach adopted by the trial judge. By opting for reading in as a remedy, the trial judge thus made an inappropriate intrusion on Parliament's powers. In the circumstances, this Court has no choice but to declare s. 745.51 *Cr. C.* invalid.

[134] With regard to the temporal scope of the declaration of invalidity, the declaration must have immediate effect given the seriousness of the infringement of the right of every individual not to be subjected to cruel and unusual punishment. To stop the continuing infringement of s. 12 of the *Charter*, this declaration with immediate effect must strike down the impugned provision retroactively to the date it was enacted in 2011.

au cumul des périodes d'inadmissibilité par bonds de 25 ans (*Débats de la Chambre des communes*, vol. 145, n° 96, 3^e sess., 40^e lég., 15 novembre 2010, p. 5931; *Débats de la Chambre des communes*, vol. 145, n° 121, 3^e sess., 40^e lég., 1^{er} février 2011, p. 7510). L'interprétation préconisée par le juge de première instance a d'ailleurs été expressément rejetée par le législateur. En effet, on avait proposé d'apporter au projet de loi un amendement qui aurait conféré au tribunal un pouvoir discrétionnaire dans la détermination de la durée totale de la période additionnelle d'inadmissibilité à la libération conditionnelle (*Débats de la Chambre des communes*, 1^{er} février 2011, p. 7515; voir aussi Chambre des communes, Comité permanent de la justice et des droits de la personne, *Témoignages*, n° 42, 3^e sess., 40^e lég., 9 décembre 2010, p. 10-11). En dépit de cette proposition, le législateur a opté pour l'infliction de périodes d'inadmissibilité d'une durée fixe de 25 ans chacune, sans possibilité de modulation par le tribunal (Comité sénatorial permanent des Affaires juridiques et constitutionnelles, *Délibérations du Comité sénatorial permanent des Affaires juridiques et constitutionnelles*, n° 22, 3^e sess., 40^e lég., 2 mars 2011, p. 10-11 et 23-24).

[133] En conséquence, puisqu'il est impossible de conclure que le législateur aurait probablement adopté la disposition attaquée avec les modifications proposées par le premier juge, le recours à l'interprétation large était inapproprié. Le législateur a délibérément choisi d'exclure l'approche retenue par le juge de première instance. Ainsi, en optant pour la réparation que constitue l'interprétation large, le premier juge a empiété de façon injustifiée sur les attributions du législateur. Dans les circonstances, notre Cour n'a d'autre choix que de déclarer invalide l'art. 745.51 *C. cr.*

[134] En ce qui concerne la portée temporelle de la déclaration d'invalidité, elle doit avoir un effet immédiat en raison de la gravité de la violation du droit de toute personne à la protection contre l'infliction d'une peine cruelle et inusitée. Afin de faire cesser la violation continue de l'art. 12 de la *Charte*, cette déclaration assortie d'une prise d'effet immédiate doit invalider rétroactivement la disposition contestée à compter de la date de l'adoption de celle-ci en 2011.

[135] When unconstitutional legislation is declared to be of no force or effect immediately pursuant to s. 52(1), it can no longer be enforced. Such a declaration is *generally* retroactive and renders the legislation invalid from the date it was enacted (*Albashir*, at paras. 38-39 and 43; *Canada (Attorney General) v. Hislop*, 2007 SCC 10, [2007] 1 S.C.R. 429, at paras. 82-83; *Nova Scotia (Workers' Compensation Board) v. Martin*, 2003 SCC 54, [2003] 2 S.C.R. 504, at para. 28). Retroactivity operates in favour of the parties by reaching back in time to annul the effects of legislation found to be unconstitutional (*Hislop*, at para. 82; see also *Boudreault*, at para. 103). It also benefits individuals who are still “within the judicial system” by allowing them to appeal on constitutional grounds (*Boudreault*, at para. 103; *R. v. Thomas*, [1990] 1 S.C.R. 713, at p. 716).

[136] However, the doctrine of *res judicata* tempers the application of the principle that remedies granted under s. 52(1) are retroactive (*Albashir*, at para. 61). *Res judicata* precludes “the re-opening of cases decided by the courts on the basis of invalid laws” (*Reference re Manitoba Language Rights*, [1985] 1 S.C.R. 721, at p. 757). In the context of criminal convictions, it is generally recognized that cases that are no longer in the system cannot be reopened, even if the provisions under which the accused persons were convicted are later declared unconstitutional (*R. v. Wigman*, [1987] 1 S.C.R. 246, at p. 257; *Thomas*, at p. 716; *Sarson*, at paras. 25-27). However, “a ‘continuing current violation’ of a *Charter*-protected interest could give rise to a successful application for a *Charter* remedy, even where the violation began with a valid order that is legally unassailable” (*Boudreault*, at para. 107, quoting *R. v. Gamble*, [1988] 2 S.C.R. 595, at p. 630).

[137] In *Boudreault*, this Court held that the rule of law, of which the principle of *res judicata* is one pillar, will not permit “the continued infliction of cruel and unusual punishment that cannot be justified in a free and democratic society” (paras. 105-6). This is especially so where the punishment is cruel and unusual

[135] Lorsqu’une disposition législative inconstitutionnelle est déclarée inopérante immédiatement, en application du par. 52(1), elle cesse à partir de ce moment de s’appliquer. Une telle déclaration a *généralement* une portée rétroactive qui invalide la disposition à partir de la date de son adoption (*Albashir*, par. 38-39 et 43; *Canada (Procureur général) c. Hislop*, 2007 CSC 10, [2007] 1 R.C.S. 429, par. 82-83; *Nouvelle-Écosse (Workers' Compensation Board) c. Martin*, 2003 CSC 54, [2003] 2 R.C.S. 504, par. 28). La rétroactivité bénéficie aux parties en ce qu’elle permet de remonter dans le temps pour annuler les effets de la disposition jugée inconstitutionnelle (*Hislop*, par. 82; voir aussi *Boudreault*, par. 103). Le bénéfice de la rétroaction permet de plus aux personnes dont l’affaire est toujours « en cours » de faire appel pour des motifs constitutionnels (*Boudreault*, par. 103; *R. c. Thomas*, [1990] 1 R.C.S. 713, p. 716).

[136] La doctrine de l’autorité de la chose jugée tempère toutefois l’application du principe selon lequel les réparations accordées en vertu du par. 52(1) ont un effet rétroactif (*Albashir*, par. 61). L’autorité de la chose jugée empêche de « rouvrir les dossiers sur lesquels les tribunaux ont statué en fonction de lois invalides » (*Renvoi relatif aux droits linguistiques au Manitoba*, [1985] 1 R.C.S. 721, p. 757). En matière de condamnation pénale, il est généralement établi que les dossiers qui ne sont plus en cours dans le système ne peuvent être rouverts, même si les dispositions en vertu desquelles les accusés ont été reconnus coupables ont été ultérieurement déclarées inconstitutionnelles (*R. c. Wigman*, [1987] 1 R.C.S. 246, p. 257; *Thomas*, p. 716; *Sarson*, par. 25-27). Les tribunaux peuvent toutefois accueillir « une demande de réparation fondée sur la *Charte* dans une situation où il y a “actuellement violation continue” d’un droit protégé par la *Charte*, même si l’atteinte tire ses origines d’une ordonnance valide et inattaquable au plan juridique » (*Boudreault*, par. 107, citant *R. c. Gamble*, [1988] 2 R.C.S. 595, p. 630).

[137] Dans l’arrêt *Boudreault*, notre Cour a conclu que la primauté du droit, dont l’un des piliers est le principe de l’autorité de la chose jugée, ne saurait autoriser « l’infliction continue d’une peine cruelle et inusitée qui ne peut se justifier dans une société libre et démocratique » (par. 105-106). Cette conclusion

by nature, as it is in the instant case, which concerns the imposition of consecutive 25-year ineligibility periods under s. 745.51 *Cr. C.* on offenders convicted of multiple first degree murders. Under this unconstitutional provision, offenders have been sentenced to imprisonment for life without eligibility for parole for 50 or even 75 years. Such a sentence is degrading in nature and thus incompatible with human dignity, as it eliminates any possibility of reintegration into society. Any offender who has been ordered under s. 745.51 *Cr. C.* to serve a parole ineligibility period of 50 years or more for multiple murders — whether the murders are first degree, second degree or a combination of the two — must be able to apply for a remedy. While some of these offenders are no longer in the judicial system, the infringement of their right guaranteed by s. 12 of the *Charter* is a continuing one, since they remain completely without access to parole. *Res judicata* cannot prevent them from bringing applications to stop this continuing infringement of s. 12 of the *Charter*. These individuals may therefore seek relief in the courts, including under s. 24(1) of the *Charter* (*Boudreault*, at para. 109; *Gamble*, at p. 649). Lastly, given that this Court has confined its analysis to the imposition of ineligibility periods of 50 years or more, nothing prevents offenders upon whom consecutive ineligibility periods totalling less than 50 years have been imposed under the provision being struck down from alleging a continuing infringement of their constitutional right, provided that the infringement is proved in each case.

[138] With regard to the respondent, given that s. 745.51 *Cr. C.* is being declared invalid immediately and that the declaration of invalidity is retroactive to the date this provision was enacted, the applicable law is the law that existed prior to that date. The 25-year parole ineligibility periods imposed on the respondent for each of the 6 counts of first degree murder must therefore be served concurrently. As a result, the respondent may not apply for parole until he has served a total ineligibility period of 25 years, in accordance with s. 745(a) *Cr. C.* The Board remains

est d'autant plus vraie dans le cas d'une peine cruelle et inusitée par nature comme en l'espèce. Dans la présente affaire, il est question du cumul de périodes d'inadmissibilité de 25 ans en cas de meurtres multiples au premier degré en vertu de l'art. 745.51 *C. cr.* En application de cette disposition inconstitutionnelle, des contrevenants ont été condamnés à l'emprisonnement à perpétuité sans possibilité de libération conditionnelle avant 50 ans, et même 75 ans. Une telle peine est de nature dégradante, et donc contraire à la dignité humaine, car elle anéantit toute possibilité de réinsertion sociale. Tout contrevenant qui, en vertu de l'art. 745.51 *C. cr.*, s'est vu imposer une période de temps d'épreuve de 50 ans ou plus — que ce soit pour des meurtres multiples au premier degré, au deuxième degré ou une combinaison des deux — doit pouvoir demander réparation. Si le dossier de certains d'entre eux n'est plus devant les tribunaux, la violation de leur droit garanti à l'art. 12 de la *Charte*, elle, est continue, dans la mesure où ces derniers demeurent totalement privés d'accès à la libération conditionnelle. L'autorité de la chose jugée ne peut interdire la présentation de demandes visant à faire cesser cette violation continue de l'art. 12 de la *Charte*. Ces personnes pourraient donc s'adresser aux tribunaux et demander réparation, notamment en vertu du par. 24(1) de la *Charte* (*Boudreault*, par. 109; *Gamble*, p. 649). En dernier lieu, comme notre Cour a limité son analyse à l'infliction de périodes d'inadmissibilité de 50 ans et plus, rien n'empêche les contrevenants assujettis à un cumul de moins de 50 ans en vertu de la disposition invalidée de faire valoir une violation continue de leur droit constitutionnel, à charge d'en faire la démonstration dans chaque cas.

[138] En ce qui concerne l'intimé, l'art. 745.51 *C. cr.* étant déclaré invalide immédiatement et la déclaration d'invalidité étant rétroactive à la date de l'adoption de cette disposition, le droit applicable est celui qui existait avant cette date. Les périodes d'inadmissibilité à la libération conditionnelle de 25 ans auxquelles est assujetti l'intimé pour chacun des 6 chefs de meurtre au premier degré doivent en conséquence être purgées concurremment. Ainsi, conformément à l'al. 745a) *C. cr.*, l'intimé ne pourra présenter de demande de libération conditionnelle

the ultimate arbiter of whether the respondent can be released on parole at the end of the ineligibility period.

V. Conclusion

[139] In summary, by stipulating that a court may impose consecutive 25-year parole ineligibility periods, the impugned provision authorizes the infliction of a degrading punishment that is incompatible with human dignity. Under this provision, a court has the power to sentence an offender to imprisonment for life without a realistic possibility of parole for 50, 75 or even 150 years. In other words, in the context of multiple first degree murders, all offenders to whom this provision applies are doomed to spend the rest of their lives behind bars, and the sentences of some offenders may even exceed human life expectancy.

[140] Not only do such punishments bring the administration of justice into disrepute, but they are cruel and unusual by nature and thus contrary to s. 12 of the *Charter*. They are intrinsically incompatible with human dignity because of their degrading nature, as they deny offenders any moral autonomy by depriving them, in advance and definitively, of any possibility of reintegration into society. Sentences of imprisonment for life without a realistic possibility of parole may also have devastating effects on offenders, who are left with no incentive to rehabilitate themselves and whose incarceration will end only upon their death.

[141] Parliament may not prescribe a sentence that negates the objective of rehabilitation in advance, and irreversibly, for all offenders. This penological objective is intimately linked to human dignity in that it reflects the conviction that every individual has the capacity to reform and re-enter society. For the objective of rehabilitation to be meaningful, every inmate must have a realistic possibility of applying for parole, at the very least earlier than the expiration of the minimum ineligibility period of 50 years stipulated in the impugned provision for cases involving first degree murders. What is at stake is our

avant d’avoir purgé un temps d’épreuve total de 25 ans. La Commission demeure l’arbitre qui décidera ultimement si l’intimé pourra obtenir une libération conditionnelle à la fin de la période d’inadmissibilité.

V. Conclusion

[139] En somme, en prescrivant le cumul de périodes d’inadmissibilité de 25 ans, la disposition attaquée autorise l’infliction d’une peine de nature dégradante, incompatible avec la dignité humaine. En vertu de cette disposition, un tribunal est habilité à condamner un contrevenant à l’emprisonnement à perpétuité sans possibilité réaliste de libération conditionnelle avant 50, 75, voire 150 ans. En d’autres termes, dans le contexte de meurtres multiples au premier degré, tout contrevenant visé par cette disposition est destiné à passer le reste de ses jours derrière les barreaux, la peine de certains pouvant même excéder l’espérance de vie humaine.

[140] Non seulement de telles peines déconsidèrent l’administration de la justice, mais elles sont cruelles et inusitées par nature et violent de ce fait l’art. 12 de la *Charte*. Ces peines sont intrinsèquement incompatibles avec la dignité humaine en raison de leur caractère dégradant, car elles nient l’autonomie morale des contrevenants en leur retirant, de manière anticipée et définitive, toute possibilité de réinsertion sociale. Les peines d’emprisonnement à perpétuité sans possibilité réaliste de libération conditionnelle sont de surcroît susceptibles de causer des effets dévastateurs chez les contrevenants, qui se voient ainsi privés de tout incitatif à se réhabiliter et pour qui seule la mort mettra un terme à leur incarcération.

[141] Le législateur ne peut prescrire une peine qui réduit à néant l’objectif de réhabilitation de manière anticipée et irréversible pour l’ensemble des contrevenants. Cet objectif pénologique est intimement lié à la dignité humaine, en ce qu’il exprime la conviction que chaque personne porte en elle la capacité de se réformer et de réintégrer la société. Pour que l’objectif de réinsertion sociale ne reste pas lettre morte, tout détenu doit bénéficier d’une possibilité réaliste de demander une libération conditionnelle, à tout le moins avant l’expiration de la période de temps d’épreuve minimale de 50 ans prescrite par la

commitment, as a society, to respect human dignity and the inherent worth of every individual, however appalling the individual's crimes may be.

[142] Let me be very clear. The conclusion that imposing consecutive 25-year parole ineligibility periods is unconstitutional must not be seen as devaluing the life of each innocent victim. Everyone would agree that multiple murders are inherently despicable acts and are the most serious of crimes, with consequences that last forever. This appeal is not about the value of each human life, but rather about the limits on the state's power to punish offenders, which, in a society founded on the rule of law, must be exercised in a manner consistent with the Constitution.

[143] In the circumstances, this Court has no choice but to declare s. 745.51 *Cr. C.* invalid immediately. This declaration strikes down the provision retroactively to its enactment in 2011. The applicable law is therefore the law that existed prior to that date. This means that the respondent must receive a sentence of imprisonment for life without eligibility for parole for a total period of 25 years.

[144] The respondent committed horrendous crimes that damaged the very fabric of our society. Fueled by hatred, he took the lives of six innocent victims and caused serious, even permanent, physical and psychological injuries to the survivors of the killings. He left not only families devastated but a whole community — the Muslim community in Québec and throughout Canada — in a state of anguish and pain, with many of its members still fearful for their safety today. And he left Canadians at large feeling deeply saddened and outraged in the wake of his heinous crimes that undermined the very foundations on which our society rests.

disposition contestée en cas de meurtres au premier degré. Ce qui est en jeu, c'est notre engagement, comme société, envers le respect de la dignité humaine et de la valeur inhérente à chaque personne, aussi abominables que soient les crimes qu'elle a commis.

[142] Qu'on me comprenne bien. Cette conclusion d'inconstitutionnalité du cumul de périodes d'inadmissibilité à la libération conditionnelle de 25 ans ne doit pas être perçue comme une dévalorisation de la vie de chacune des victimes innocentes. Tous conviennent que les meurtres multiples sont des actes intrinsèquement ignobles et représentent les crimes les plus graves qui soient, dont les séquelles sont permanentes. Le présent pourvoi ne porte pas sur la valeur de chaque vie humaine, mais bien sur les limites du pouvoir de l'État de punir des contrevenants, un pouvoir qui, dans une société fondée sur la primauté du droit, doit être exercé de manière conforme à la Constitution.

[143] Dans les circonstances, notre Cour n'a d'autre choix que de déclarer invalide immédiatement l'art. 745.51 *C. cr.* Cette déclaration a pour effet d'invalidier rétroactivement cette disposition à compter de son adoption en 2011. Le droit applicable est donc celui qui existait antérieurement à cette date. En conséquence, l'intimé doit se voir infliger une peine d'emprisonnement à perpétuité, sans possibilité de libération conditionnelle pour une période totale de 25 ans.

[144] L'intimé a commis des crimes horribles, qui ont endommagé notre tissu social. Motivé par la haine, il a enlevé la vie à six victimes innocentes et causé des séquelles physiques et psychologiques graves, voire permanentes, aux survivants de la tuerie. Il a non seulement laissé des familles dévastées, mais il a également suscité un état de douleur et d'angoisse au sein de toute une communauté, la communauté musulmane de Québec et de l'ensemble du Canada, dont plusieurs membres continuent de craindre pour leur sécurité. Il a en outre fait naître un profond sentiment de tristesse et d'indignation chez tous les Canadiens et les Canadiennes par suite de ses crimes haineux, qui ont ébranlé les fondements mêmes sur lesquels repose notre société.

[145] Sadly, this case is but one example of the crimes committed by multiple murderers that shock our collective conscience. Other examples include murders committed by sexual predators who place no value on the lives of their victims and who leave entire communities in a state of fear and terror until they are apprehended. So, too, is the case of terrorists who seek to destroy Canada's political order without regard to the devastation and loss of life that may result from their crimes.

[146] The horror of the crimes, however, does not negate the basic proposition that all human beings carry within them a capacity for rehabilitation and that, accordingly, punishments which fail to account for this human quality will offend the principles that underlie s. 12 of the *Charter*.

[147] All multiple murderers receive a minimum sentence of life in prison. In the current state of the law, they are eligible for parole after 25 years in the case of first degree murders. Eligibility for parole is not a right to parole. Experience has shown that the Board generally proceeds with care and caution before making a decision as important as releasing multiple murderers back into society. The protection of the public is the paramount consideration in the Board's decision-making process, but the Board also takes into account other factors such as the gravity of the offence and its impact on victims. It, perhaps, provides a measure of solace to know that compelling evidence of rehabilitation will be demanded before the perpetrators of such crimes will be released on parole.

[148] For all these reasons, the appeal is dismissed.

Appeal dismissed.

*Solicitor for the appellant Her Majesty The Queen:
Director of Criminal and Penal Prosecutions, Québec.*

[145] Malheureusement, la présente affaire n'est qu'un exemple parmi d'autres des crimes qui sont commis par des meurtriers multiples et qui choquent notre conscience collective. Mentionnons également les meurtres que commettent des prédateurs sexuels qui n'accordent aucune valeur à la vie de leurs victimes et qui, tant qu'ils n'ont pas été appréhendés, laissent des communautés entières dans un état de peur et de terreur. Pensons aussi aux terroristes qui cherchent à détruire l'ordre politique du Canada, sans se soucier des dévastations et des pertes de vie que pourraient entraîner leurs crimes.

[146] Cependant, l'horreur des crimes ne nie pas la proposition fondamentale que tous les êtres humains portent en eux la capacité de se réhabiliter et qu'en conséquence, les peines qui ne tiennent pas compte de cette qualité humaine vont à l'encontre des principes qui sous-tendent l'art. 12 de la *Charte*.

[147] Tous les meurtriers multiples reçoivent une peine minimale d'emprisonnement à vie. Dans l'état actuel du droit, ces derniers sont admissibles à la libération conditionnelle après 25 ans en cas de meurtres au premier degré. L'admissibilité à la libération conditionnelle n'est pas un droit à la libération conditionnelle. L'expérience montre que la Commission procède généralement avec soin et prudence avant de prendre une décision aussi importante que celle de remettre en liberté des meurtriers multiples. La protection du public est le critère prépondérant dans le processus décisionnel de la Commission, mais celle-ci tient également compte d'autres facteurs tels que la gravité de l'infraction et son impact sur les victimes. Il peut être réconfortant, dans une certaine mesure, de savoir que des preuves convaincantes de réhabilitation sont exigées avant que les auteurs de tels crimes ne soient remis en liberté sous condition.

[148] Pour tous ces motifs, l'appel est rejeté.

Pourvoi rejeté.

*Procureur de l'appelante Sa Majesté la Reine :
Directeur des poursuites criminelles et pénales,
Québec.*

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

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

Solicitor for the respondent: Centre communautaire juridique de Québec, Québec.

Procureur de l'intimé : Centre communautaire juridique de Québec, Québec.

Solicitor for the intervener the Attorney General of Canada: Attorney General of Canada, Montréal.

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

Solicitor for the intervener the Attorney General of Ontario: Attorney General of Ontario, Toronto.

Procureur de l'intervenant le procureur général de l'Ontario : Procureur général de l'Ontario, Toronto.

Solicitor for the intervener the Attorney General of Nova Scotia: Attorney General of Nova Scotia, Halifax.

Procureur de l'intervenant le procureur général de la Nouvelle-Écosse : Procureur général de la Nouvelle-Écosse, Halifax.

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

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

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

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

Solicitors for the intervener Association des avocats de la défense de Montréal-Laval-Longueuil: Juristes Power, Montréal.

Procureurs de l'intervenante l'Association des avocats de la défense de Montréal-Laval-Longueuil : Juristes Power, Montréal.

Solicitors for the intervener the Queen's Prison Law Clinic: Embry Dann, Toronto.

Procureurs de l'intervenante Queen's Prison Law Clinic : Embry Dann, Toronto.

Solicitors for the interveners the Toronto Police Association, the Canadian Police Association, Karen Fraser, Jennifer Sweet, Nicole Sweet, Kim Sweet, John Sweet, J. Robert Sweet, Charles Sweet, Patricia Corcoran, Ann Parker, Ted Baylis, Sharon Baylis, Cory Baylis, Michael Leone, Doug French, Donna French and Deborah Mahaffy: Danson Recht, Toronto.

Procureurs des intervenants Toronto Police Association, l'Association canadienne des policiers, Karen Fraser, Jennifer Sweet, Nicole Sweet, Kim Sweet, John Sweet, J. Robert Sweet, Charles Sweet, Patricia Corcoran, Ann Parker, Ted Baylis, Sharon Baylis, Cory Baylis, Michael Leone, Doug French, Donna French et Deborah Mahaffy : Danson Recht, Toronto.

Solicitor for the intervener the Observatory on National Security Measures: Université de Montréal — Faculté de droit, Montréal.

Procureur de l'intervenant l'Observatoire des mesures visant la sécurité nationale : Université de Montréal — Faculté de droit, Montréal.

Solicitors for the intervener the Independent Criminal Defence Advocacy Society: Melville Law Chambers, Vancouver.

Procureurs de l'intervenante Independent Criminal Defence Advocacy Society : Melville Law Chambers, Vancouver.

Solicitors for the intervener the Canadian Prison Law Association: Borys Law, Kingston.

Procureurs de l'intervenante Canadian Prison Law Association : Borys Law, Kingston.

Solicitor for the intervener the National Council of Canadian Muslims: National Council of Canadian Muslims, Ottawa.

Procureur de l'intervenant le Conseil national des musulmans canadiens : Conseil national des musulmans canadiens, Ottawa.

Solicitors for the intervener the Canadian Civil Liberties Association: Ruby Shiller Enenajor DiGiuseppe, Toronto.

Procureurs de l'intervenante l'Association canadienne des libertés civiles : Ruby Shiller Enenajor DiGiuseppe, Toronto.

Solicitors for the intervener the British Columbia Civil Liberties Association: Henein Hutchison, Toronto.

Procureurs de l'intervenante British Columbia Civil Liberties Association : Henein Hutchison, Toronto.

Solicitor for the intervener the Canadian Association of Chiefs of Police: Calgary Police Service — Legal Services Division, Calgary; York Regional Police, Aurora, Ont.

Procureurs de l'intervenante l'Association canadienne des chefs de police : Calgary Police Service — Legal Services Division, Calgary; York Regional Police, Aurora (Ont.).

Mandeep Singh Chehil *Appellant*

v.

Her Majesty The Queen *Respondent*

and

Attorney General of Ontario, Canadian Civil Liberties Association, Samuelson-Glushko Canadian Internet Policy and Public Interest Clinic and British Columbia Civil Liberties Association *Interveners*

INDEXED AS: **R. v. CHEHIL**

2013 SCC 49

File No.: 34524.

2013: January 22; 2013: September 27.

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

ON APPEAL FROM THE COURT OF APPEAL FOR NOVA SCOTIA

Constitutional law — Charter of Rights — Search and seizure — Sniffer dogs — Airplane luggage — Police suspecting accused, airline passenger, of transporting drugs — Police verifying accused's checked bag using drug detection dog — Whether police had reasonable grounds to suspect accused was involved in drug-related offence — Whether drug detection dog was sufficiently reliable for sniff search to be reasonable — Canadian Charter of Rights and Freedoms, s. 8.

Police analyzed the passenger manifest for an overnight flight from Vancouver to Halifax. They suspected that the accused was trafficking drugs on the basis of a number of indicators: the accused's travel was on a one-way ticket, he was one of the last passengers to purchase a ticket, he was travelling alone, he paid for his ticket in cash and checked one bag. The police verified the accused's checked bag for the presence of drugs using a drug detection dog. As the dog gave a positive indication for the scent of drugs, the accused was arrested for possession of a narcotic. On searching the bag, police found

Mandeep Singh Chehil *Appelant*

c.

Sa Majesté la Reine *Intimée*

et

Procureur général de l'Ontario, Association canadienne des libertés civiles, Clinique d'intérêt public et de politique d'internet du Canada Samuelson-Glushko et Association des libertés civiles de la Colombie-Britannique *Intervenants*

RÉPERTORIÉ : **R. c. CHEHIL**

2013 CSC 49

N° du greffe : 34524.

2013 : 22 janvier; 2013 : 27 septembre.

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

EN APPEL DE LA COUR D'APPEL DE LA NOUVELLE-ÉCOSSE

Droit constitutionnel — Charte des droits — Fouilles, perquisitions et saisies — Chiens renifleurs — Bagage à bord d'un avion — Accusé, passager de l'avion, soupçonné par la police de transporter de la drogue — Bagage enregistré de l'accusé soumis par la police à un contrôle par un chien détecteur de drogue — La police avait-elle des motifs raisonnables de soupçonner l'accusé d'une infraction liée à la drogue? — Le chien détecteur était-il suffisamment fiable pour que la fouille effectuée au moyen de l'animal soit jugée non abusive? — Charte canadienne des droits et libertés, art. 8.

La police a analysé le manifeste des passagers d'un vol de nuit entre Vancouver et Halifax. Les agents soupçonnaient l'accusé de trafiquer de la drogue en raison de certains indices : l'accusé avait acheté un billet aller simple, il avait été l'un des derniers passagers à acheter son billet; il voyageait seul, il avait payé comptant pour sa place et avait enregistré un seul bagage. Les agents ont soumis le bagage enregistré de l'accusé à un contrôle par un chien détecteur de drogue. L'animal ayant indiqué qu'il avait détecté une odeur de drogue, l'accusé a été arrêté pour possession d'un stupéfiant. La fouille de

three kilograms of cocaine. The trial judge held that the police did not have reasonable suspicion when they deployed the sniffer dog and further, the dog's performance in the field was not sufficiently reliable for the search to be reasonable. The trial judge excluded the evidence under s. 24(2) of the *Canadian Charter of Rights and Freedoms*. The Court of Appeal allowed the appeal, holding that the search was reasonable and the accused's arrest was justified. It ordered a new trial.

Held: The appeal should be dismissed.

The deployment of a dog trained to detect illegal drugs using its sense of smell is a search that may be carried out without prior judicial authorization where the police have a reasonable suspicion based on objective, ascertainable facts that evidence of an offence will be discovered. The reasonable suspicion threshold respects the balance struck under s. 8 of the *Charter* by permitting law enforcement to employ legitimate but limited investigative techniques. This balance is maintained by subsequent judicial oversight that prevents indiscriminate and discriminatory breaches of privacy interests by ensuring that the police have an objective and reasonable basis for interfering with an individual's reasonable expectation of privacy. The fact that reasonable suspicion deals with possibilities, rather than probabilities, necessarily means that in some cases the police will reasonably suspect that innocent people are involved in crime. In spite of this reality, properly conducted sniff searches that are based on reasonable suspicion are *Charter* compliant in light of their minimally intrusive, narrowly targeted and highly accurate nature.

Reasonable suspicion must be assessed against the totality of the circumstances. This inquiry must be fact-based, flexible and grounded in common sense and practical, everyday experience. A constellation of factors will not be sufficient to ground reasonable suspicion where it amounts merely to a "generalized" suspicion that would capture too many innocent people. Exculpatory, neutral or equivocal information cannot be disregarded when assessing a constellation of factors. However, the obligation of the police to take all factors into account does not impose a duty to undertake further investigation to seek out exculpatory factors or rule out possible innocent explanations. While the police must point to particularized conduct or particularized evidence of criminal

la valise a révélé trois kilogrammes de cocaïne. Le juge du procès a statué que les agents n'avaient pas de soupçons raisonnables au moment d'utiliser le chien renifleur et, en outre, que le rendement de l'animal sur le terrain n'était pas suffisamment fiable pour que la fouille ne soit pas jugée abusive. Le juge du procès a écarté la preuve en application du par. 24(2) de la *Charte canadienne des droits et libertés*. La Cour d'appel a accueilli l'appel, concluant que la fouille n'était pas abusive et que l'arrestation de l'accusé était justifiée. Elle a ordonné la tenue d'un nouveau procès.

Arrêt : Le pourvoi est rejeté.

L'utilisation d'un chien spécialement dressé pour la détection olfactive de certaines substances illicites constitue une fouille qui ne nécessite aucune autorisation judiciaire préalable dans le cas où les policiers ont des soupçons raisonnables, fondés sur des faits objectivement discernables, que des éléments de preuve établissant la perpétration d'une infraction seront découverts. Le seuil des soupçons raisonnables respecte l'équilibre établi pour l'application de l'art. 8 de la *Charte*, car il autorise le recours par les forces de l'ordre à des techniques d'enquête légitimes mais circonscrites. Le contrôle judiciaire ultérieur permet d'assurer cet équilibre et d'empêcher les atteintes aveugles et discriminatoires au droit à la vie privée, les tribunaux vérifiant que l'atteinte policière à l'attente raisonnable en matière de vie privée repose bel et bien sur un fondement objectif et raisonnable. Les soupçons raisonnables étant une affaire de possibilité, plutôt que de probabilité, il s'ensuit nécessairement que les policiers soupçonneront raisonnablement, dans certains cas, des personnes innocentes d'être des criminels. Malgré cette réalité, la fouille bien effectuée à l'aide d'un chien renifleur et fondée sur des soupçons raisonnables est conforme à la *Charte*, vu son caractère peu envahissant, étroitement ciblé et hautement fiable.

Les soupçons raisonnables doivent être évalués à la lumière de toutes les circonstances. L'appréciation doit s'appuyer sur des faits, être souple et relever du bon sens et de l'expérience pratique quotidienne. Un ensemble de facteurs ne suffira pas à justifier des soupçons raisonnables lorsqu'ils équivalent simplement à des soupçons « généraux » susceptibles de viser trop de personnes innocentes. On ne peut faire abstraction des renseignements disculpatoires, neutres ou équivoques dans l'évaluation d'un ensemble de facteurs. Toutefois, l'obligation imposée à la police de prendre en compte tous les facteurs ne la contraint pas à pousser l'enquête pour trouver des facteurs disculpatoires ou écarter des explications possiblement innocentes. Bien que la police doive fonder les

activity in order to ground reasonable suspicion, such evidence need not itself consist of unlawful behaviour or evidence of a specific known criminal act.

Characteristics identified by a police profile can be considered when evaluating reasonable suspicion; however, profile characteristics are not a substitute for objective facts that raise a reasonable suspicion of criminal activity. The analysis must remain focused on one central question: Is the totality of the circumstances, including the specific characteristics of the suspect, the contextual factors, and the offence suspected, sufficient to reach the threshold of reasonable suspicion?

The onus is on the Crown to show that objective and ascertainable facts rise to the level of reasonable suspicion, such that a reasonable person, standing in the shoes of the police officer, would have held a reasonable suspicion of criminal activity. An officer's training and experience may provide an objective experiential, as opposed to empirical, basis for grounding reasonable suspicion. However, this is not to say that hunches or intuition grounded in an officer's experience will suffice, or that deference is owed to a police officer's view of the circumstances based on her training or experience in the field. A police officer's educated guess must not supplant the rigorous and independent scrutiny demanded by the reasonable suspicion standard.

The reliability of a particular dog is relevant to determining whether a particular sniff search was conducted reasonably. In the absence of legislated standards, trial judges must scrutinize the evidence before them in making this assessment. Both the results of testing in a controlled setting and the results of deployment in the field are helpful in assessing the reliability of a positive indication as a sign of the actual presence of drugs.

The accused in this case had a reasonable expectation of privacy in his checked luggage with regard to general police investigations. However, the sniff search was reasonable. The trial judge erred in principle in the manner of applying the reasonable suspicion standard by assessing the factors individually. Viewed in their entirety, the factors in this case justified a reasonable suspicion of illegal drug activity such that the sniff search was consistent with the *Charter*. Given the strength of the constellation of factors that led to the decision to deploy the dog, the reliability of the dog, and the absence of exculpatory explanations, the positive indication raised

soupons raisonnables sur un comportement précis ou un indice précis d'activité criminelle, l'indice ne doit pas constituer lui-même un comportement illégal ou révéler un acte criminel identifié.

Dans l'évaluation des soupçons raisonnables, les caractéristiques définies dans un profil policier peuvent être prises en considération; toutefois, elles ne sauraient se substituer à des faits objectifs donnant naissance à des soupçons raisonnables quant à la perpétration d'une activité criminelle. L'analyse doit plutôt demeurer axée sur la question fondamentale, à savoir l'ensemble des circonstances — y compris les caractéristiques propres au suspect, les facteurs contextuels et l'infraction soupçonnée — suffit-il pour que le seuil des soupçons raisonnables soit atteint?

Le ministère public a le fardeau de prouver que les faits objectivement discernables font naître des soupçons raisonnables, de sorte qu'une personne raisonnable à la place du policier aurait soupçonné raisonnablement la tenue d'une activité criminelle. La formation et l'expérience du policier peuvent fournir un fondement expérientiel, plutôt qu'empirique, aux soupçons raisonnables. Toutefois, il ne s'ensuit pas que l'intuition fondée sur l'expérience du policier suffira ou que le point de vue de ce dernier sur les circonstances commandera la déférence. Une supposition éclairée ne saurait supplanter l'examen rigoureux et indépendant qu'exige la norme des soupçons raisonnables.

La fiabilité du chien en question joue également pour déterminer si la fouille effectuée à l'aide de l'animal a été menée de manière abusive ou non. En l'absence de normes légales, le juge de première instance doit examiner attentivement la preuve dont il dispose pour procéder à cette appréciation. Tant les résultats d'essais dans un environnement contrôlé que ceux de l'utilisation sur le terrain sont utiles pour déterminer si une indication constitue un signe fiable de la présence réelle de drogue.

En l'espèce, l'accusé avait une attente raisonnable au respect de sa vie privée à l'égard de son bagage enregistré, dans le contexte d'une enquête policière générale. Toutefois, la fouille effectuée à l'aide du chien renifleur n'était pas abusive. Le juge du procès a commis une erreur de principe dans la manière d'appliquer la norme des soupçons raisonnables en appréciant les facteurs individuellement. Considérés dans leur ensemble, les facteurs en l'espèce justifiaient des soupçons raisonnables quant à une activité illicite liée à la drogue de sorte que la fouille effectuée à l'aide du chien renifleur était conforme à la *Charte*. Vu la force de l'ensemble de

the reasonable suspicion generated by the constellation to the level of reasonable and probable grounds to arrest the accused.

Cases Cited

Referred to: *R. v. Kang-Brown*, 2008 SCC 18, [2008] 1 S.C.R. 456; *R. v. A.M.*, 2008 SCC 19, [2008] 1 S.C.R. 569; *R. v. Simpson* (1993), 12 O.R. (3d) 182; *R. v. MacKenzie*, 2013 SCC 50, [2013] 3 S.C.R. 250; *R. v. Collins*, [1987] 1 S.C.R. 265; *Hunter v. Southam Inc.*, [1984] 2 S.C.R. 145; *R. v. Simmons*, [1988] 2 S.C.R. 495; *R. v. Monney*, [1999] 1 S.C.R. 652; *R. v. Mann*, 2004 SCC 52, [2004] 3 S.C.R. 59; *R. v. M. (M.R.)*, [1998] 3 S.C.R. 393; *R. v. Caslake*, [1998] 1 S.C.R. 51; *R. v. Bramley*, 2009 SKCA 49, 324 Sask. R. 286; *United States v. Gooding*, 695 F.2d 78 (1982); *Reid v. Georgia*, 448 U.S. 438 (1980); *Terry v. Ohio*, 392 U.S. 1 (1968); *R. v. Golub* (1997), 34 O.R. (3d) 743; *United States v. Sokolow*, 490 U.S. 1 (1989); *R. v. Payette*, 2010 BCCA 392, 291 B.C.A.C. 289; *Florida v. Harris*, 133 S.Ct. 1050 (2013); *R. v. Borden*, [1994] 3 S.C.R. 145; *R. v. Storrey*, [1990] 1 S.C.R. 241; *R. v. Lozano*, 2013 ONSC 1871, [2013] O.J. No. 1432 (QL); *R. v. Nguyen*, 2013 SKQB 36 (CanLII); *Alberta v. Jarvis*, 2012 ABQB 602, 270 C.R.R. (2d) 154; *R. v. Gowing*, 2012 ABPC 38, 532 A.R. 312; *R. v. Earle*, 2012 NSPC 27, 315 N.S.R. (2d) 123; *R. v. Krafczyk*, 2011 ABQB 107, 511 A.R. 211; *R. v. Imani*, [2012] N.B.J. No. 120 (QL); *R. v. Ryan*, 2011 NSSC 102, 300 N.S.R. (2d) 97; *R. v. Hoy*, 2010 ABQB 575, 534 A.R. 58; *R. v. Hoang*, 2010 BCPC 24, 206 C.R.R. (2d) 127; *R. v. Frieburg*, 2013 MBCA 40 (CanLII); *R. v. Tse*, 2012 SCC 16, [2012] 1 S.C.R. 531; *R. v. Patrick*, 2009 SCC 17, [2009] 1 S.C.R. 579; *R. v. Shepherd*, 2009 SCC 35, [2009] 2 S.C.R. 527; *R. v. Wong*, 2005 BCPC 24, 127 C.R.R. (2d) 342; *R. v. Calderon* (2004), 188 C.C.C. (3d) 481.

Statutes and Regulations Cited

Canadian Charter of Rights and Freedoms, ss. 8, 9, 24(2).
Corrections and Conditional Release Act, S.C. 1992, c. 20, s. 49.
Criminal Code, R.S.C. 1985, c. C-46, ss. 254(2), 492.2.
Customs Act, R.S.C. 1985, c. 1 (2nd Supp.), s. 98.
Proceeds of Crime (Money Laundering) and Terrorist Financing Act, S.C. 2000, c. 17, ss. 15(1), 17(1).

Authors Cited

Sankoff, Peter, and Stéphane Perrault. "Suspicious Searches: What's so Reasonable About Them?" (1999), 24 C.R. (5th) 123.

facteurs ayant mené à la décision d'utiliser le chien, la fiabilité de l'animal et l'absence d'explications disculpatoires, l'indication a eu pour effet de transformer les soupçons raisonnables découlant de l'ensemble en motifs raisonnables et probables d'arrestation.

Jurisprudence

Arrêts mentionnés : *R. c. Kang-Brown*, 2008 CSC 18, [2008] 1 R.C.S. 456; *R. c. A.M.*, 2008 CSC 19, [2008] 1 R.C.S. 569; *R. c. Simpson* (1993), 12 O.R. (3d) 182; *R. c. MacKenzie*, 2013 CSC 50, [2013] 3 R.C.S. 250; *R. c. Collins*, [1987] 1 R.C.S. 265; *Hunter c. Southam Inc.*, [1984] 2 R.C.S. 145; *R. c. Simmons*, [1988] 2 R.C.S. 495; *R. c. Monney*, [1999] 1 R.C.S. 652; *R. c. Mann*, 2004 CSC 52, [2004] 3 R.C.S. 59; *R. c. M. (M.R.)*, [1998] 3 R.C.S. 393; *R. c. Caslake*, [1998] 1 R.C.S. 51; *R. c. Bramley*, 2009 SKCA 49, 324 Sask. R. 286; *United States c. Gooding*, 695 F.2d 78 (1982); *Reid c. Georgia*, 448 U.S. 438 (1980); *Terry c. Ohio*, 392 U.S. 1 (1968); *R. c. Golub* (1997), 34 O.R. (3d) 743; *United States c. Sokolow*, 490 U.S. 1 (1989); *R. c. Payette*, 2010 BCCA 392, 291 B.C.A.C. 289; *Florida c. Harris*, 133 S.Ct. 1050 (2013); *R. c. Borden*, [1994] 3 R.C.S. 145; *R. c. Storrey*, [1990] 1 R.C.S. 241; *R. c. Lozano*, 2013 ONSC 1871, [2013] O.J. No. 1432 (QL); *R. c. Nguyen*, 2013 SKQB 36 (CanLII); *Alberta c. Jarvis*, 2012 ABQB 602, 270 C.R.R. (2d) 154; *R. c. Gowing*, 2012 ABPC 38, 532 A.R. 312; *R. c. Earle*, 2012 NSPC 27, 315 N.S.R. (2d) 123; *R. c. Krafczyk*, 2011 ABQB 107, 511 A.R. 211; *R. c. Imani*, [2012] N.B.J. No. 120 (QL); *R. c. Ryan*, 2011 NSSC 102, 300 N.S.R. (2d) 97; *R. c. Hoy*, 2010 ABQB 575, 534 A.R. 58; *R. c. Hoang*, 2010 BCPC 24, 206 C.R.R. (2d) 127; *R. c. Frieburg*, 2013 MBCA 40 (CanLII); *R. c. Tse*, 2012 CSC 16, [2012] 1 R.C.S. 531; *R. c. Patrick*, 2009 CSC 17, [2009] 1 R.C.S. 579; *R. c. Shepherd*, 2009 CSC 35, [2009] 2 R.C.S. 527; *R. c. Wong*, 2005 BCPC 24, 127 C.R.R. (2d) 342; *R. c. Calderon* (2004), 188 C.C.C. (3d) 481.

Lois et règlements cités

Charte canadienne des droits et libertés, art. 8, 9, 24(2).
Code criminel, L.R.C. 1985, ch. C-46, art. 254(2), 492.2.
Loi sur le recyclage des produits de la criminalité et le financement des activités terroristes, L.C. 2000, ch. 17, art. 15(1), 17(1).
Loi sur le système correctionnel et la mise en liberté sous condition, L.C. 1992, ch. 20, art. 49.
Loi sur les douanes, L.R.C. 1985, ch. 1 (2^e suppl.), art. 98.

Doctrine et autres documents cités

Sankoff, Peter, and Stéphane Perrault. « Suspicious Searches : What's so Reasonable About Them? » (1999), 24 C.R. (5th) 123.

Shapiro, Jonathan. “Confusion and Dangers in Lowering the *Hunter* Standards” (2008), 55 C.R. (6th) 396.

Tanovich, David M. “A Powerful Blow Against Police Use of Drug Courier Profiles” (2008), 55 C.R. (6th) 379.

APPEAL from a judgment of the Nova Scotia Court of Appeal (MacDonald C.J.N.S. and Saunders and Farrar JJ.A.), 2011 NSCA 82, 308 N.S.R. (2d) 122, 278 C.C.C. (3d) 445, 243 C.R.R. (2d) 109, 88 C.R. (6th) 300, 976 A.P.R. 122, [2011] N.S.J. No. 499 (QL), 2011 CarswellNS 646, setting aside a decision of Cacchione J., 2010 NSSC 255, 300 N.S.R. (2d) 28, 268 C.C.C. (3d) 249, 950 A.P.R. 28, [2010] N.S.J. No. 712 (QL), 2010 CarswellNS 906, and ordering a new trial. Appeal dismissed.

Stanley W. MacDonald, Q.C., for the appellant.

Mark Covan, for the respondent.

Amy Alyea, for the intervener the Attorney General of Ontario.

Mahmud Jamal, David Mollica and W. David Rankin, for the intervener the Canadian Civil Liberties Association.

Written submissions only by *Tamir Israel*, for the intervener the Samuelson-Glushko Canadian Internet Policy and Public Interest Clinic.

Michael A. Feder and H. Michael Rosenberg, for the intervener the British Columbia Civil Liberties Association.

The judgment of the Court was delivered by

[1] KARAKATSANIS J. — In *R. v. Kang-Brown*, 2008 SCC 18, [2008] 1 S.C.R. 456, and *R. v. A.M.*, 2008 SCC 19, [2008] 1 S.C.R. 569, the Court balanced the travelling public’s privacy interests against the public interest in apprehending those who transport and traffic drugs. The Court concluded that the use of a properly deployed drug detection dog was a search that was authorized by law and reasonable on a lower threshold of

Shapiro, Jonathan. « Confusion and Dangers in Lowering the *Hunter* Standards » (2008), 55 C.R. (6th) 396.

Tanovich, David M. « A Powerful Blow Against Police Use of Drug Courier Profiles » (2008), 55 C.R. (6th) 379.

POURVOI contre un arrêt de la Cour d’appel de la Nouvelle-Écosse (le juge en chef MacDonald et les juges Saunders et Farrar), 2011 NSCA 82, 308 N.S.R. (2d) 122, 278 C.C.C. (3d) 445, 243 C.R.R. (2d) 109, 88 C.R. (6th) 300, 976 A.P.R. 122, [2011] N.S.J. No. 499 (QL), 2011 CarswellNS 646, qui a infirmé une décision du juge Cacchione, 2010 NSSC 255, 300 N.S.R. (2d) 28, 268 C.C.C. (3d) 249, 950 A.P.R. 28, [2010] N.S.J. No. 712 (QL), 2010 CarswellNS 906, et ordonné la tenue d’un nouveau procès. Pourvoi rejeté.

Stanley W. MacDonald, c.r., pour l’appelant.

Mark Covan, pour l’intimée.

Amy Alyea, pour l’intervenant le procureur général de l’Ontario.

Mahmud Jamal, David Mollica et W. David Rankin, pour l’intervenante l’Association canadienne des libertés civiles.

Argumentation écrite seulement par *Tamir Israel*, pour l’intervenante la Clinique d’intérêt public et de politique d’internet du Canada Samuelson-Glushko.

Michael A. Feder et H. Michael Rosenberg, pour l’intervenante l’Association des libertés civiles de la Colombie-Britannique.

Version française du jugement de la Cour rendu par

[1] LA JUGE KARAKATSANIS — Dans les arrêts *R. c. Kang-Brown*, 2008 CSC 18, [2008] 1 R.C.S. 456, et *R. c. A.M.*, 2008 CSC 19, [2008] 1 R.C.S. 569, la Cour met en balance les droits à la vie privée des voyageurs et l’intérêt du public à l’arrestation de ceux qui se livrent au transport et au trafic de la drogue. Elle conclut que l’utilisation adéquate d’un chien détecteur de drogue constitue une fouille autorisée par la loi et que pareille fouille, si elle est

“reasonable suspicion”. Because they are minimally intrusive, narrowly targeted, and can be highly accurate, sniff searches may be conducted without prior judicial authorization. These appeals require the Court to elaborate on the principles underlying the reasonable suspicion standard and its application.

[2] Some of the interveners urge the Court to find there is no reasonable expectation of privacy in luggage in an airport setting; or to elevate the standard for authorizing a sniff search to reasonable and probable grounds. However, they provided no compelling reason to revisit the balance struck in *Kang-Brown* and *A.M.* between society’s interest in routine crime prevention and an individual’s interest in her own privacy.

[3] In my view, there is no need to revise the reasonable suspicion standard. It is a robust standard determined on the totality of the circumstances, based on objectively discernible facts, and is subject to independent and rigorous judicial scrutiny. As Doherty J.A. said in *R. v. Simpson* (1993), 12 O.R. (3d) 182 (C.A.), at p. 202, the standard prevents the indiscriminate and discriminatory exercise of police power.

[4] However, the application of the reasonable suspicion standard continues to raise concerns, particularly when individual factors relied upon by police are neutral and capable of innocent explanation. The appellant submits that the characteristics identified by the police as forming part of the “drug courier profile” should not be used to ground reasonable suspicion, as they do not provide particularized evidence of criminal activity. In the companion appeal, *R. v. MacKenzie*, 2013 SCC 50, [2013] 3 S.C.R. 250, the appellant in that case also challenges the use of drug courier profiles.

effectuée en application de la norme moins stricte des « soupçons raisonnables », n’est pas abusive. Parce qu’elle porte une atteinte minime, vise un objectif bien circonscrit et peut se révéler d’une grande fiabilité, la fouille effectuée à l’aide d’un chien renifleur ne nécessite pas d’autorisation judiciaire préalable. Dans les présents pourvois, la Cour est appelée à expliciter les principes qui sous-tendent la norme des soupçons raisonnables et son application.

[2] Certains intervenants en l’espèce demandent à la Cour de conclure qu’il ne saurait y avoir d’attente raisonnable en matière de vie privée à l’égard de bagages à l’aéroport ou bien de resserrer la norme de sorte qu’il faudrait des motifs raisonnables et probables pour qu’une fouille effectuée à l’aide d’un chien renifleur soit autorisée. Toutefois, ils n’ont fourni aucune raison impérieuse justifiant la modification de l’équilibre établi dans les arrêts *Kang-Brown* et *A.M.* entre l’intérêt de la société à la tenue d’opérations courantes de prévention du crime et le droit d’une personne à sa vie privée.

[3] À mon avis, il n’est pas nécessaire de modifier la norme des soupçons raisonnables. Il s’agit d’une norme solide, qui appelle la prise en compte de l’ensemble des circonstances, en fonction de faits objectivement vérifiables, et dont l’application est assujettie à un examen rigoureux et indépendant par les tribunaux. Comme l’a affirmé le juge Doherty dans l’arrêt *R. c. Simpson* (1993), 12 O.R. (3d) 182 (C.A.), p. 202, la norme fait obstacle à l’exercice aveugle et discriminatoire des pouvoirs policiers.

[4] Toutefois, l’application de la norme des soupçons raisonnables continue de susciter des inquiétudes, particulièrement lorsque les facteurs individuels sur lesquels s’appuie la police sont neutres et admettent une explication innocente. L’appelant fait valoir que les caractéristiques propres au « profil des passeurs de drogue » établi par la police ne devraient pas fonder les soupçons raisonnables, puisqu’elles ne fournissent pas de preuve précise d’activité criminelle. Dans le pourvoi connexe, *R. c. MacKenzie*, 2013 CSC 50, [2013] 3 R.C.S. 250, l’appelant conteste lui aussi le recours aux profils des passeurs de drogue.

[5] In addition, the appellant asks the Court to affirm the trial judge's finding that the dog deployed in this case was not reliable and to require and establish national standards to determine reliability of sniffer dogs.

[6] For the reasons that follow, I would dismiss the appeal. The reasonable suspicion standard requires that the entirety of the circumstances, inculpatory and exculpatory, be assessed to determine whether there are objective ascertainable grounds to suspect that an individual is involved in criminal behaviour. It does not require the police to investigate to rule out exculpatory circumstances. The Court of Appeal correctly concluded that the trial judge erred in assessing the factors individually rather than in their entirety and in finding the sniffer dog to be unreliable.

I. Facts

[7] Late on a Tuesday evening in November 2005, Mr. Chehil departed from Vancouver International Airport on WestJet's overnight flight to Halifax.

[8] The next morning, Corporal Fraser and Constable Ruby, of the RCMP's Criminal Interdiction Team (CIT), attended WestJet's offices in Halifax and analyzed the passenger manifest for the flight on the overnight Vancouver-Halifax run. They observed that the appellant was one of the last passengers to purchase a ticket, paid for his ticket in cash, and checked one bag. The officers testified that, in their experience, these characteristics were indicators of the illegal traffic of narcotics.

[9] As a result, they decided to verify the appellant's checked bag for the presence of drugs using a drug detection dog, Boris. When the appellant's flight arrived, the officers located his bag on the secure side of the airport. Nine other bags from the same flight were also removed and lined up with the appellant's bag. Boris was deployed by Officer Daigle and walked down the line of bags. On his first run, he turned and looked at the appellant's bag. On the second pass, Boris indicated that he

[5] En outre, l'appelant demande à la Cour de confirmer la conclusion du juge du procès selon laquelle le chien utilisé en l'espèce n'était pas fiable et de prescrire l'établissement de normes nationales visant à déterminer la fiabilité des chiens renifleurs ainsi que de définir ces dernières.

[6] Pour les motifs qui suivent, je suis d'avis de rejeter le pourvoi. La norme des soupçons raisonnables oblige à apprécier l'ensemble des circonstances — inculpatives et disculpatoires — pour déterminer s'il existe des motifs objectivement discernables de soupçonner qu'une personne se livre à une activité criminelle. Elle n'oblige pas la police à faire enquête pour écarter des circonstances disculpatoires. La Cour d'appel a conclu à bon droit que le juge du procès avait commis une erreur en évaluant les facteurs individuellement, plutôt que dans leur ensemble, et en concluant que le chien renifleur n'était pas fiable.

I. Les faits

[7] Tard un mardi soir de novembre 2005, M. Chehil a quitté l'aéroport international de Vancouver à bord d'un appareil de WestJet à destination de Halifax.

[8] Le lendemain matin, aux bureaux de WestJet à Halifax, le caporal Fraser et l'agente Ruby, de l'Équipe de répression criminelle (ERC) de la GRC, ont analysé le manifeste des passagers de la liaison de nuit Vancouver-Halifax. Ils ont observé que l'appelant avait été l'un des derniers passagers à acheter son billet, l'avait payé comptant et avait enregistré un seul bagage. Dans leur témoignage, les policiers ont déclaré qu'il s'agit là, selon leur expérience, d'indices du trafic illégal de stupéfiants.

[9] À la lumière de ces observations, ils ont décidé de soumettre le bagage enregistré de l'appelant à un contrôle par un chien détecteur de drogue nommé Boris. À l'arrivée du vol de l'appelant, les agents ont repéré sa valise du côté sécurisé de l'aéroport. Neuf autres bagages provenant du même vol ont également été retirés et alignés avec celui de l'appelant. L'agent Daigle a fait marcher Boris le long de cette file. Lors de son premier passage, le chien s'est tourné vers la valise de l'appelant et l'a

had detected the scent of drugs by sitting in front of the appellant's bag, and then on the next item in the line-up, a cooler. The owner of the cooler subsequently consented to a search, and no drugs were found.

[10] After the appellant collected his bag, he was approached by another police officer, who informed him that there had been a positive indication for drugs on his bag and arrested him for possession of a narcotic.

[11] The appellant was taken to a secure location. Upon forcing open his locked bag, the police found a backpack containing three kilograms of cocaine. The appellant was arrested for possession of a narcotic for the purpose of trafficking.

II. Judicial History

A. *Supreme Court of Nova Scotia (2010 NSSC 255, 300 N.S.R. (2d) 28)*

[12] The trial judge held that Mr. Chehil had a reasonable expectation of privacy in his checked luggage and that there was no reason to lower constitutional protections in an airport. He drew a distinction between a traveller's expectation of privacy in relation to flight safety as opposed to general police investigations.

[13] Finding that only the purchase of the ticket with cash, perhaps at the last minute, could be viewed as suspicious, and that the rest of the factors relied upon were open to several neutral explanations that were not explored, the trial judge held that the police did not have reasonable suspicion when they deployed Boris. In particular, the CIT's failure to conduct further investigation or consider exculpatory explanations meant that the police did not undertake the global assessment of the facts required to establish reasonable suspicion. At best, they were operating on intuition or an educated guess, and thus the search was not authorized at common law.

regardée. Lors de son deuxième passage, Boris a indiqué qu'il avait détecté une odeur de drogue en s'asseyant devant la valise de l'appelant, puis devant l'article voisin, une glacière. Le propriétaire de la glacière a subséquemment consenti à une fouille, qui n'a pas révélé la présence de drogue.

[10] Après avoir pris sa valise, l'appelant a été abordé par un autre agent qui l'a informé de l'indication donnée à l'égard de sa valise, révélant qu'elle contenait de la drogue, et l'a arrêté pour possession d'un stupéfiant.

[11] L'appelant a été emmené à un lieu sécurisé. Forçant sa valise fermée à clé, la police y a trouvé un sac à dos contenant trois kilogrammes de cocaïne. L'appelant a été arrêté pour possession d'un stupéfiant en vue d'en faire le trafic.

II. Historique judiciaire

A. *Cour suprême de la Nouvelle-Écosse (2010 NSSC 255, 300 N.S.R. (2d) 28)*

[12] Le juge du procès a statué que M. Chehil avait une attente raisonnable en matière de vie privée à l'égard de son bagage enregistré et que rien ne justifiait la réduction des protections constitutionnelles dans un aéroport. Il a établi une distinction entre l'attente d'un voyageur quant au respect de sa vie privée dans le contexte de la sécurité du vol et son attente à cet égard dans le contexte d'une enquête policière générale.

[13] Concluant que seul l'achat du billet au comptant — possiblement à la dernière minute — pouvait être considéré comme étant suspect, et que les autres facteurs relevés par les policiers admettaient plusieurs explications neutres qui n'avaient pas été examinées, le juge du procès a statué que ces derniers n'avaient pas de soupçons raisonnables au moment d'utiliser Boris. En particulier, parce que l'ERC n'avait pas poussé l'enquête ou envisagé des explications disculpatoires, elle n'avait pas procédé à l'évaluation globale des faits nécessaire pour établir les soupçons raisonnables. Au mieux, les policiers agissaient sur la foi d'une intuition ou d'une supposition éclairée; par conséquent, la fouille n'était pas autorisée en common law.

[14] The trial judge also found that yearly validation performance was not an adequate indicator of a sniffer dog's reliability, and that Boris's performance in the field was not sufficiently reliable for the search to be reasonable.

[15] The trial judge excluded the evidence under s. 24(2) of the *Canadian Charter of Rights and Freedoms*.

B. *Nova Scotia Court of Appeal (2011 NSCA 82, 308 N.S.R. (2d) 122)*

[16] The Court of Appeal agreed that the appellant retained a privacy interest in his suitcase and that heightened efforts to combat terrorism in airports cannot circumvent protections guaranteed in relation to the investigation of crime generally. However, the Court of Appeal held that the trial judge erred by considering the factors relied upon by the police in isolation, rather than determining whether they coalesced to form a reasonable suspicion despite potential innocent explanations for each. Whether additional steps could have been taken to buttress the grounds of reasonable suspicion was irrelevant; the police need only demonstrate they have done enough to establish reasonable suspicion.

[17] The Court of Appeal found that reliability assessments cannot ignore the fact that sniffer dogs are trained to detect the smell of drugs, not drugs themselves. The trial judge erred by rejecting Corporal Daigle's expert opinion that the false indication on the cooler likely resulted from scent emanating from the appellant's adjacent bag. Given that the police had reasonable and probable grounds to believe the appellant was in possession of illegal drugs following Boris's positive indication, his arrest was justified and the search of his suitcase reasonable. There was no *Charter* breach.

[14] Le juge du procès a également conclu qu'un contrôle annuel du rendement d'un chien renifleur ne constituait pas un indicateur adéquat de sa fiabilité et que le rendement de Boris sur le terrain n'était pas suffisamment fiable pour que la fouille ne soit pas jugée abusive.

[15] Le juge du procès a écarté la preuve en application du par. 24(2) de la *Charte canadienne des droits et libertés*.

B. *Cour d'appel de la Nouvelle-Écosse (2011 NSCA 82, 308 N.S.R. (2d) 122)*

[16] La Cour d'appel a reconnu que l'appelant conservait un droit à la vie privée à l'égard de sa valise et que les mesures accrues de lutte contre le terrorisme mises en œuvre dans les aéroports ne pouvaient court-circuiter les protections garanties dans le cadre d'enquêtes criminelles générales. Toutefois, elle a statué que le juge du procès avait fait erreur en considérant isolément les facteurs sur lesquels les policiers s'étaient appuyés et qu'il aurait plutôt fallu s'attacher à déterminer si, une fois combinés, ces facteurs faisaient naître des soupçons raisonnables, même si chacun admettait possiblement une explication innocente. La question de savoir si des mesures supplémentaires auraient pu être prises pour étayer les soupçons raisonnables n'était pas pertinente; les policiers n'ont qu'à démontrer avoir pris des moyens suffisants pour établir l'existence de tels soupçons.

[17] La Cour d'appel a conclu que l'évaluation de la fiabilité du chien renifleur ne saurait faire fi du fait que ce dernier est dressé pour détecter l'odeur de drogue, et non la drogue elle-même. Le juge du procès a eu tort de rejeter la preuve d'expert du caporal Daigle selon laquelle l'indication erronée de la glacière avait probablement résulté de l'odeur émanant de la valise adjacente de l'appelant. Vu que les policiers avaient des motifs raisonnables et probables de croire que l'appelant avait en sa possession de la drogue illicite après l'indication donnée par Boris, son arrestation était justifiée et la fouille de sa valise n'était pas abusive. Il n'y a eu aucune violation de la *Charte*.

III. Issues/Outline

[18] The outline is as follows:

A. *General Principles*

- (1) Nature of Reasonable Suspicion
- (2) Profiling and Reasonable Suspicion
- (3) Nature of Judicial Scrutiny
- (4) Reliability of Individual Dogs
- (5) Actions Following Positive Indication

B. *Application to This Case*

- (1) Reasonable Suspicion of the Police
- (2) Reasonableness of the Search
- (3) Arrest Subsequent to Positive Indication

IV. AnalysisA. *General Principles*

[19] The deployment of a single-profile narcotic dog (a dog trained to detect certain kinds of illegal drugs using its sense of smell) is a search that does not require prior judicial authorization. However, in order for a sniff search to be *Charter*-compliant, it must meet the criteria for unauthorized searches laid out in *R. v. Collins*, [1987] 1 S.C.R. 265. As such, when sniffer dogs are engaged by the police, the deployment must be authorized by a reasonable law (in this case, the common law), and the manner in which the sniff search was conducted must be reasonable. In *Kang-Brown*, a majority of the Court found that the decision to deploy a sniffer dog meets the *Collins* test where the police have a reasonable suspicion based on objective, ascertainable facts that evidence of an offence will be discovered: see *Kang-Brown*, at para. 60, *per* Binnie J.; paras. 188-94, *per* Deschamps J.; and para. 244, *per* Bastarache J. Further, as I will explain, a sniff search is conducted reasonably where the sniffer dog used was properly trained and handled.

III. Questions en litige/Plan

[18] Le plan est le suivant :

A. *Principes généraux*

- (1) La nature des soupçons raisonnables
- (2) Le profilage et les soupçons raisonnables
- (3) La nature de l'examen par les tribunaux
- (4) La fiabilité du chien
- (5) Les mesures découlant d'une indication

B. *Application à l'espèce*

- (1) Les soupçons raisonnables de la police
- (2) Le caractère non abusif de la fouille
- (3) L'arrestation subséquente à l'indication

IV. AnalyseA. *Principes généraux*

[19] L'utilisation d'un chien détecteur de drogue (spécialement dressé pour la détection olfactive de certaines substances illicites) constitue une fouille qui ne nécessite aucune autorisation judiciaire préalable. Toutefois, pour qu'une telle fouille soit conforme à la *Charte*, elle doit satisfaire aux critères applicables aux fouilles sans autorisation énoncés dans l'arrêt *R. c. Collins*, [1987] 1 R.C.S. 265. Ainsi, le recours à un chien renifleur doit être autorisé par une loi qui n'a elle-même rien d'abusif (en l'espèce, la common law), et la fouille ne doit pas être effectuée d'une manière abusive. Dans l'arrêt *Kang-Brown*, les juges majoritaires de la Cour concluent que la décision d'utiliser un chien renifleur satisfait aux critères établis dans l'arrêt *Collins* dans le cas où les policiers ont des soupçons raisonnables, fondés sur des faits objectivement discernables, que des éléments de preuve établissant la perpétration d'une infraction seront découverts (voir *Kang-Brown*, par. 60, le juge Binnie; par. 188-194, la juge Deschamps; par. 244, le juge Bastarache). En outre, comme je l'expliquerai, une fouille à l'aide d'un chien renifleur est effectuée d'une manière qui n'est pas abusive si ce dernier est bien dressé et bien utilisé.

[20] The appellant submits that the police applied the reasonable suspicion standard in a way that authorizes random generalized searches of a very large number of innocent travellers. The appellant and certain interveners are concerned that profile characteristics, applied mechanically, capture a high percentage of innocent travellers or racially marginalized groups. They suggest that if the factors are individually innocent or innocuous, police should be required to conduct further investigation to seek out any exculpatory factors.

[21] In my view, there is no need to reformulate the “reasonable suspicion” test; it is a common standard that arises in a number of contexts. However, in light of the concerns raised, I propose to clarify (1) the nature of reasonable suspicion; (2) the role of “profiles” as grounds for reasonable suspicion; and (3) the nature of rigorous judicial scrutiny.

(1) Nature of Reasonable Suspicion

[22] In *Hunter v. Southam Inc.*, [1984] 2 S.C.R. 145, the Court laid out the underlying principles of the s. 8 framework, which balances privacy interests and the public interest in providing law enforcement with the means to investigate crime. First, s. 8 does not protect against all encroachments on an individual’s privacy interests. Its primary goal is to protect individuals from arbitrary state action by balancing their interest in being left alone, against the public interest in providing the state with the means to investigate crime (pp. 159-60). This balance must be struck on objective grounds (pp. 166-67), and, where possible, should be assessed before the search occurs (p. 160). In most cases, “[t]he state’s interest in detecting and preventing crime begins to prevail over the individual’s interest in being left alone at the point where credibly-based probability replaces suspicion” (p. 167).

[20] L’appelant plaide que les policiers ont appliqué la norme des soupçons raisonnables de manière à autoriser les fouilles générales aléatoires d’un très grand nombre de voyageurs innocents. L’appelant et certains intervenants craignent que des caractéristiques d’un profil, si elles sont appliquées mécaniquement, visent un pourcentage élevé de voyageurs innocents ou de groupes marginalisés en raison de leur race. Ils prétendent que si les facteurs, considérés individuellement, sont innocents ou anodins, les policiers devraient être tenus de pousser l’enquête à la recherche de facteurs disculpatoires.

[21] À mon avis, il n’est pas nécessaire de reformuler le critère des « soupçons raisonnables »; il s’agit d’une norme courante qui entre en jeu dans plusieurs contextes. Toutefois, à la lumière des préoccupations soulevées, je me propose de clarifier (1) la nature des soupçons raisonnables; (2) le rôle des « profils » comme motifs de soupçons raisonnables; (3) la nature de l’examen rigoureux par les tribunaux.

(1) La nature des soupçons raisonnables

[22] Dans l’arrêt *Hunter c. Southam Inc.*, [1984] 2 R.C.S. 145, la Cour énonce les principes qui sous-tendent le cadre d’application de l’art. 8, qui appelle l’établissement d’un équilibre entre le droit à la vie privée et l’intérêt qu’a le public à donner à ceux qui sont chargés de faire respecter la loi les moyens d’enquêter sur des crimes. Premièrement, l’art. 8 ne protège pas contre tout empiétement sur le droit à la vie privée. Son but fondamental est de protéger le particulier contre l’action arbitraire de l’État en conciliant le droit du premier de ne pas être importuné avec l’intérêt qu’a le public à donner au second les moyens d’enquêter sur des crimes (p. 159-160). Cet équilibre doit être établi sur le fondement de motifs objectifs (p. 166-167) et, si possible, l’appréciation doit précéder la fouille (p. 160). Dans la plupart des cas, « [l]e droit de l’État de déceler et de prévenir le crime commence à l’emporter sur le droit du particulier de ne pas être importuné lorsque les soupçons font place à la probabilité fondée sur la crédibilité » (p. 167-168).

[23] Both the impact on privacy interests and the importance of the law enforcement objective play a role in determining the level of justification required for the state to intrude upon the privacy interest in question. In *Hunter*, this Court also recognized that this balancing of interests can justify searches on a lower standard where privacy interests are reduced, or where state objectives of public importance are predominant (p. 168). Thus, the Court has found reasonable suspicion to be a sufficient threshold in certain investigative contexts,¹ and Parliament has employed this standard when authorizing certain searches in legislation.²

[24] In the case of sniff searches, the use of the reasonable suspicion standard reflects, in part, the minimal intrusion of a dog sniff. For a physical search of luggage incident to arrest, which will be more intrusive, the more exacting reasonable and probable grounds standard is engaged, as the arrest must be justified: see *R. v. Caslake*, [1998] 1 S.C.R. 51. This mirrors the continuum established under s. 9 of the *Charter* to justify detentions, ranging from reasonable suspicion (for investigative detentions) to reasonable and probable grounds (for arrests): see *R. v. Mann*, 2004 SCC 52, [2004] 3 S.C.R. 59.

1 These contexts include border security investigations, see *R. v. Simmons*, [1988] 2 S.C.R. 495, and *R. v. Monney*, [1999] 1 S.C.R. 652; limited searches accompanying investigative detentions, see *R. v. Mann*, 2004 SCC 52, [2004] 3 S.C.R. 59; and searches performed in schools by school authorities, see *R. v. M. (M.R.)*, [1998] 3 S.C.R. 393.

2 *Criminal Code*, R.S.C. 1985, c. C-46, s. 254(2) (physical coordination tests and obtaining a breath sample to test for the presence of alcohol or a drug), and s. 492.2 (use of a number recorder and obtaining telephone records); *Customs Act*, R.S.C. 1985, c. 1 (2nd Supp.), s. 98 (search power for customs officers); *Corrections and Conditional Release Act*, S.C. 1992, c. 20, s. 49 (frisk searches of inmates); *Proceeds of Crime (Money Laundering) and Terrorist Financing Act*, S.C. 2000, c. 17, s. 15(1) (search of a person), s. 17(1) (examination and opening of mail).

[23] L'incidence sur le droit à la vie privée et l'importance de l'objectif d'application de la loi jouent toutes deux quand il s'agit de déterminer le degré de justification nécessaire à l'empiétement par l'État sur ce droit. Dans l'arrêt *Hunter*, la Cour reconnaît également que cet exercice de pondération des intérêts en jeu peut justifier une fouille en application d'une norme moins rigoureuse lorsque les droits à la vie privée sont réduits ou lorsque les objectifs d'ordre public de l'État sont prédominants (p. 168). Ainsi, elle estime que les soupçons raisonnables constituent un seuil suffisant dans certains contextes d'enquête¹, et le législateur a subordonné l'autorisation de certaines fouilles à cette norme².

[24] Dans le cas de la fouille effectuée à l'aide d'un chien renifleur, la norme des soupçons raisonnables témoigne, en partie, de l'atteinte minime que porte ce genre de fouille. La fouille matérielle des bagages accessoire à l'arrestation, plus envahissante, est subordonnée à la norme plus rigoureuse des motifs raisonnables et probables, car l'arrestation doit être justifiée (voir *R. c. Caslake*, [1998] 1 R.C.S. 51). La même fourchette a été établie pour l'application de l'art. 9 de la *Charte* pour justifier la détention, qui va des soupçons raisonnables (pour la détention aux fins d'enquête) aux motifs raisonnables et probables (pour l'arrestation) (voir *R. c. Mann*, 2004 CSC 52, [2004] 3 R.C.S. 59).

1 Ces contextes comprennent les enquêtes de sécurité frontalière, voir *R. c. Simmons*, [1988] 2 R.C.S. 495, et *R. c. Monney*, [1999] 1 R.C.S. 652; la fouille limitée accessoire à une détention aux fins d'enquête, voir *R. c. Mann*, 2004 CSC 52, [2004] 3 R.C.S. 59; et les fouilles effectuées par les autorités scolaires, voir *R. c. M. (M.R.)*, [1998] 3 R.C.S. 393.

2 *Code criminel*, L.R.C. 1985, ch. C-46, par. 254(2) (épreuves de coordination des mouvements et obtention d'un échantillon d'haleine pour vérifier la présence d'alcool ou de drogue), et art. 492.2 (utilisation d'un enregistreur de numéro et obtention d'un registre de téléphone); *Loi sur les douanes*, L.R.C. 1985, ch. 1 (2^e suppl.), art. 98 (pouvoirs de fouille des agents des douanes); *Loi sur le système correctionnel et la mise en liberté sous condition*, L.C. 1992, ch. 20, art. 49 (fouille par palpation sur le détenu); *Loi sur le recyclage des produits de la criminalité et le financement des activités terroristes*, L.C. 2000, ch. 17, par. 15(1) (fouille d'une personne), par. 17(1) (examen et ouverture du courrier).

[25] The reasonable suspicion threshold respects the balance struck under s. 8 by permitting law enforcement to employ legitimate but limited investigative techniques. This balance is maintained by subsequent judicial oversight that prevents indiscriminate and discriminatory breaches of privacy interests by ensuring that the police have an objective and reasonable basis for interfering with an individual's reasonable expectation of privacy.

[26] Reasonable suspicion derives its rigour from the requirement that it be based on objectively discernible facts, which can then be subjected to independent judicial scrutiny. This scrutiny is exacting, and must account for the totality of the circumstances. In *Kang-Brown*, Binnie J. provided the following definition of reasonable suspicion, at para. 75:

The “reasonable suspicion” standard is not a new juridical standard called into existence for the purposes of this case. “Suspicion” is an expectation that the targeted individual is possibly engaged in some criminal activity. A “reasonable” suspicion means something more than a mere suspicion and something less than a belief based upon reasonable and probable grounds.

[27] Thus, while reasonable grounds to suspect and reasonable and probable grounds to believe are similar in that they both must be grounded in objective facts, reasonable suspicion is a lower standard, as it engages the reasonable possibility, rather than probability, of crime. As a result, when applying the reasonable suspicion standard, reviewing judges must be cautious not to conflate it with the more demanding reasonable and probable grounds standard.

[28] The fact that reasonable suspicion deals with possibilities, rather than probabilities, necessarily means that in some cases the police will reasonably suspect that innocent people are involved in crime. In spite of this reality, properly conducted sniff searches that are based on reasonable suspicion are *Charter*-compliant in light of their minimally

[25] Le seuil des soupçons raisonnables respecte l'équilibre établi pour l'application de l'art. 8, car il autorise le recours par les forces de l'ordre à des techniques d'enquête légitimes mais circonscrites. Le contrôle judiciaire ultérieur permet d'assurer cet équilibre et d'empêcher les atteintes aveugles et discriminatoires au droit à la vie privée, les tribunaux vérifiant que l'atteinte policière à l'attente raisonnable en matière de vie privée repose bel et bien sur un fondement objectif et raisonnable.

[26] La rigueur de la norme des soupçons raisonnables découle de l'exigence que ces soupçons soient fondés sur des faits objectivement discernables, qui peuvent ensuite être soumis à l'examen judiciaire indépendant. Cet examen est rigoureux et doit prendre en compte l'ensemble des circonstances. Dans l'arrêt *Kang-Brown*, le juge Binnie donne la définition suivante des soupçons raisonnables :

La norme des « soupçons raisonnables » n'est pas une nouvelle norme juridique créée pour les besoins de la présente affaire. Les « soupçons » sont une impression que l'individu ciblé se livre à une activité criminelle. Les soupçons « raisonnables » sont plus que de simples soupçons, mais ils ne correspondent pas à une croyance fondée sur des motifs raisonnables et probables. [par. 75]

[27] Ainsi, bien que les motifs raisonnables de soupçonner, d'une part, et les motifs raisonnables et probables de croire, d'autre part, soient semblables en ce sens qu'ils doivent, dans les deux cas, être fondés sur des faits objectifs, les premiers constituent une norme moins rigoureuse, puisqu'ils évoquent la possibilité — plutôt que la probabilité — raisonnable d'un crime. Par conséquent, lorsqu'il applique la norme des soupçons raisonnables, le juge siégeant en révision doit se garder de la confondre avec la norme plus exigeante des motifs raisonnables et probables.

[28] Les soupçons raisonnables étant une affaire de possibilité, plutôt que de probabilité, il s'ensuit nécessairement que les policiers soupçonneront raisonnablement, dans certains cas, des personnes innocentes d'être des criminels. Malgré cette réalité, la fouille bien effectuée à l'aide d'un chien renifleur et fondée sur des soupçons raisonnables

intrusive, narrowly targeted, and highly accurate nature: see *Kang-Brown*, at para. 60, *per* Binnie J., and *A.M.*, at paras. 81-84, *per* Binnie J. However, the suspicion held by the police cannot be so broad that it descends to the level of generalized suspicion, which was described by Bastarache J., at para. 151 of *A.M.*, as suspicion “that attaches to a particular activity or location rather than to a specific person”.

[29] Reasonable suspicion must be assessed against the totality of the circumstances. The inquiry must consider the constellation of objectively discernible facts that are said to give the investigating officer reasonable cause to suspect that an individual is involved in the type of criminal activity under investigation. This inquiry must be fact-based, flexible, and grounded in common sense and practical, everyday experience: see *R. v. Bramley*, 2009 SKCA 49, 324 Sask. R. 286, at para. 60. A police officer’s grounds for reasonable suspicion cannot be assessed in isolation: see *Monney*, at para. 50.

[30] A constellation of factors will not be sufficient to ground reasonable suspicion where it amounts merely to a “generalized” suspicion because it “would include such a number of presumably innocent persons as to approach a subjectively administered, random basis” for a search: *United States v. Gooding*, 695 F.2d 78 (4th Cir. 1982), at p. 83. The American jurisprudence supports the need for a sufficiently particularized constellation of factors. See *Reid v. Georgia*, 448 U.S. 438 (1980), and *Terry v. Ohio*, 392 U.S. 1 (1968). Indeed, the reasonable suspicion standard is designed to avoid indiscriminate and discriminatory searches.

[31] While some factors, such as travelling under a false name, or flight from the police, may give rise to reasonable suspicion on their own (*Kang-Brown*, at para. 87, *per* Binnie J.), other elements of a constellation will not support reasonable suspicion, except in combination with other factors. Generally, characteristics that apply broadly to innocent people are insufficient, as they are markers only of generalized suspicion. The same is true of factors

est conforme à la *Charte*, vu son caractère peu envahissant, étroitement ciblé et hautement fiable (voir *Kang-Brown*, par. 60, le juge Binnie, et *A.M.*, par. 81-84, le juge Binnie). Toutefois, les soupçons des policiers ne doivent pas être à ce point vagues qu’ils se réduisent à des soupçons généraux, décrits par le juge Bastarache, au par. 151 de l’arrêt *A.M.*, comme des soupçons « non pas au sujet d’une personne bien précise mais plutôt au sujet d’un lieu ou d’une activité en particulier ».

[29] Les soupçons raisonnables doivent être évalués à la lumière de toutes les circonstances. L’appréciation doit prendre en compte l’ensemble des faits objectivement discernables qui donneraient à l’enquêteur un motif raisonnable de soupçonner une personne d’être impliquée dans le type d’activité criminelle sur lequel porte l’enquête. L’appréciation doit s’appuyer sur des faits, être souple et relever du bon sens et de l’expérience pratique quotidienne (voir *R. c. Bramley*, 2009 SKCA 49, 324 Sask. R. 286, par. 60). Les soupçons raisonnables du policier ne sauraient être évalués isolément (voir *Monney*, par. 50).

[30] Un ensemble de facteurs ne suffira pas à justifier des soupçons raisonnables lorsqu’ils équivalent simplement à des soupçons « généraux », puisque la fouille [TRADUCTION] « viserait un tel nombre de personnes censément innocentes qu’elle se rapprocherait d’une mesure subjective administrée aléatoirement » (*United States c. Gooding*, 695 F.2d 78 (4th Cir. 1982), p. 83). La jurisprudence américaine exige également un ensemble de facteurs suffisamment spécifiques. Voir *Reid c. Georgia*, 448 U.S. 438 (1980), et *Terry c. Ohio*, 392 U.S. 1 (1968). En effet, la norme des soupçons raisonnables est conçue pour prévenir les fouilles aveugles et discriminatoires.

[31] Bien que certains facteurs, comme le fait de voyager sous un faux nom ou celui de fuir les policiers, puissent à eux seuls éveiller des soupçons raisonnables (*Kang-Brown*, par. 87, le juge Binnie), d’autres éléments d’un ensemble ne donneront naissance à des soupçons raisonnables que s’ils sont combinés à d’autres. Généralement, les caractéristiques qui s’appliquent globalement aux personnes innocentes ne suffisent pas, puisqu’elles ne

that may “go both ways”, such as an individual’s making or failing to make eye contact. On their own, such factors cannot support reasonable suspicion; however, this does not preclude reasonable suspicion arising when the same factor is simply one part of a constellation of factors.

[32] Further, reasonable suspicion need not be the only inference that can be drawn from a particular constellation of factors. Much as the seven stars that form the Big Dipper have also been interpreted as a bear, a saucepan, and a plough, factors that give rise to a reasonable suspicion may also support completely innocent explanations. This is acceptable, as the reasonable suspicion standard addresses the *possibility* of uncovering criminality, and not a *probability* of doing so.

[33] Exculpatory, neutral, or equivocal information cannot be disregarded when assessing a constellation of factors. The totality of the circumstances, including favourable and unfavourable factors, must be weighed in the course of arriving at any conclusion regarding reasonable suspicion. As Doherty J.A. found in *R. v. Golub* (1997), 34 O.R. (3d) 743 (C.A.), at p. 751, “[t]he officer must take into account all information available to him and is entitled to disregard only information which he has good reason to believe is unreliable”. This is self-evident.

[34] However, the obligation of the police to take all factors into account does not impose a duty to undertake further investigation to seek out exculpatory factors or rule out possible innocent explanations. As was noted in *United States v. Sokolow*, 490 U.S. 1 (1989), at p. 10 (citing *Illinois v. Gates*, 462 U.S. 213 (1983), at p. 244, footnote 13), “the relevant inquiry is not whether particular conduct is ‘innocent’ or ‘guilty,’ but the degree of suspicion that attaches to particular types of non-criminal acts”. In conducting this inquiry to ascertain whether reasonable suspicion was present, the court will assess the circumstances the police were aware of at the time of the execution of the

peuvent révéler que des soupçons généraux. Il en va de même des facteurs qui peuvent aller « dans les deux sens », par exemple le fait qu’une personne regarde ou non quelqu’un dans les yeux. À eux seuls, de tels facteurs ne sauraient fonder des soupçons raisonnables, mais ils le peuvent s’ils s’inscrivent dans un ensemble de facteurs.

[32] De plus, on peut tirer d’un ensemble particulier de facteurs autre chose que des soupçons raisonnables. Tout comme les sept étoiles qui forment la Grande Ourse représentent pour certains une louche, une casserole ou une charrue, les facteurs qui font naître des soupçons raisonnables peuvent également admettre des explications tout à fait innocentes. Il s’agit d’une thèse acceptable, puisque la norme des soupçons raisonnables correspond à la *possibilité* — et non à la *probabilité* — de découvrir de la criminalité.

[33] On ne peut faire abstraction des renseignements disculpatoires, neutres ou équivoques dans l’évaluation d’un ensemble de facteurs. Il faut pondérer toutes les circonstances, tant les facteurs favorables que les facteurs défavorables, avant de conclure ou non à l’existence de soupçons raisonnables. Pour reprendre les propos du juge Doherty dans l’arrêt *R. c. Golub* (1997), 34 O.R. (3d) 743 (C.A.), p. 751, [TRADUCTION] « [l]’agent doit prendre en compte tous les renseignements à sa disposition et il ne peut faire abstraction que des renseignements dont il a de bonnes raisons de croire qu’ils ne sont pas fiables ». C’est l’évidence même.

[34] Toutefois, l’obligation imposée à la police de prendre en compte tous les facteurs ne la contraint pas à pousser l’enquête pour trouver des facteurs disculpatoires ou écarter des explications possiblement innocentes. Comme le tribunal l’a noté dans l’arrêt *United States c. Sokolow*, 490 U.S. 1 (1989), p. 10 (citant *Illinois c. Gates*, 462 U.S. 213 (1983), p. 244, note de bas de page 13), [TRADUCTION] « la question pertinente n’est pas de savoir si un comportement particulier est “innocent” ou “coupable”, mais de déterminer dans quelle mesure des types particuliers d’actes non criminels font naître des soupçons ». En procédant à cette analyse pour déterminer l’existence de soupçons raisonnables,

search, including those learned after the decision to deploy the sniffer dog was made if there is a delay in deployment, as there was in this case. However, it would not be permissible for the reasonable suspicion inquiry to assess circumstances learned *after* the execution of the search: see *Kang-Brown*, at para. 92.

[35] Finally, the objective facts must be indicative of the possibility of criminal behaviour. While I agree with the appellant's submission that police must point to particularized conduct or particularized evidence of criminal activity in order to ground reasonable suspicion, I do not accept that the evidence must itself consist of unlawful behaviour, or must necessarily be evidence of a specific known criminal act.

[36] A nexus must exist between the criminal conduct that is suspected and the investigative technique employed: see *Mann*, at para. 34. In the context of drug detection dogs, this nexus arises by way of a constellation of facts that reasonably supports the suspicion of drug-related activity that the dog deployed is trained to detect. For instance, in *R. v. Payette*, 2010 BCCA 392, 291 B.C.A.C. 289, the Court of Appeal for British Columbia stated that in order to justify the deployment of a sniffer dog, the constellation must be "capable of providing the required objectively discern[i]ble nexus between the [accused] and illegal drug activity" (para. 22). Binnie J. was of a similar view in *Kang-Brown*, where he cast reasonable suspicion broadly, linking it to the presence of contraband (para. 25). The particularized indicia of drug couriership have been documented by the police and can be established by objective evidence.

[37] In sum, when single-profile narcotic dogs are deployed on the basis of reasonable suspicion, the police intrusion must be connected to factors indicating a drug-related offence. Reasonable suspicion does not, however, require the police to point to a specific ongoing crime, nor does it entail the

le tribunal évaluera les circonstances dont les policiers avaient connaissance au moment de procéder à la fouille, y compris celles qu'ils ont apprises après la décision d'utiliser le chien renifleur si elle n'a pas été mise à exécution immédiatement, comme en l'espèce. En revanche, l'analyse servant à déterminer l'existence de soupçons raisonnables ne saurait tenir compte de circonstances dont la police a eu connaissance *après* la fouille (voir *Kang-Brown*, par. 92).

[35] Enfin, les faits objectifs doivent révéler la possibilité d'un comportement criminel. Bien que j'accepte l'argument de l'appelant selon lequel la police doit fonder sur un comportement précis ou un indice précis d'activité criminelle les soupçons raisonnables, je rejette celui voulant que l'indice doive constituer lui-même un comportement illégal ou révéler un acte criminel identifié.

[36] Il doit y avoir un lien entre le comportement suspect et la technique d'enquête utilisée (voir *Mann*, par. 34). Dans le contexte des chiens détecteurs de drogue, ce lien est établi dès lors qu'un ensemble de faits justifie raisonnablement de soupçonner une activité liée à la drogue que l'animal est dressé pour détecter. Par exemple, dans l'arrêt *R. c. Payette*, 2010 BCCA 392, 291 B.C.A.C. 289, la Cour d'appel de la Colombie-Britannique a affirmé que, pour justifier l'utilisation d'un chien renifleur, l'ensemble doit être [TRADUCTION] « susceptible de fournir le lien objectivement discernable entre l'[accusé] et l'activité illégale liée à la drogue » (par. 22). Le juge Binnie exprime un avis semblable dans l'arrêt *Kang-Brown*, où il conçoit les soupçons raisonnables en termes larges et les associe à la présence d'articles interdits (par. 25). La police a circonscrit les indices du passage de drogue, et des éléments objectifs peuvent permettre d'en établir l'existence.

[37] En somme, la décision de la police, fondée sur l'existence de soupçons raisonnables, d'utiliser un chien spécialement dressé pour la détection de stupéfiants doit reposer sur des facteurs suggérant une infraction relative à la drogue. La norme des soupçons raisonnables n'exige toutefois pas que

identification of the precise illegal substance being searched for. The reasonable suspicion held by the police need only be linked to the possession, traffic, or production of drugs or other drug-related contraband.

(2) Profiling and Reasonable Suspicion

[38] The appellants in this case and in the companion appeal, *MacKenzie*, as well as the interveners the Canadian Civil Liberties Association (“CCLA”) and the Samuelson-Glushko Canadian Internet Policy and Public Interest Clinic ask this Court to rule that drug courier profiles cannot ground reasonable suspicion in and of themselves. They say that reliance on profiles replaces rigorous judicial scrutiny with the police view of the circumstances. The CCLA highlights various dangers related to the use of profiles, even as an investigative tool to identify persons of interest, such as inconsistent application or after-the-fact modification by the police, unanticipated impacts on bystanders, disproportionate harm to visible minorities, and stereotyping.

[39] In my view, it is unhelpful to speak of profiling as generating reasonable suspicion. The term itself suggests an assessment based on stereotyping and discriminatory factors, which have no place in the reasonable suspicion analysis. Rather, the analysis must remain focused on one central question: Is the totality of the circumstances, including the specific characteristics of the suspect, the contextual factors, and the offence suspected, sufficient to reach the threshold of reasonable suspicion?

[40] The application of the reasonable suspicion standard cannot be mechanical and formulaic. It must be sensitive to the particular circumstances of each case. Characteristics identified by a police profile can be considered when evaluating reasonable suspicion; however, profile characteristics are not a substitute for objective facts that raise a reasonable

les policiers indiquent le crime précis en voie de perpétration ou identifient la substance illicite recherchée. Il suffit que leurs soupçons raisonnables portent sur la possession, le trafic ou la production de drogue ou d’articles interdits liés à la drogue.

(2) Le profilage et les soupçons raisonnables

[38] Les appelants dans le présent pourvoi et dans le pourvoi connexe, *MacKenzie*, ainsi que l’Association canadienne des libertés civiles (« ACLC ») et la Clinique d’intérêt public et de politique d’internet du Canada Samuelson-Glushko, intervenantes en l’espèce, demandent à la Cour de statuer que les profils des passeurs de drogue ne sauraient à eux seuls fonder des soupçons raisonnables. Ils affirment qu’en s’appuyant sur des profils on substitue le point de vue des policiers sur la situation à un examen judiciaire rigoureux. L’ACLC met en évidence plusieurs dangers liés au recours aux profils, même comme outils d’enquête permettant de repérer les personnes d’intérêt, par exemple une application incohérente ou la modification après coup par les policiers, l’incidence imprévue sur des tiers, le tort disproportionné causé aux minorités visibles et les stéréotypes.

[39] À mon avis, rien ne sert de parler de profilage comme source de soupçons raisonnables. Le terme lui-même évoque une évaluation fondée sur des stéréotypes et des facteurs discriminatoires qui n’ont pas leur place dans l’analyse servant à déterminer s’il existe des soupçons raisonnables. Cette analyse doit plutôt demeurer axée sur la question fondamentale, à savoir l’ensemble des circonstances — y compris les caractéristiques propres au suspect, les facteurs contextuels et l’infraction soupçonnée — suffit-il pour que le seuil des soupçons raisonnables soit atteint?

[40] L’application de la norme des soupçons raisonnables ne saurait être mécanique ni convenue. Elle est fonction des circonstances particulières de chaque espèce. Dans l’évaluation qu’elle emporte, les caractéristiques définies dans un profil policier peuvent être prises en considération; toutefois, elles ne sauraient se substituer à des faits objectifs

suspicion of criminal activity. Profile characteristics must be approached with caution precisely because they risk undermining a careful individualized assessment of the totality of the circumstances.

[41] In this case, the profiling alleged consisted of a set of factors that the officers had been taught to look for and had learned through experience to look for in order to detect drug couriers. Whether or not these factors give rise to reasonable suspicion will depend upon a police officer's reasons for relying on specific factors, the evidence connecting these factors to criminal activity, and the entirety of the circumstances of the case.

[42] It is not alleged in this case, or in the companion appeal, that any form of discriminatory profiling took place. Even though we are not concerned with these issues here, I caution that courts must be wary that factors arising out of police experience are not in fact stereotypical or discriminatory.

[43] Furthermore, the elements considered as part of the reasonable suspicion analysis must respect *Charter* principles. The factors considered under the reasonable suspicion analysis must relate to the actions of the subject of an investigation, and not his or her immutable characteristics.

[44] Nor should the exercise of *Charter* rights, such as the right to remain silent or to walk away from questioning made outside the context of a detention, provide grounds for reasonable suspicion. These rights become meaningless to the extent that they are capable of forming the basis of reasonable suspicion. Individuals should not have to sacrifice privacy to exercise *Charter* rights.

(3) Nature of Judicial Scrutiny

[45] The requirement for objective and ascertainable facts as the basis for reasonable suspicion permits an independent after-the-fact review by the court and protects against arbitrary state action. Under the *Collins* framework, the onus is on the

donnant naissance à des soupçons raisonnables quant à la perpétration d'une activité criminelle. Il convient d'envisager les caractéristiques du profil avec prudence, justement parce qu'il existe un risque qu'elles minent l'évaluation attentive de l'ensemble des circonstances, qui s'effectue au cas par cas.

[41] En l'espèce, le profil en question consistait dans un ensemble de facteurs propres aux passeurs de drogue d'après la formation et l'expérience des agents. Ces facteurs feront naître ou non des soupçons raisonnables en fonction des motifs qu'aura le policier d'en relever certains, des éléments rattachant ces facteurs à une activité criminelle et de l'ensemble des circonstances de l'affaire.

[42] Ni en l'espèce, ni dans le pourvoi connexe, on ne prétend qu'il y a eu profilage discriminatoire. Même si nous n'avons pas à trancher de telles questions, j'appelle les tribunaux à considérer avec prudence les facteurs issus de l'expérience policière pour déterminer s'ils constituent en fait des stéréotypes ou de la discrimination.

[43] Qui plus est, les éléments considérés dans l'analyse visant à déterminer s'il existe des soupçons raisonnables doivent respecter les principes de la *Charte*. Ils doivent porter sur les actes de la personne visée par l'enquête, et non sur ses caractéristiques immuables.

[44] L'exercice des droits garantis par la *Charte*, par exemple celui de garder le silence ou de mettre fin à un interrogatoire qui n'est pas tenu dans le contexte de la détention, ne saurait pas non plus fonder des soupçons raisonnables. Ces droits perdraient alors tout leur sens. Personne ne devrait avoir à sacrifier sa vie privée pour exercer les droits que lui garantit la *Charte*.

(3) La nature de l'examen par les tribunaux

[45] L'exigence de soupçons raisonnables fondés sur des faits objectivement discernables permet un examen judiciaire ultérieur et protège contre l'action arbitraire de l'État. Selon le cadre établi dans l'arrêt *Collins*, le ministère public a le fardeau

Crown to show that the objective facts rise to the level of reasonable suspicion, such that a reasonable person, standing in the shoes of the police officer, would have held a reasonable suspicion of criminal activity.

[46] Rigorous judicial scrutiny is an independent review that ensures that the suspicion relied on by the police is supported by factors that are objectively ascertainable, meaning that the suspicion is based on “factual elements which can be adduced in evidence and permit an independent judicial assessment”: P. Sankoff and S. Perrault, “Suspicious Searches: What’s so Reasonable About Them?” (1999), 24 C.R. (5th) 123, at p. 125. The constellation of facts must be based in the evidence, tied to the individual, and capable of supporting a logical inference of criminal behaviour. If the link between the constellation and criminality cannot be established by way of a logical inference, the Crown must lead evidence to connect the circumstances to criminality. This evidence may be empirical or statistical, or it may be based upon the investigating officer’s training and experience.

[47] An officer’s training and experience may provide an objective experiential, as opposed to empirical, basis for grounding reasonable suspicion. However, this is not to say that hunches or intuition grounded in an officer’s experience will suffice, or that deference is owed to a police officer’s view of the circumstances based on her training or experience in the field: see *Payette*, at para. 25. A police officer’s educated guess must not supplant the rigorous and independent scrutiny demanded by the reasonable suspicion standard. Evidence as to the specific nature and extent of such experience and training is required so that the court may make an objective assessment of the probative link between the constellation of factors relied on by the police and criminality. The more general the constellation relied on by the police, the more there will be a need for specific evidence regarding police experience and training. To the extent that specific evidence of the investigating officer’s experience and training supports the link the Crown asks the court to draw, the more compelling that link will be.

de prouver que les faits objectifs font naître des soupçons raisonnables, de sorte qu’une personne raisonnable à la place du policier aurait soupçonné raisonnablement la tenue d’une activité criminelle.

[46] L’examen judiciaire rigoureux sert à vérifier de manière indépendante que les soupçons sur lesquels les policiers se sont appuyés sont à leur tour fondés sur des facteurs qui sont objectivement discernables, c’est-à-dire que les soupçons reposent sur [TRADUCTION] « des éléments factuels susceptibles d’être présentés en preuve et permettent une appréciation judiciaire indépendante » (P. Sankoff et S. Perrault, « Suspicious Searches : What’s so Reasonable About Them? » (1999), 24 C.R. (5th) 123, p. 125). L’ensemble de faits sur lequel s’appuient les policiers doit donc reposer sur la preuve, être lié au suspect et pouvoir étayer une inférence logique quant à l’existence d’un comportement criminel. Si le lien entre l’ensemble et la criminalité ne peut être établi au moyen d’une inférence logique, le ministère public doit présenter une preuve — empirique, statistique ou tirée de la formation et de l’expérience de l’enquêteur — visant à l’établir.

[47] La formation et l’expérience du policier peuvent fournir un fondement expérientiel, plutôt qu’empirique, aux soupçons raisonnables. Toutefois, il ne s’ensuit pas que l’intuition fondée sur l’expérience du policier suffira ou que le point de vue de ce dernier sur les circonstances commandera la déférence (voir *Payette*, par. 25). Une supposition éclairée ne saurait supplanter l’examen rigoureux et indépendant qu’exige la norme des soupçons raisonnables. La nature et la teneur de la formation et de l’expérience doivent être démontrées pour permettre au tribunal de déterminer objectivement si le lien entre l’ensemble de facteurs circonscrit par la police et la criminalité est probant. Plus cet ensemble est général, plus il faudra fournir une preuve particulière de l’expérience et de la formation policières. Et plus cette preuve sous-tend le lien que le ministère public demande au tribunal d’établir, plus ce lien sera jugé convaincant.

(4) Reliability of Individual Dogs

[48] Concerns about the reliability and accuracy of a drug detection dog may arise at each level of the *Collins* inquiry. In *Kang-Brown*, the high accuracy of sniffer dogs that were properly trained and deployed was key to endorsing a reasonable suspicion standard for sniff searches. Further, in light of the consequences of a false indication, the reliability of a particular dog is also relevant to determining whether a particular sniff search was conducted reasonably in the circumstances: see *Kang-Brown*, at paras. 63-65.

[49] The consequences of a false indication by a sniffer dog can be severe. As discussed below, a positive indication for the presence of the smell of narcotics by a reliable dog may, depending on the circumstances, lead to reasonable and probable grounds for an arrest. If the police make use of a dog whose indications cannot be taken as a reliable sign of the presence of the smell of drugs, the false positive resulting from the dog's unreliable nose could lead to unnecessary arrests. Because dogs are trained to indicate for smell and thus may indicate even in the absence of drugs, validations in controlled settings are important, as it is only in such environments that a false positive can truly be identified.

[50] However, evidence of the searching dog's performance during past deployments is also relevant. Because the dog's ability is to detect the *smell* of drugs, a sniffer dog will be unable to distinguish between a smell emanating from contaminated items rather than actual drugs. If the smell of drugs from contaminated property becomes pervasive, the utility of an indication by smell is diminished. In environments with high contamination rates, a dog may be inherently unreliable; however, this should not count against a dog's performance record in general. Information about deployment may also demonstrate whether a particular dog is exceptionally prone to false alerts or detecting residual odours.

(4) La fiabilité du chien

[48] Il se peut que la fiabilité d'un chien détecteur de drogue suscite des questions à chacune des étapes de l'analyse fondée sur l'arrêt *Collins*. Dans l'affaire *Kang-Brown*, la grande fiabilité des chiens renifleurs bien dressés et utilisés a joué un rôle crucial dans la décision de la Cour d'accepter la norme des soupçons raisonnables pour ce genre de fouilles. En outre, vu les conséquences découlant d'un faux positif, la fiabilité du chien en question joue également pour déterminer si la fouille a été menée de manière abusive dans les circonstances (voir *Kang-Brown*, par. 63-65).

[49] Les conséquences d'un faux positif peuvent être graves. Comme nous le verrons, il se peut, selon les circonstances, que l'indication par un chien fiable qu'il a détecté l'odeur de stupéfiants donne au policier des motifs raisonnables et probables d'arrestation. Le recours à un chien dont l'odorat n'est pas fiable risque de mener à des arrestations inutiles. Les chiens étant dressés pour déceler l'odeur de la drogue et sont de ce fait susceptibles de la détecter même en l'absence de la substance, il est important de procéder à des validations dans un environnement contrôlé, car c'est seulement dans un tel environnement qu'il est véritablement possible de reconnaître un faux positif.

[50] Néanmoins, la preuve du rendement du chien renifleur au cours d'utilisations antérieures est également pertinente. Parce que le chien est dressé à détecter l'*odeur* de drogue, il sera incapable de distinguer celle qui émane d'articles contaminés de celle qui émane de la substance elle-même. Si des biens contaminés dégagent un effluve puissant, l'utilité d'une indication olfactive sera réduite. Dans un environnement présentant un taux de contamination élevé, il se peut qu'un chien ne soit pas fiable en raison de la nature même de ses compétences. Cependant, il ne faudrait pas que son dossier général de rendement en souffre. Le bilan des utilisations sur le terrain peut également indiquer si l'animal démontre une tendance exceptionnelle à donner de fausses alertes ou à détecter des odeurs résiduelles.

[51] A method of searching that captures an inordinate number of innocent individuals cannot be reasonable, due to the unnecessary infringement of privacy and personal dignity that an arrest would bring. Accordingly, both the capacity of the individual dog and the potential for the dog to be less accurate in certain settings due to environmental cross-contamination must factor into the contextual analysis of reliability. In order to assist in analyzing an individual dog's susceptibility for providing false positives, handlers should keep records of the dog and team's performance. Both the results of testing in a controlled setting and the results of deployment in the field are helpful in assessing the reliability of a positive indication as a sign of the actual presence of drugs.

[52] The appellant urges the Court to insist on national testing standards in order to ensure consistent reliability of sniffer dogs. However, while standards to regulate the use of sniffer dogs would be desirable, they must be implemented through legislative action by Parliament.

[53] In the absence of legislated standards, trial judges must continue to scrutinize the evidence before them in order to determine whether the particular sniff search meets the *Collins* criteria. Thus, even though *indicia* like a dog's past performance and the risk of cross-contamination can be relevant to determining a dog's reliability, no specific evidentiary requirements will apply mechanically to every case. The prosecution does not have to prove that the dog is infallible, just as it does not have to prove that an informer's tip is infallible.

[54] Dog reliability is also important to determining whether a positive indication provides the reasonable and probable grounds required to justify further police action. The reviewing court will make this determination armed with the results of the sniff search and evidence regarding the reliability of the dog. If a sniff search is conducted lawfully, the officer already has reasonable grounds

[51] Une méthode de fouille qui aurait pour effet de viser un nombre démesuré de personnes innocentes ne saurait être jugée non abusive, en raison de l'atteinte injustifiée à la vie privée et à la dignité personnelle qu'emporteraient les arrestations. Par conséquent, la capacité du chien et la possibilité de fiabilité réduite de l'animal dans certains environnements présentant une contamination croisée doivent entrer en ligne de compte dans l'analyse contextuelle de la fiabilité. Pour les aider à reconnaître les situations où leur animal risque d'indiquer des faux positifs, les maîtres-chiens devraient tenir des dossiers sur le rendement de ce dernier et de l'équipe. Tant les résultats d'essais dans un environnement contrôlé que ceux de l'utilisation sur le terrain sont utiles pour déterminer si une indication constitue un signe fiable de la présence réelle de drogue.

[52] L'appelant demande à la Cour d'exiger l'établissement de normes nationales de vérification pour assurer la fiabilité systématique de tous les chiens renifleurs. Toutefois, bien que des normes régissant le recours à ces chiens soient souhaitables, il appartient au législateur de légiférer en ce sens.

[53] En l'absence de normes légales, le juge de première instance doit, comme toujours, examiner attentivement la preuve dont il dispose pour déterminer si la fouille effectuée à l'aide d'un chien renifleur respecte le critère établi dans l'arrêt *Collins*. Par conséquent, même si certains *indices* — notamment le rendement passé d'un chien et le risque de contamination croisée — peuvent être pertinents quand il s'agit d'apprécier la fiabilité de l'animal, aucune exigence particulière en matière de preuve ne s'appliquera mécaniquement dans chaque affaire. La poursuite n'a pas à prouver l'infailibilité du chien, tout comme elle n'a pas à prouver l'infailibilité de l'information communiquée par un indicateur.

[54] La fiabilité du chien importe également pour savoir si l'indication qu'il a donnée fournit les motifs raisonnables et probables nécessaires à la prise d'autres mesures policières. Le tribunal siégeant en révision procédera à cette appréciation en s'appuyant sur le résultat de la fouille effectuée à l'aide du chien renifleur et sur la preuve relative à la fiabilité de ce dernier. Si la fouille est effectuée

to suspect criminal conduct based on the totality of the circumstances that existed prior to the sniff search. With all these elements in mind, the court must determine whether the *totality* of the circumstances reached the reasonable and probable grounds threshold. I note that a similar approach was recently endorsed by the Supreme Court of the United States in *Florida v. Harris*, 133 S.Ct. 1050 (2013), albeit in the context of the “probable cause” test, which is specific to American law.

(5) Actions Following Positive Indication

[55] Once a sniffer dog has delivered a positive indication, the police often seek consent for a verification search. Provided that the consent is properly sought and obtained, the search will respect s. 8 of the *Charter*: see *R. v. Borden*, [1994] 3 S.C.R. 145. Alternately, the police may determine that they have the grounds required under the *Charter* to proceed with a warrantless arrest, namely reasonable and probable grounds to believe that the accused has committed an offence: see *R. v. Storrey*, [1990] 1 S.C.R. 241, at pp. 249-51. If the arrest is validly made, the police may conduct a search incident to arrest in order to secure evidence that could be used at the accused’s trial: see *Caslake*. That is what occurred in this case, and in the majority of reported cases dealing with sniff searches occurring post-*Kang-Brown* in which the police conducted a search to confirm the presence of drugs.³

3 *R. v. Lozano*, 2013 ONSC 1871, [2013] O.J. No. 1432 (QL) (arrest then search); *R. v. Nguyen*, 2013 SKQB 36 (CanLII) (arrest then search); *Alberta v. Jarvis*, 2012 ABQB 602, 270 C.R.R. (2d) 154 (arrest then search); *R. v. Gowing*, 2012 ABPC 38, 532 A.R. 312 (arrest then search); *R. v. Earle*, 2012 NSPC 27, 315 N.S.R. (2d) 123 (arrest then search); *R. v. Krafczyk*, 2011 ABQB 107, 511 A.R. 211 (verification search, but the accused had fled the scene); *R. v. Imani*, [2012] N.B.J. No. 120 (QL) (Q.B. (T.D.)) (arrest then search); *R. v. Ryan*, 2011 NSSC 102, 300 N.S.R. (2d) 97 (arrest then search); *R. v. Hoy*, 2010 ABQB 575, 534 A.R. 58 (arrest then search); *R. v. Hoang*, 2010 BCPC 24, 206 C.R.R. (2d) 127 (verification search of the accused’s car conducted on consent, verification search of the accused’s person conducted incident to arrest).

en toute légalité, l’agent a déjà des motifs raisonnables de soupçonner une conduite criminelle, compte tenu de l’ensemble des circonstances préalables à la fouille. La cour doit prendre en considération ces éléments pour déterminer si, à la lumière de l’*ensemble* des circonstances, le seuil des motifs raisonnables et probables est atteint. Je note que la Cour suprême des États-Unis a récemment adopté cette approche dans l’arrêt *Florida c. Harris*, 133 S.Ct. 1050 (2013), quoique dans le contexte du critère de la « cause probable », propre au droit américain.

(5) Les mesures découlant d’une indication

[55] Après l’indication donnée par un chien renifleur, le policier demande souvent le consentement pour effectuer une fouille aux fins de vérification. Pourvu que le consentement soit dûment demandé et obtenu, la fouille est conforme à l’art. 8 de la *Charte* (voir *R. c. Borden*, [1994] 3 R.C.S. 145). Par ailleurs, les policiers peuvent conclure qu’ils ont les motifs exigés par cette dernière pour procéder à une arrestation sans mandat, c’est-à-dire des motifs raisonnables et probables de croire que l’accusé a commis une infraction (voir *R. c. Storrey*, [1990] 1 R.C.S. 241, p. 249-251). Si l’arrestation est valide, les policiers peuvent effectuer une fouille qui y est accessoire pour protéger les éléments de preuve susceptibles d’être présentés au procès de l’accusé (voir *Caslake*). C’est ainsi que les policiers ont procédé en l’espèce, tout comme dans la plupart des affaires répertoriées postérieures à *Kang-Brown* où l’utilisation d’un chien renifleur a mené à une fouille aux fins de vérification³.

3 *R. c. Lozano*, 2013 ONSC 1871, [2013] O.J. No. 1432 (QL) (arrestation suivie d’une fouille); *R. c. Nguyen*, 2013 SKQB 36 (CanLII) (arrestation suivie d’une fouille); *Alberta c. Jarvis*, 2012 ABQB 602, 270 C.R.R. (2d) 154 (arrestation suivie d’une fouille); *R. c. Gowing*, 2012 ABPC 38, 532 A.R. 312 (arrestation suivie d’une fouille); *R. c. Earle*, 2012 NSPC 27, 315 N.S.R. (2d) 123 (arrestation suivie d’une fouille); *R. c. Krafczyk*, 2011 ABQB 107, 511 A.R. 211 (fouille aux fins de vérification, mais l’accusé avait fui les lieux); *R. c. Imani*, [2012] N.B.J. No. 120 (QL) (B.R. (1^{re} inst.)) (arrestation suivie d’une fouille); *R. c. Ryan*, 2011 NSSC 102, 300 N.S.R. (2d) 97 (arrestation suivie d’une fouille); *R. c. Hoy*, 2010 ABQB 575, 534 A.R. 58 (arrestation suivie d’une fouille); *R. c. Hoang*, 2010 BCPC 24, 206 C.R.R. (2d) 127 (fouille aux fins de vérification de la voiture de l’accusé effectuée avec son consentement, fouille aux fins de vérification de l’accusé accessoire à l’arrestation).

[56] The intervener the CCLA argued that a positive indication for drugs by a sniffer dog should only justify a verification search, which is less intrusive than an arrest. This position echoes Binnie J.'s observation in *Kang-Brown* (at para. 101) and *A.M.* (at para. 14) that it would be preferable that no arrest be made until a verification search has confirmed the presence of drugs.

[57] Given the fact that the use of verification searches, as opposed to arrests, to respond to positive indications for drugs from sniffer dogs was not raised by the parties or addressed by the courts below, I would leave this issue for another day.⁴ However, it seems to me that the minimal intrusion on privacy interests posed by a sniff search was key to this Court's decision in *Kang-Brown* and *A.M.* to recognize a common law power to sniff search without prior judicial authorization. The same would not hold true for verification searches, which involve the actual inspection of a hiding place's contents and pose a greater interference with privacy interests. I note as well that Binnie J. did not speak for a majority of the Court in *Kang-Brown* and *A.M.*, and did not provide a basis for the new common law power regarding verification searches: see J. Shapiro, "Confusion and Dangers in Lowering the *Hunter* Standards" (2008), 55 C.R. (6th) 396, at p. 399.

[58] I would also observe that, in cases like this one, where the police deploy a sniffer dog to sniff an item in the absence of its owner, the police should generally provide notice to the owner of the item searched, even in the event of a negative indication. For example, it would be practical in such circumstances to simply add a tag or other notice to the item searched indicating that it had been sniffed

[56] L'ACLC, intervenante en l'espèce, fait valoir que l'indication donnée par le chien renifleur ne justifie qu'une fouille aux fins de vérification, moins envahissante qu'une arrestation. Sa thèse fait écho à l'observation du juge Binnie dans *Kang-Brown* (par. 101) et dans *A.M.* (par. 14) selon laquelle il serait préférable de ne procéder à aucune arrestation tant qu'une fouille aux fins de vérification n'aura pas permis de confirmer la présence de drogue.

[57] Comme les parties n'ont pas soulevé la question du recours à une fouille aux fins de vérification plutôt qu'à une arrestation par suite de l'indication donnée par le chien renifleur et que les juridictions inférieures n'ont pas statué sur celle-ci, je suis d'avis de remettre à une autre occasion une telle analyse⁴. Toutefois, il me semble que l'atteinte minimale à la vie privée qu'emporte la fouille effectuée au moyen d'un chien renifleur a compté pour beaucoup dans la décision de la Cour (dans les affaires *Kang-Brown* et *A.M.*) de reconnaître le pouvoir, issu de la common law, d'effectuer de telles fouilles sans autorisation judiciaire préalable. Il n'en irait pas de même de la fouille aux fins de vérification, qui emporte l'inspection physique du contenu d'une cache et porte davantage atteinte au droit à la vie privée. Je signale en outre que le juge Binnie ne s'exprime pas au nom des juges majoritaires dans les arrêts *Kang-Brown* et *A.M.* et qu'aucune source n'étaye ce nouveau pouvoir de common law relatif à la fouille aux fins de vérification (voir J. Shapiro, « Confusion and Dangers in Lowering the *Hunter* Standards » (2008), 55 C.R. (6th) 396, p. 399).

[58] Je signale également que, dans une affaire comme celle dont nous sommes saisis en l'espèce, où la police soumet à un contrôle par un chien renifleur un article en l'absence de son propriétaire, elle devrait généralement en aviser ce dernier, même si le chien n'a rien détecté. Par exemple, dans de telles circonstances, il serait pratique de fixer une étiquette à l'article ayant subi la fouille ou d'indiquer par

4 Subsequent to the hearing of this appeal, the Court of Appeal for Manitoba considered the constitutionality of verification searches in *R. v. Frieburg*, 2013 MBCA 40 (CanLII). In that case, the court determined, based on the reasons of Binnie J. in *Kang-Brown*, that verification searches pass constitutional muster.

4 Après l'audition du présent pourvoi par notre Cour, la Cour d'appel du Manitoba s'est penchée sur le caractère constitutionnel de la fouille aux fins de vérification dans *R. c. Frieburg*, 2013 MBCA 40 (CanLII). Se fondant sur les motifs du juge Binnie dans l'arrêt *Kang-Brown*, la Cour d'appel a jugé qu'une telle fouille résistait au contrôle de sa constitutionnalité.

for drugs by a dog trained to detect the smell of drugs. Indeed, as I have explained, the rigour of the reasonable suspicion standard is derived from the fact that it is based on objective facts that are subject to judicial review. Without a notice requirement, judicial review of a search conducted in the absence of an item's owner may not be possible. Further, as this Court noted in *R. v. Tse*, 2012 SCC 16, [2012] 1 S.C.R. 531, at paras. 82-84, after-the-fact notice of searches that are not subject to prior judicial authorization is an important safeguard against the abuse of such powers. However, the appellant in this case clearly had notice of the sniff search conducted in his absence.

B. *Application to This Case*

[59] The intervener the Attorney General of Ontario suggested that travellers do not have a reasonable expectation of privacy in their checked luggage in an airport setting, given the security screening that such luggage is subjected to as a condition of travel. However, as this Court has found in the past, an individual's reasonable expectation of privacy must be assessed contextually, and may vary depending on the nature of the circumstances: see *R. v. Patrick*, 2009 SCC 17, [2009] 1 S.C.R. 579, at paras. 26 and 38. The trial judge found that while the appellant was aware of and implicitly consented to the security screening that his bag would undergo, this did not undermine his reasonable expectation of privacy in his checked luggage with regard to general police investigations. The Court of Appeal agreed. The Crown does not contest these findings before this Court, and I see no reason to disturb them. Accordingly, the appellant's interests under s. 8 of the *Charter* were engaged in this case.

un autre moyen que l'article en question a été flairé par un chien dressé pour détecter l'odeur de drogue. En effet, comme nous l'avons vu, la rigueur de la norme des soupçons raisonnables tient au fait qu'elle est fondée sur des faits objectifs soumis au contrôle judiciaire. À défaut d'une exigence d'aviser le propriétaire, le contrôle judiciaire de la fouille effectuée en l'absence du propriétaire de l'article pourrait se révéler impossible. En outre, comme le signale la Cour dans *R. c. Tse*, 2012 CSC 16, [2012] 1 R.C.S. 531, par. 82-84, l'avis donné après les fouilles ne nécessitant pas une autorisation judiciaire préalable constitue une protection importante contre l'abus de ces pouvoirs. Or, l'appelant en l'espèce a manifestement été avisé de la fouille effectuée à l'aide d'un chien renifleur en son absence.

B. *Application à l'espèce*

[59] Le procureur général de l'Ontario, intervenant en l'espèce, laisse entendre que les voyageurs n'ont aucune attente raisonnable en matière de vie privée à l'égard de leur bagage enregistré à l'aéroport, étant donné le contrôle de sécurité auquel celui-ci est obligatoirement soumis préalablement au vol. Toutefois, comme le dit la Cour, l'attente raisonnable d'une personne au respect de sa vie privée s'apprécie selon le contexte et est susceptible de varier selon les circonstances (voir *R. c. Patrick*, 2009 CSC 17, [2009] 1 R.C.S. 579, par. 26 et 38). En l'espèce, le juge du procès a conclu que, bien que l'appelant ait eu connaissance du contrôle de sécurité que subirait sa valise et y ait consenti de manière implicite, ce fait ne mine aucunement l'attente raisonnable de l'appelant au respect de sa vie privée à l'égard de son bagage enregistré, dans le contexte d'une enquête policière générale. La Cour d'appel était du même avis. Le ministère public ne conteste pas ces conclusions devant la Cour, et je ne conçois aucune raison justifiant de les modifier. Par conséquent, les droits que l'art. 8 de la *Charte* garantit à l'appelant sont en cause en l'espèce.

(1) Reasonable Suspicion of the Police(a) *Standard of Review*

[60] A trial judge's determination as to whether a constellation of factors relied on by the police in making the decision to deploy a sniffer dog gave rise to a reasonable suspicion is a question of mixed fact and law. While a trial judge is owed deference in relation to her factual findings, whether those factual findings support reasonable suspicion is a question of law, and as such is reviewable on the correctness standard: see *R. v. Shepherd*, 2009 SCC 35, [2009] 2 S.C.R. 527, at para. 20.

(b) *The Constellation in This Case*

[61] The trial judge found that the appellant travelled alone, on an overnight one-way flight from Vancouver to Halifax, that he was one of the last passengers to purchase a ticket for this flight, and that he had paid for his ticket with cash. The trial judge considered potential innocent explanations for individual factors that could have been dealt with through further investigation, and found that absent such investigation, there could be no reasonable suspicion of involvement in drug crimes.

[62] The Court of Appeal found that the trial judge erred by looking at each factor individually. In their view, it was not determinative that each factor, viewed in isolation, was capable of innocent explanation. They found that the circumstances must be looked at in their totality, which precludes a divide and conquer approach that finds each factor individually equivocal.

[63] The appellant argues that none of the factors highlighted by the police in this case involve particularized evidence of criminal activity, and that they capture large groups of innocent travellers. He also submits that, in order to raise reasonable suspicion, the use of cash must be paired with particularized conduct that raises a reasonable suspicion of criminal activity.

(1) Les soupçons raisonnables de la policea) *Norme de contrôle*

[60] La conclusion du juge du procès quant à savoir si l'ensemble de facteurs étayant la décision de la police d'utiliser un chien renifleur donnait naissance à des soupçons raisonnables constitue une question mixte de fait et de droit. Bien que les conclusions de fait tirées par le juge commandent la déférence, la question de savoir si elles justifient ou non l'existence des soupçons raisonnables constitue une question de droit, assujettie à la norme de la décision correcte (voir *R. c. Shepherd*, 2009 CSC 35, [2009] 2 R.C.S. 527, par. 20).

b) *L'ensemble de faits en l'espèce*

[61] Le juge du procès a déterminé que l'appellant voyageait seul, qu'il avait acheté un billet aller simple sur la liaison de nuit Vancouver-Halifax, qu'il était l'un des derniers passagers à acheter son billet et qu'il avait payé comptant. Le juge a envisagé pour chacun de ces facteurs des explications innocentes qui auraient pu faire l'objet d'une enquête plus poussée et a conclu qu'à défaut d'une telle enquête, rien n'éveillait de soupçons raisonnables d'activité criminelle liée à la drogue.

[62] Selon la Cour d'appel, le juge du procès avait eu tort d'examiner chaque facteur individuellement. De l'avis des juges, il n'était pas déterminant que chaque facteur, considéré isolément, admît une explication innocente; il fallait plutôt examiner les circonstances dans leur ensemble, et non pas les compartimenter pour finir par conclure à la nature équivoque de chaque facteur.

[63] L'appellant fait valoir qu'aucun des facteurs relevés par la police en l'espèce ne constitue de preuve précise d'une activité criminelle et que ces facteurs visent de nombreux voyageurs innocents. Il soutient également que, pour susciter des soupçons raisonnables, il faut que le paiement comptant soit assorti d'un certain comportement qui éveille lui-même des soupçons raisonnables quant à une activité criminelle.

[64] The presence of reasonable suspicion must be assessed in the context of a specific case. The officers testified that no indicator by itself was determinative, that the decision to deploy a sniffer dog was made based on the following factors: (1) the travel was on a one-way ticket; (2) the flight originated in Vancouver; (3) the appellant was travelling alone; (4) the ticket was purchased with cash; (5) the ticket was the last one purchased before the flight departed; (6) the appellant checked one piece of luggage; (7) the flight was overnight; (8) the flight took place mid- to late-week; and (9) drug couriers prefer less expensive airlines, such as WestJet. In her cross-examination, Constable Ruby gave evidence that most people meeting this constellation had been proven to be drug couriers:

Q: Now, Constable Ruby, yesterday you testified about some indicators that you, as a police officer, look at when you go to look at the manifest.

A: Yes, sir.

Q: Okay? And including things like how the ticket was purchased; you know, whether it was last minute, walk-up, paid for cash, et cetera, right?

A: Yes, sir.

Q: Now would you agree with me that not all people who purchase tickets in this manner are drug couriers?

A: Yes, sir.

Q: Okay. Would you agree with me that, in fact, most probably are not?

A: I wouldn't be able to agree to that, because what I look at, and it's been my experience that when there's a cluster, and in — taken in their totality, our experience has been that those persons that we have spoken to, or end up in arresting, have been in possession of narcotics. [A.R., vol. V, at pp. 64-65]

The officers testified they had seen this constellation in Halifax, and knew that it was common to drug

[64] L'existence de soupçons raisonnables s'apprécie eu égard au contexte d'une affaire. Dans leur témoignage, les agents ont affirmé qu'aucun indice n'était déterminant en soi et que le recours au chien renifleur était fondé sur les facteurs suivants : (1) il s'agissait d'un voyage en aller simple; (2) le vol provenait de Vancouver; (3) l'appelant voyageait seul; (4) le billet a été acheté comptant; (5) le billet était le dernier acheté avant le départ; (6) l'appelant a enregistré un seul bagage; (7) il s'agissait d'un vol de nuit; (8) le vol s'effectuait en milieu de semaine ou vers la fin de la semaine; (9) les passeurs de drogue préfèrent les compagnies aériennes offrant des billets à prix réduit, comme WestJet. Au cours de son contre-interrogatoire, l'agente Ruby a affirmé qu'il s'est avéré que la plupart des gens réunissant cet ensemble de facteurs sont des passeurs de drogue :

[TRADUCTION]

Q : Alors, Agente Ruby, hier vous avez témoigné au sujet de certains indices que vous, en tant que policière, relevez lorsque vous examinez le manifeste des passagers.

R : Oui Monsieur.

Q : D'accord? Y compris des éléments comme l'achat du billet; vous savez, si c'était à la dernière minute, au comptoir, payé comptant, etc., c'est ça?

R : Oui Monsieur.

Q : Maintenant, êtes-vous d'accord avec moi pour dire que les gens qui achètent des billets de cette manière ne sont pas tous des passeurs de drogue?

R : Oui Monsieur.

Q : Bon. Êtes-vous d'accord avec moi pour dire qu'en fait, la plupart ne le sont probablement pas?

R : Je ne pourrais pas être d'accord là-dessus, puisque quand je regarde, et selon mon expérience lorsqu'il y a un ensemble, et dans — considérés dans leur ensemble, l'expérience nous dicte que ces personnes à qui nous avons parlé, ou que nous finissons par arrêter, avaient en leur possession des stupéfiants. [d.a., vol. V, p. 64-65]

Les agents ont témoigné avoir déjà vu cet ensemble de facteurs à Halifax et savaient qu'il s'appliquait

courriers. The constellation had been noted in their training and observed by them in their prior investigations. It was not common to innocent travellers. This assertion was not challenged on cross-examination.

[65] In some cases, evidence has been adduced that challenges the probative value of the factors relied upon by the police: see *R. v. Wong*, 2005 BCPC 24, 127 C.R.R. (2d) 342, or *R. v. Calderon* (2004), 188 C.C.C. (3d) 481 (Ont. C.A.). In those cases, a poor track record undermined the police's reliance on the particular constellations involved. As Professor Tanovich has noted, "evidence of an unreasonably high false positive rate can impact on the ability of the police to rely on a profile, for example, in establishing the requisite constitutional threshold for an investigative detention or search": "A Powerful Blow Against Police Use of Drug Courier Profiles" (2008), 55 C.R. (6th) 379, at p. 391. No such evidence was adduced in this case.

[66] The appellant also argues that the police had a duty to investigate in order to exclude innocent explanations for the constellation giving rise to reasonable suspicion, and that the Court of Appeal erred by considering the relatively new condition of his suitcase, as this factor was not known to the police at the time of the decision to deploy the sniffer dog.

[67] As I have outlined above, the police are not under a duty to investigate alternative explanations for constellations of factors giving rise to reasonable suspicion. However, they must account for information received between the time of the decision to deploy the sniffer dog and the performance of the sniff search. In this case, there was evidence that the police practice was to take such information into account, and that factors such as being met by grieving family members or a comment on the reservation record noting a bereavement rate would likely exclude an individual from suspicion. The police are also entitled to account for

couramment à des passeurs de drogue. Ils l'avaient vu dans leur formation et l'avaient remarqué dans leurs enquêtes antérieures. Un tel ensemble n'est pas caractéristique des voyageurs innocents. Cette déclaration n'a pas été contestée lors du contre-interrogatoire.

[65] Dans certains cas, des éléments ont été invoqués pour miner la valeur probante des facteurs relevés par la police (voir *R. c. Wong*, 2005 BCPC 24, 127 C.R.R. (2d) 342, ou *R. c. Calderon* (2004), 188 C.C.C. (3d) 481 (C.A. Ont.)). Dans ces affaires, des résultats antérieurs médiocres avaient déprécié l'ensemble de facteurs pris en compte par la police. Comme le souligne le professeur Tanovich, [TRADUCTION] « la preuve d'un taux déraisonnablement élevé de faux positifs peut nuire à la capacité des policiers de se fier à un profil, par exemple, pour établir le seuil constitutionnel nécessaire à une détention ou à une fouille aux fins d'enquête » (« A Powerful Blow Against Police Use of Drug Courier Profiles » (2008), 55 C.R. (6th) 379, p. 391). Aucun élément de preuve de ce genre n'a été présenté en l'espèce.

[66] L'appelant plaide également que les policiers avaient l'obligation de faire enquête pour écarter les explications innocentes relatives à l'ensemble de facteurs donnant naissance à des soupçons raisonnables. En outre, selon lui, la Cour d'appel a eu tort de tenir compte de l'état de sa valise, qui était relativement neuve, puisque ce facteur n'était pas connu des policiers quand ils ont décidé d'utiliser le chien renifleur.

[67] Je le répète, les policiers n'ont pas l'obligation d'enquêter sur les autres explications possibles à un ensemble de facteurs qui donne naissance à des soupçons raisonnables. Toutefois, ils doivent prendre en compte les renseignements obtenus entre la décision d'avoir recours à un chien renifleur et son exécution. En l'espèce, la preuve révèle que la police avait pour pratique de tenir compte de ces renseignements et que des facteurs comme le fait pour le suspect d'être accueilli par des proches endeuillés ou un commentaire versé au dossier de réservation indiquant un tarif de deuil laveraient vraisemblablement celui-ci de tout soupçon. Les

information obtained that strengthens the inference of reasonable suspicion.

[68] However, I agree that the Court of Appeal erred by including the relatively new condition of the suitcase in the constellation of factors. Constable Pattison and Constable Ruby did not remark on the relatively new condition of the appellant's luggage until *after* Boris's sniff search. The constellation of factors must be assessed *at the time* of the search and not after: see *Kang-Brown*, at para. 92.

[69] For these reasons, I agree with the Court of Appeal that the trial judge erred in principle in the manner of applying the reasonable suspicion standard by assessing the factors individually. Viewed in their entirety, the factors in this case justified a reasonable suspicion of illegal drug activity.

(2) Reasonableness of the Search

[70] The trial judge found that the search was unreasonable, as the sniffer dog used was not reliable. He focused on the fact that in this case, Boris indicated on a cooler containing no drugs, as well as the appellant's bag, finding this gave a reliability rating of 50 percent on the day in question. He also looked to actual deployments, including Boris's indications where no drugs were found. The trial judge concluded that the RCMP training assessment was unreliable, as it was not conducted by an independent agency and was not based on national standards. He was also of the view that the lack of instruction given by the RCMP to dog handlers with regard to the way in which a sniffer dog's reliability should be evaluated led to highly subjective accuracy assessments.

[71] The Court of Appeal overturned these findings, saying that they were based on speculation and misapprehension of the evidence.

[72] Corporal Daigle provided detailed evidence of Boris's validation performance and records of 178 deployments in the field from May 2003 to

policiers ont également le droit de prendre en compte des renseignements qui étayaient leurs soupçons raisonnables.

[68] Toutefois, je conviens que la Cour d'appel a eu tort de conclure que l'état de la valise appartenait à l'ensemble des facteurs. Ce n'est qu'*après* la fouille par Boris que les agents Pattison et Ruby ont remarqué l'état de la valise de l'appelant. Or, l'ensemble des facteurs doit être évalué *au moment* de la fouille et non après (voir l'arrêt *Kang-Brown*, par. 92).

[69] Pour ces motifs, je partage l'avis de la Cour d'appel selon lequel le juge du procès a commis une erreur de principe dans la manière d'appliquer la norme des soupçons raisonnables en appréciant les facteurs individuellement. Considérés dans leur ensemble, les facteurs en l'espèce justifiaient des soupçons raisonnables quant à une activité illicite liée à la drogue.

(2) Le caractère non abusif de la fouille

[70] Le juge du procès estimait que la fouille était abusive, puisque le chien renifleur n'était pas fiable. Il a porté une attention particulière au fait que Boris avait indiqué une glacière qui ne contenait aucune drogue en plus de la valise de l'appelant, concluant à un taux de fiabilité de 50 p. 100 ce jour-là. Il a également examiné le dossier de l'animal, y compris les faux positifs. Selon le juge du procès, l'évaluation par la GRC du dressage n'est pas probante, puisqu'elle n'est pas effectuée par un organisme indépendant et ne repose pas sur des normes nationales. Selon lui, les évaluations par les maîtres-chiens de la fiabilité de leur animal se révélaient très subjectives faute d'instructions provenant de la GRC sur la manière d'y procéder.

[71] La Cour d'appel a infirmé ces conclusions, qui étaient à son avis fondées sur des conjectures et une mauvaise appréciation de la preuve.

[72] Le caporal Daigle a fourni une preuve détaillée des contrôles de rendement de Boris et les relevés de 178 utilisations sur le terrain effectuées de

November 2005. As well, his evidence established that Boris had never given a “false sit” in a controlled environment. Through four validation exercises Boris was 99 percent accurate in detecting hidden drugs.

[73] Further, the evidence established that 87.6 percent of Boris’s indications for the smell of drugs led to the discovery of drugs or drug residue or involved circumstances that demonstrated the likely recent presence of drugs, such as admitted recent drug use by the owner of the luggage, the discovery of drug-related paraphernalia in the luggage, or the discovery of large amounts of cash (in amounts varying between \$9,000 and \$84,775).

[74] In my view, the trial judge erred in principle by discounting the RCMP’s controlled yearly validations and by failing to consider evidence of contamination from the recent presence of drugs that explained indications where no drugs were found, an explanation that would equally apply to the indication on the cooler in this case. As a result, and based on the record, the trial judge committed a palpable and overriding error in finding that Boris was only 50 percent reliable.

[75] I agree with the Court of Appeal that the trial judge erred and that Boris was reliable. Given the reliability of the dog, the sniff search was reasonable in these circumstances.

(3) Arrest Subsequent to Positive Indication

[76] The appellant was arrested following Boris’s positive indication on his bag. When the police officer arrested the appellant, he knew of the constellation of factors that led to the decision to deploy Boris, and that Boris had in fact indicated on the appellant’s bag. In this case, given the strength of the constellation, the reliability of the dog, and the absence of exculpatory explanations, the positive

mai 2003 à novembre 2005. Cette preuve a établi également que Boris n’avait jamais donné de faux positif dans un environnement contrôlé. À l’issue de quatre exercices de validation, le taux de fiabilité de Boris en ce qui a trait à la détection de drogue dissimulée s’établissait à 99 p. 100.

[73] En outre, la preuve démontrait que dans 87,6 p. 100 des cas où Boris avait détecté l’odeur de drogue, on avait découvert de la drogue, ou des résidus de drogue, ou on avait pu conclure à la probabilité de présence récente de drogue. Par exemple, le propriétaire du bagage avait avoué avoir consommé récemment, ou encore, des accessoires facilitant la consommation de drogues ou des sommes importantes en argent liquide (variant de 9 000 \$ à 84 775 \$) avaient été découverts.

[74] À mon avis, le juge du procès a commis une erreur de principe en rejetant la preuve des validations annuelles contrôlées auxquelles avait procédé la GRC et en faisant fi de la preuve sur les cas où l’article avait été contaminé par un contact récent avec de la drogue, qui explique pourquoi certaines indications ne s’étaient pas traduites par la découverte de substance illicite et pourrait expliquer en l’espèce l’indication donnée à l’égard de la glacière. Par conséquent, compte tenu du dossier, le juge du procès a commis une erreur manifeste et dominante en attribuant à Boris un taux de fiabilité de 50 p. 100.

[75] Je suis d’accord avec la Cour d’appel pour dire que le juge du procès a fait erreur et que Boris était fiable. Compte tenu de la fiabilité du chien renifleur, la fouille effectuée à l’aide de celui-ci n’était pas abusive en l’espèce.

(3) L’arrestation subséquente à l’indication

[76] L’appelant a été arrêté après que Boris a indiqué avoir détecté l’odeur de drogue émanant de sa valise. Le policier qui l’a appréhendé connaissait l’ensemble de facteurs qui avait mené à la décision d’utiliser Boris et savait que le chien avait indiqué la valise de l’appelant. En l’espèce, vu la force de l’ensemble, la fiabilité du chien et l’absence d’explications disculpatoires, l’indication a eu pour

indication raised the reasonable suspicion generated by the constellation to the level of reasonable and probable grounds to arrest the appellant.

V. Conclusion

[77] The police had a reasonable suspicion that they would discover evidence of a drug-related crime in Mr. Chehil's luggage. The sniff search was conducted reasonably. It is unnecessary to consider the fresh evidence tendered by the Crown in light of my conclusion and I would dismiss the appeal.

Appeal dismissed.

Solicitors for the appellant: Garson MacDonald, Halifax.

Solicitor for the respondent: Public Prosecution Service of Canada, Halifax.

Solicitor for the intervener the Attorney General of Ontario: Attorney General of Ontario, Toronto.

Solicitors for the intervener the Canadian Civil Liberties Association: Osler, Hoskin & Harcourt, Toronto.

Solicitor for the intervener the Samuelson-Glushko Canadian Internet Policy and Public Interest Clinic: University of Ottawa, Ottawa.

Solicitors for the intervener the British Columbia Civil Liberties Association: McCarthy Tétrault, Vancouver.

effet de transformer les soupçons raisonnables découlant de l'ensemble de facteurs en motifs raisonnables et probables d'arrestation.

V. Conclusion

[77] Les policiers avaient des soupçons raisonnables qu'ils découvrirait la preuve d'une activité criminelle liée à la drogue dans le bagage de M. Chehil. La fouille à l'aide du chien renifleur n'a pas été effectuée d'une manière abusive. Vu ma conclusion, il n'est pas nécessaire d'examiner les nouveaux éléments de preuve présentés par le ministère public. Je suis d'avis de rejeter le pourvoi.

Pourvoi rejeté.

Procureurs de l'appelant : Garson MacDonald, Halifax.

Procureur de l'intimée : Service des poursuites pénales du Canada, Halifax.

Procureur de l'intervenant le procureur général de l'Ontario : Procureur général de l'Ontario, Toronto.

Procureurs de l'intervenante l'Association canadienne des libertés civiles : Osler, Hoskin & Harcourt, Toronto.

Procureur de l'intervenante la Clinique d'intérêt public et de politique d'internet du Canada Samuelson-Glushko : Université d'Ottawa, Ottawa.

Procureurs de l'intervenante l'Association des libertés civiles de la Colombie-Britannique : McCarthy Tétrault, Vancouver.

Please see in particular para. 31

NOVA SCOTIA COURT OF APPEAL

Citation: *R. v. Cross*, 2006 NSCA 30

Leave to appeal refused: 2006 CanLII 29077 (SCC)

Date: 20060309

Docket: CAC 251898

Registry: Halifax

Between:

Her Majesty the Queen

Appellant

v.

James Everett Cross

Respondent

Judges: MacDonald, C.J.N.S.; Roscoe and Bateman, J.J.A.

Appeal Heard: February 13, 2006, in Halifax, Nova Scotia

Held: Appeal allowed per reasons for judgment of Bateman, J.A.;
MacDonald, C.J.N.S. and Roscoe, J.A. concurring.

Counsel: Daniel A. MacRury, Q.C., for the appellant
Roger Burrill, for the respondent

Reasons for judgment:

[1] This is an appeal from the Order of Judge James H. Burrill of the Provincial Court refusing an application by the Crown for an order requiring Mr. Cross to comply with the requirements of the **Sex Offender Registration Information Act** which are contained in S.C. 2004, c. 10. The decision is reported as **R. v. Cross** (2005), 235 N.S.R. (2d) 93; N.S.J. No. 263 (Q.L.).

BACKGROUND:

[2] The facts and issues before the Court were summarized by the trial judge as follows:

[2] James Everett Cross, was found guilty of assault (S. 266(a) C.C.), sexual assault (S. 271 C.C.) and unlawful confinement (279(2) C.C.). The offences occurred on May 7, 2002, he was convicted on June 23, 2004 and after several adjournments the matter was before me for sentencing on January 6, 2005. Mr. Cross was sentenced to 42 months imprisonment. The Crown sought an order under the **S.O.I.R.A.**, but the defence objected on the basis that it would violate s. 11(i) of the **Canadian Charter of Rights and Freedoms**.

...

[4] Section 11(i) of the **Charter** provides that:

Any person charged with an offence has the right
(i) if found guilty of the offence and if the punishment for the offence has been varied between the time of commission and the time of sentencing, to the benefit of the lesser punishment.

[5] Obviously the offences committed by Mr. Cross occurred prior to the proclamation of the **S.O.I.R.A.** The issue is whether the requirements of the legislation constitute a "punishment" within the meaning of s. 11(i).

[6] The defence argues that they do and that s. 11(i) exempts Mr. Cross from a registration order. The Crown argues that the requirements of a registration order made pursuant to the **S.O.I.R.A.** do not constitute a "punishment" and, therefore, do not violate section

11(i). The Crown asks the court to impose a registration order in Form 52.

(Emphasis added)

[3] "S.O.I.R.A." in the extract above refers to the **Sex Offender Information Registration Act**. That **Act** creates a sex offender registry, specifies the information to be collected in the registry and addresses the control of that information. Related sections of the **Criminal Code** authorize an application for a sex offender registration order and provide an exemption provision. In this judgment I will use **SOIRA** to refer, collectively, to the **Act** and the companion provisions of the **Criminal Code**. The judge concluded that a **SOIRA** order is a "punishment" and could not be made in relation to Mr. Cross as it would violate s.11(i) of the **Charter**:

11. Any person charged with an offence has the right

...

(i) if found guilty of the offence and if the punishment for the offence has been varied between the time of commission and the time of sentencing, to the benefit of the lesser punishment.

[4] There is a single issue on this appeal. The Crown says the judge erred at law in ruling the order under s.490.012 of the **Criminal Code** is "punishment" within the meaning of s.11(i) of the **Canadian Charter of Rights**. The standard of review is correctness.

[5] For the reasons set out below, it is my view that the appeal must be allowed.

ANALYSIS:

[6] The **SOIRA** sections of the **Code** which are relevant here provide:

490.012 (1) A court shall, on application of the prosecutor, make an order in Form 52 requiring a person to comply with the *Sex Offender Information Registration Act* for the applicable period specified in subsection 490.013(2), (3) or (4) as soon as possible after it imposes a sentence on the person for an offence referred to in paragraph (a), (c), (d) or (e) of the definition "designated offence" in subsection

490.011(1), or renders a verdict of not criminally responsible on account of mental disorder for such an offence.

...

(4) The court is not required to make an order under this section if it is satisfied that the person has established that, if the order were made, the impact on them, including on their privacy or liberty, would be grossly disproportionate to the public interest in protecting society through the effective investigation of crimes of a sexual nature, to be achieved by the registration of information relating to sex offenders under the *Sex Offender Information Registration Act*.

[7] A **SOIRA** order imposes an ongoing obligation on an offender to provide contact information to the authorities for lengthy periods after sentence. I will detail the informational requirements later in this judgment.

[8] On this appeal counsel concede that the **SOIRA** legislation provides for an order in relation to certain offenders who were convicted prior to the coming into force of the **Act**; in the case of Mr. Cross, an offender who had not yet been sentenced. (In **R. v. Aberdeen**, [2005] A. J. No.1062 (Q.L.)(Prov.Ct.) and **R. v. Rouschop**, [2005] O.J. No. 1336 (Q.L.)(Ont .Ct. J.) the courts concluded that the provisions were intended to operate retrospectively (at paras. 17 - 18 of **Aberdeen**)). The retrospective effect is said to flow by implication from the combined effect of ss. 490.011(1)(c) and (d) and 490.012 of the **Criminal Code**. It would be difficult to conceive of more complex wording to express a retrospective intent.

[9] Mr. Cross does not contend that a **SOIRA** order would violate his liberty (s. 7) or privacy (s. 8) rights under the **Charter**. The only issue is whether s. 11(i) of the **Charter** precludes such an order.

[10] Thus, while the constitutionality of the **SOIRA** legislation is not raised directly here, the meaning of “punishment” in s. 11(i) of the **Charter** must be interpreted using the constitutional jurisprudence. If a **SOIRA** order is, indeed, “punishment”, it cannot be made in relation to any offender who committed the crime before the legislation came into force.

The Decision of the Application Judge:

[11] Burrill, J. was persuaded that a **SOIRA** order was punitive in effect. He found such an order to be “a severe infringement of the individual’s liberty”. He said:

[23]. . . The requirements of a registration order are, in my opinion, a severe infringement of the individual's liberty which is undiminished by attempting to call it an administrative consequence of conviction rather than a punishment. In the case at bar, Mr. Cross would be required to comply with the order for twenty (20) years. He would have to report in person, at least annually, to the Registration Center closest to his primary residence. I am advised that there are eight Registration Centers in Nova Scotia and depending on the location of his residence this could require the offender to undertake significant travel in order to meet his reporting obligations. While the order imposes no geographical restrictions nor it does prevent the offender from engaging in any particular activity, it does place restrictions on the activities that they can engage in without providing information to the state. The offender can not, for example, take a vacation for more than fifteen (15) days unless they provide what is essentially their itinerary to the authorities.

[24] It is not one, but a combination of the requirements under the **S.O.I.R.A.** that cause me to conclude that a registration order is indeed punitive in effect. That fact combined with the fact that the requirements are imposed on individuals who have been convicted of an index offence and no one else (unlike a s. 810.1 order which can be imposed on anyone regardless of conviction) cause me to conclude that a registration order it is indeed a "punishment" within the meaning of 11(i) of the **Charter**. To categorize it as something else is, in my opinion, an attempt to draw a distinction where none exists.

[12] In reaching this conclusion the judge adopted the following definition of punishment:

[21] The fact that the registration order is not part of the formal sentence is not dispositive. I agree with the court in **Lambert**, (supra), [**R. v. Lambert** (1994), 93 C.C.C. (3d) 88 (Nfld. C.A.) at p. 93] that "punishment" is not confined to the narrow legal definition that

corresponds exclusively to the formal sentence of the court. Considering the authorities to which I have referred I conclude that "punishment" within the meaning of section 11(i) also means any deprivation or hardship that places a limit on the future behaviours of an offender and severely impairs restricts their liberty.

(Emphasis added)

The SORIA Reporting Requirements:

[13] The obligations on a sex offender who is subject to a **SOIRA** order are set out in ss. 4 through 6 of the **Act**. Summarizing, the offender must report to a registration centre within 15 days of making the order or release from custody and not leave Canada until he has done so. On that reporting he must provide his full name and any alias(s) used; date of birth; gender; the address and telephone number of his main and any secondary residence; his employment address; if enrolled in an educational institution, that address; any mobile telephone number; his height, weight and any distinguishing marks.

[14] Any change of name or residence must be updated within 15 days and, in any event, the offender must update all information, in person, annually.

[15] If an offender will be away from his main or secondary residence for more than 15 consecutive days, but within Canada, he must advise the registration centre by registered mail (or in person) the locations where he will be staying and his estimated departure and return dates. This must be done not later than 15 days before departure. For a trip outside of Canada the requirements are the same, however, the intended addresses of his stay need not be provided. In either event the offender is to advise the registration centre of the actual date of his return to Canada within 15 days.

[16] The person at the registration centre to whom the offender is reporting is entitled to record observable identifying characteristics and can require the offender to submit to a photograph.

[17] Failure to comply with the above obligations is an offence punishable by a maximum fine of \$10,000 or up to six months imprisonment for the first offence and a fine or an increased term of imprisonment for a subsequent offence (s. 490.031 **Criminal Code**).

[18] The offender's obligation to provide the information is for 10 years, 20 years or life, depending upon the nature of the offence (s. 490.013 **Criminal Code**), subject to the right to apply for termination at the half point of the term of the order or after 20 years if the term is life (s. 490.015 **Criminal Code**).

The Nature of a SOIRA Order:

[19] The starting point in this inquiry is to ascertain the purpose, principles and effect of the legislation in question. The purpose and principles of the **SOIRA** are set out in the **Act** as follows:

2. (1) The purpose of this Act is to help police services investigate crimes of a sexual nature by requiring the registration of certain information relating to sex offenders.
- (2) This Act shall be carried out in recognition of, and in accordance with, the following principles:
 - (a) in the interest of protecting society through the effective investigation of crimes of a sexual nature, police services must have rapid access to certain information relating to sex offenders;
 - (b) the collection and registration of accurate information on an ongoing basis is the most effective way of ensuring that such information is current and reliable; and
 - (c) the privacy interests of sex offenders and the public interest in their rehabilitation and reintegration into the community as law-abiding citizens require that
 - (i) the information be collected only to enable police services to investigate crimes that there are reasonable grounds to suspect are of a sexual nature, and
 - (ii) access to the information, and use and disclosure of it, be restricted.

[20] Counsel have not suggested that the **SOIRA**'s purpose is broader than that stated above. Mr. Cross's focus is on the effect of the order. On this appeal we must decide whether the judge erred at law in finding that a **SOIRA** order has a

punitive effect. This requires that the effect of such orders be assessed objectively, in accord with basic **Charter** principles.

[21] Interpretation of the guaranteed rights and freedoms is to be purposive, informed by the **Charter's** broad intent which is to protect individual rights and liberties. While narrow and technical interpretations of those rights are to be avoided, the interpretation must accord with practical considerations and not become too abstract or theoretical. (**R. v. Big M Drug Mart Ltd.**, [1985] 1 S.C.R. 295; S.C.J. No. 17 (Q.L.) at p. 359.

[22] The meaning of a right or freedom guaranteed by the **Charter** is determined in the light of the interests it was meant to protect (**Hunter v. Southam**, [1984] 2 S.C.R. 145). As Dickson, C.J. wrote for the majority of the Court in **R. v. Big M Drug Mart Ltd.**, *supra* at p. 344:

. . . the purpose of the right or freedom in question is to be sought by reference to the character and the larger objects of the *Charter* itself, to the language chosen to articulate the specific right or freedom, to the historical origins of the concepts enshrined, and where applicable, to the meaning and purpose of the other specific rights and freedoms with which it is associated within the text of the *Charter*. The interpretation should be, as the judgment in *Southam* emphasizes, a generous rather than an linguistic one, aimed at fulfilling the purpose of the guarantee and securing for individuals the full benefit of the *Charter's* protection. At the same time it is important not to overshoot the actual purpose of the right or freedom in question, but to recall that the *Charter* was not enacted in a vacuum, and must therefore, as this Court's decision in *Law Society of Upper Canada, v. Skapinker* ... illustrates, be placed in its proper linguistic, philosophic, and historical contexts.

[23] The meaning of "punishment" within the **Charter** has been analyzed in various contexts. For example, in **Regina v. S.B.** (1983), 146 D.L.R. (3d) 69; B.C.J. No. 2273 (Q.C.) (B.C.C.A.), the court considered whether a nine year confinement in an industrial school under the **Juvenile Delinquents Act**, R.S.C. 1970, c. J-3 constituted "punishment", the challenge there being under ss. 11(f) and (h) of the **Charter**. The court commented at pp. 71-72 as follows (*per* Anderson, J.A.):

The word "punishment" is defined in Murray's New English Dictionary at p. 1604 as follows:

The infliction of a penalty in retribution for an offence; that which is inflicted as a penalty; a penalty imposed to insure the application and enforcement of a law.

The word "punish" is defined at p. 1603 as follows:

To cause to suffer for an offence; to subject to judicial chastisement as retribution or requital or as a caution against further transgressions.

See also Shorter Oxford English Dictionary, pp. 1708 and 1709, where the meaning of the words "punish" and "punishment" is defined in identical terms.

. . .

It should also be noted that punishment, in the criminal law sense, includes public condemnation of the offender. Another important concern of the courts in "punishing" or inflicting a penalty on an offender is deterrence to others. . . .

[24] In **R. v. T.R. (No. 2)** (1984), 7 D.L.R. (4th) 263; A.J. No. 1 (Q.L.) (Alta.Q.B.) McDonald, J., also considered whether the **Juvenile Delinquents Act** prescribed "punishment" in the context of a s. 11(h) **Charter** challenge. In an earlier, related, decision (reported as **R. v. T.R.**, [1983] A.J. No. 483 (Q.L.) at ¶7) he expressed disagreement with the approach of the court in **R. v. S.B.**, *supra*, where it was held that the legislative purpose alone determines whether a provision is "punishment". In endorsing an objective analysis he said in relation to punishment at pp. 268-269:

. . . All sentences of imprisonment are "punishment" for the purpose of s. 11(h), even if the sentencing judge was moved by reformatory or rehabilitative considerations. All fines are "punishment" even if the accused is rich and will scarcely notice the impact. Why is this so in the case of adult crime? The answer lies in identifying the characteristics of "punishment". One characteristic of "punishment", obviously not illustrated by the imposition of a fine but certainly illustrated by the imposition of a term of imprisonment, is that the accused is deprived of his liberty — his freedom to associate with his family and friends and to carry on his normal employment and other activities. He is, in the words of Professor Rawls ("Two Concepts of Rules", in Acton *The Philosophy of Punishment* (1969),

p. 104 at p. 111, quoted in J.W. Harris, *Legal Philosophies* (1980), p. 52) "said to suffer punishment whenever he is legally deprived of some of the normal rights of a citizen on the ground that he has violated a rule of law ..."

A second characteristic of "punishment" is found in the first element of the definition of "punishment" by H.L.A. Hart, in his *Punishment and Responsibility*, (1968), p. 4. His definition, although published first only in 1968, is commonly referred to now in English, Canadian and American literature on the theory of punishment. Hart's first element in the definition is: "It must involve pain or other consequences normally considered unpleasant." Other authorities which include the same, or a similar, element in their definition of "punishment" are cited by V.J. Bourke, "The Ethical Justification of Punishment," 22 Am. J. Jur. 1, at pp. 2-3 (1977). Involuntary confinement in a prison or jail, and even the payment of a fine, are illustrations of consequences normally considered unpleasant. A third characteristic of "punishment" is that the penalty, like the conviction itself, carries with it a degree of stigmatisation. This is inherent in the public nature of the adult criminal adjudicatory process.

[25] The meaning of punishment in the context of s. 11(i) of the **Charter** was considered by Steele, J.A. in **R. v. Lambert** (1994), 93 C.C.C. (3d) 88; N.J. 328 (Q.L.) (Nfld. C.A.). The court held an order requiring the appellant to serve one-half of his sentence before parole eligibility (s. 741.2 of the **Criminal Code**) constituted a greater "punishment". In so deciding Steele, J.A. wrote at p. 93:

Section 741.2 uses the term "sentence" without any reference to "punishment". In s. 11(i) of the Charter, however, Parliament selected the term "punishment" that appears in the phrases "*punishment* for the offence" and "benefit of the lesser *punishment*". I can only assume that in drafting s. 11(i) of the Charter, the term "*punishment*" was intentionally chosen.

As I construe s. 11(i) of the Charter, "punishment" means or includes the formal sentence of the court (which is the punishment inflicted for the commission of the offence), but in addition, also means or includes any other "severe handling" or "harsh or injurious treatment". The term "punishment" appearing in s. 11(i) of the Charter is not confined to the narrow legal definition that corresponds exclusively to

the formal sentence of the court. Punishment may also encompass any coercive or punitive treatment likely to discourage or deter an accused (and sometimes others) from a repetition of criminal activity.

(Emphasis added)

[26] In **R. v. Wigglesworth**, [1987] 2 S.C.R. 541; S.C.J. No. 71 (Q.L.), the Court was called upon to decide whether s. 11(h) of the **Charter** was applicable to certain R.C.M.P disciplinary consequences so as to preclude a criminal trial for the same conduct for which the member had been internally disciplined.

[27] Section 11(h) protects an individual from not being tried or punished twice for the same offence (double jeopardy):

11. Any person charged with an offence has the right

...

(h) if finally acquitted of the offence, not to be tried for it again and, if finally found guilty and punished for the offence, not to be tried or punished for it again . . .

[28] The R.C.M.P. officer in **Wigglesworth** had allegedly assaulted a prisoner in custody. He was charged with a major service offence under the **Royal Canadian Mounted Police Act**, R.S.C. 1970, c. R-9. The officer in question was fined \$300, although the maximum penalty for such an offence was one year in prison. He was subsequently charged with common assault under the **Criminal Code** and succeeded in having the Information quashed by the trial judge. This was upheld on appeal. On further appeal to the Supreme Court of Canada the question was whether the proceeding under the **R.C.M.P. Act** amounted to a “trial” within s. 11(h) which would preclude the subsequent **Criminal Code** prosecution. The Court looked at the **R.C.M.P. Act** to determine whether, under the discipline code, the officer faced “a true penal consequence”, answering that question in the affirmative. The appeal was allowed, however, with the majority holding that the proceeding under the **R.C.M. P. Act** and that under the **Criminal Code** were not “the same offence” within s. 11(h).

[29] Wilson, J. confirmed that the rights guaranteed by s. 11 of the **Charter** are available to persons prosecuted by the State for public offences involving punitive sanctions (at p. 554), that is criminal or quasi-criminal proceedings and those giving rise to penal consequences (at p. 558).

[30] Helpful here is her consideration of whether the R.C.M.P. proceeding was “in respect of a criminal or penal matter”. She rejected an analysis which was based solely upon the harshness of the sanction (p. 559 “There are many examples of offences which are criminal in nature but which carry relatively minor consequences following conviction. ...”) and, instead, asked whether consequences were “truly penal in nature” (*per* Wilson, J. for the majority, at p. 560 S.C.R.:

This is not to say that if a person is charged with a private, domestic or disciplinary matter which is primarily intended to maintain discipline, integrity or to regulate conduct within a limited private sphere of activity, he or she can never possess the rights guaranteed under s. 11. Some of these matters may well fall within s. 11, not because they are the classic kind of matters intended to fall within the section, but because they involve the imposition of true penal consequences. 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. ...

[31] This lends support to the objective analysis adopted by McDonald, J. in **R. v. T.R., supra**. The nature of the consequence is initially assessed in the context of the purpose of the measure in question, which in **Wigglesworth** was the regulation of conduct within the R.C.M.P. Notwithstanding its stated purpose, if the sanction is of such magnitude that it appears to be directed at redressing a wrong done to society it will be considered “a true penal consequence”.

[32] In **R. v. Shubley**, [1990] 1 S.C.R. 3; S.C.J. No. 1 (Q.L.), in determining whether internal prison disciplinary proceedings engaged the double jeopardy section of the **Charter**, McLachlin, J. (as she then was), for the majority, considered the nature of the proceeding and concluded that the purpose of the disciplinary proceedings was not “to mete out criminal punishment, but to maintain order in the prison.” (p. 20). She endorsed Wilson, J.’s caution in **Wigglesworth, supra**, against too broad an application of s. 11 (at p. 23).

[33] While in **Wigglesworth** and **Shubley** the Court was concerned with an over-expansive interpretation of “offence” as used in the opening words of s. 11, I

would suggest that the same concern applies to assigning an overly broad meaning to “punishment” in s. 11(i). This aligns with Chief Justice Dickson’s caution in **Big M, supra**, (at para. 21 above) “not to overshoot the actual purpose of the right or freedom in question” and to ensure that the interpretation accords with practical considerations.

[34] In his paper “Section 487.055 The Retroactive DNA Data Bank Provisions: A Survey of Constitutional Issues” (Paper presented to the Fifth Annual Canadian Symposium on Forensic DNA Evidence: Pushing the Limits, November 1, 2003) [QL, PDNA/RP-012], John McInnes notes that many conviction-based measures which have significant negative ramifications for an offender, are held to be non-punitive:

¶ 25 Most forms of *ex post facto* treatment that have been considered under s. 11(h) have not been viewed as "punishment". Deportation following conviction is not a further "punishment" within the meaning of s. 11(h): *Re Gittens and the Queen* [[1983] 1 F.C. 152, 68 C.C.C. (2d) 438 (F.C.T.D.)]; *Hurd v. Canada (Minister of Employment and Immigration)* [[1989] 2 F.C. 594 (C.A.)]. A license suspension under provincial law following a conviction for impaired driving was not a "punishment" but rather a "civil disability flowing from conviction": *Johnston v. Superintendent of Motor Vehicles et al.* [[1987] B.C.J. No. 44, 46 M.V.R. 59 (B.C.S.C.)] Assessment of interest and administrative penalties by Revenue Canada for income earned from misappropriated funds when the funds had already been the subject of a fine and restitution order in criminal proceedings, was not "punishment" within the meaning of s. 11(h): *Taylor v. Canada* [[1995] T.C.J. No. 414].

[35] In the **Johnston** case referred to in the above extract, the defendant had been convicted of impaired driving and was prohibited from operating a motor vehicle under s. 242(1)(a) of the **Criminal Code** for three months. Under s.92(2) of the provincial **Motor Vehicle Act** he was prohibited from driving in British Columbia for a period of six months. He argued that the provincial prohibition was double punishment contrary to s. 11(h) of the **Charter**. Wood, J. (pp. 64-65 M.V.R.), citing **Provincial Secretary of Prince Edward Island v. Egan**, [1941] S.C.R. 396, concluded that the prohibition was not double punishment. In so doing he adopted a restrictive definition of “punishment” so as to balance the **Charter** ‘s

protection of the individual against the state's legitimate need to address societal interests which are affected by a conviction:

Secondly, I do not think that the framers of the Charter intended to include within the concept of punishment for an offence, as described in s. 11(h), the civil disabilities that may consequentially flow from the conviction of such an offence. The range of punishment which is the subject-matter of s. 11(h) is unquestionably broader than that which Rinfret, J. had under consideration in the *Egan* case, since he was there concerned only with the alleged invasion of the federal power to legislate in relation to the criminal law. It is not necessary to attempt any definition of the limits of that range in this case. Suffice it to say that in my view it would be unreasonable to interpret s. 11(h) in such a way that the imposition of legislatively sanctioned punishment upon conviction for a criminal, or even a quasi-criminal, offence would necessarily foreclose the concurrent or subsequent imposition of civil disabilities resulting from the consequential application of legislation intended to effect some object or purpose other than that served by the legislation creating the offence.

As noted earlier, there are many consequences that reasonably and necessarily ought to flow from a person's conviction of an offence. Those consequences are as many and as varied as the different individual and societal interests which are affected by such conviction. Such interests include those which society seeks to protect through legislation, the effect of which is often to give rise to civil disabilities affecting the person convicted. Unless the concept of punishment in s. 11(h) of the Charter is given a restrictive interpretation, those interests will necessarily be thrown into conflict with the result that some may even be compromised. Any interpretation of the Charter which produces that result should be avoided.

[36] In **Cunningham v. Canada**, [1993] 2 S.C.R. 143 the constitutionality of changes to the **Parole Act**, R.S.C. 1985, c. P-2 were at issue. The facts are summarized as follows at p. 143:

In 1981 the appellant was sentenced to 12 years' imprisonment for manslaughter. Under the *Parole Act* in force at the time, he was entitled to be released on mandatory supervision after serving approximately two-thirds of his sentence, provided that he was of

good behaviour. In 1986 the Act was amended to allow the Commissioner of Corrections, within six months of the "presumptive release date", to refer a case to the National Parole Board where he has reason to believe, on the basis of information obtained within those six months, that the inmate is likely, prior to the expiration of his sentence, to commit an offence causing death or serious harm. The Parole Board may, if it sees fit, deny release of the inmate. Shortly before his release date, the appellant received a notice that the Commissioner had decided to seek his continued detention. Following a hearing, he was ordered to be detained until his sentence expired, subject to annual reviews.

[37] The issue was whether the 1986 amendment to the **Parole Act** amounted to a denial of the appellant's liberty contrary to the principles of fundamental justice under s. 7 of the **Charter**. The Court concluded that Mr. Cunningham had been deprived of a liberty interest but in accord with the principles of fundamental justice. The Court commented, however, that every alleged infringement of a **Charter** right does not attract scrutiny, only those that are "... sufficiently serious to attract **Charter** protection" (per McLachlin J., as she then was, at p. 148). She wrote at p. 151:

I conclude that the appellant has suffered deprivation of liberty. The next question is whether the deprivation is sufficiently serious to warrant *Charter* protection. The *Charter* does not protect against insignificant or "trivial" limitations of rights: *R. v. Edwards Books and Art Ltd.*, [1986] 2 S.C.R. 713, at p. 759 (*per* Dickson C.J.); *R. v. Jones*, [1986] 2 S.C.R. 284, at p. 314; *Lavigne v. Ontario Public Service Employees Union*, [1991] 2 S.C.R. 211, at p. 259; *Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143, at pp. 168-69. It follows that qualification of a prisoner's expectation of liberty does not necessarily bring the matter within the purview of s. 7 of the *Charter*. The qualification must be significant enough to warrant constitutional protection. To require that all changes to the manner in which a sentence is served be in accordance with the principles of fundamental justice would trivialize the protections under the *Charter*. To quote Lamer J. in *Dumas*, *supra*, at p. 464, there must be a "substantial change in conditions amounting to a further deprivation of liberty".

[38] In support of its submission that a **SOIRA** order is not punitive, the Crown cites **R. v. Budreo** (2000), 142 C.C.C. (3d) 225; O.J. No. 72 (Q.L.) (Ont.C.A.), a constitutional challenge to s. 810.1 of the **Criminal Code**. That section allows a court to require a recognizance by any person likely to commit a sexual offence against a child which prohibits that person, for up to one year, from engaging in activities or attending places where children are likely to be present. The restriction may be applied although the person has not committed an offence and has no criminal record.

[39] At issue on the appeal was whether the provision violated s.7 of the **Charter**. The Crown had acknowledged that a s. 810.1 order meets the first branch of the s. 7 test in that it deprives the subject of his liberty. The question was whether that deprivation accorded with the principles of fundamental justice. Mr. Budreo argued that it did not because: (i) s. 810.1 created a status offence; (ii) the section was over-broad; and, (iii) it was void for vagueness. In rejecting the submission that s. 810.1 created a “status based offence”, the Court noted that the purpose of the provision was not to mete out punishment but to prevent crime. It was in that context the court said, *per* Laskin, J.A.:

[30] By these standards, s. 810.1 does not create an offence. Its purpose is not to punish crime but to prevent crime from happening. Its sanctions are not punitive, nor are they intended to redress a wrong; they are activity and geographic restrictions on a person's liberty intended to protect a vulnerable group in our society from future harm.

[40] Thus, every measure impacting upon the behaviour of an individual need not be regarded as punitive rather than preventative.

[41] In **R. v. Beare**, [1988] 2 S.C.R. 387; S.C.J. No. 92 (Q.L.), the provisions of the **Identification of Criminals Act**, R.S.C. 1985, c. I-1, s. 2 and ss. 453.3(3) and 455.5(5) of the **Criminal Code** were subjected to constitutional challenge. That **Act** permits the fingerprinting of suspects who are charged with an indictable offence. There, the court recognized the importance of not placing undue restraint on criminal investigations (at pp. 404 and 410). The fingerprinting requirements oblige an individual to appear at a specific time and place for the purpose of fingerprinting. The alleged violation was to the suspect's liberty interest (**Charter**, s.7). The interference with that interest is not violative of the **Charter** if it accords

with the principles of fundamental justice. In conducting the inquiry the Court recognized the importance of identification techniques in assisting criminal investigations and endorsed a “sense of proportion” in the analysis. LaForest, J., for the Court, wrote at pp. 403-404:

33 The application of s. 2 of the *Identification of Criminals Act* is confined to persons in or deemed to be in lawful custody, who are charged with or have been convicted of an indictable offence. It should be observed that the common law permitted a number of other, in my view more serious, intrusions on the dignity of an individual or persons in custody in the interest of law enforcement. As an incident to a lawful arrest, a peace officer has a right to search the person arrested and to take any property the officer reasonably believes is connected with the offence charged, or any weapon found upon such person; see *R. v. Morrison* (1987), 20 O.A.C. 230. This authority is based on the need to disarm an accused and to discover evidence. In the course of custodial arrest an accused may be stripped. Of particular relevance, height, weight and natural or artificial marks on the body, such as birth marks or tattoo marks, may be used for purposes of identification; see *Adair v. M'Garry*, [1933] S.L.T. 482 (J.)

These procedures have been permitted because of the felt need in the community to arm the police with adequate and reasonable powers for the investigation of crime. Should fingerprinting be assimilated to these procedures? Many considerations, we saw, argue for that position. Promptitude and facility in the identification and the discovery of indicia of guilt or innocence are of great importance in criminal investigations. This, along with its certitude, which is critical to the criminal justice system, has resulted in the general use of fingerprinting by police forces throughout the world. What really requires determination is whether in the circumstances the process unduly invades the rights of the accused.

In examining this question one must have a sense of proportion. Is the taking of fingerprints any more serious an invasion of the right of a person in custody than examining the person's body for birthmarks and the like? I do not think so and, as I noted, being arrested and charged for an offence seems to me to be more serious. As Augustus Hand J. stated in *United States v. Kelly*, 55 F.2d 67 (2nd Cir. 1932), at p. 70:

It is no more humiliating than other means of identification that have been universally held to infringe neither constitutional nor common-law rights. Finger printing is used in numerous branches of business and of civil service, and is not in itself a badge of crime. As a physical invasion it amounts to almost nothing, and as a humiliation it can never amount to as much as that caused by the publicity attending a sensational indictment to which innocent men may have to submit.

(Emphasis added)

[42] The Court's conclusion that the fingerprinting provisions were constitutional, although applied to persons not yet convicted of a criminal offence, lends support to the proposition that identification procedures are not intrinsically "punitive". Commenting further on the importance of identification in police investigations, LaForest, J. wrote at p. 408:

As already noted, it is appropriate and necessary for peace officers to check, confirm, or establish the identity of accused persons in a wide variety of situations. In urban areas, in particular, individuals are relatively anonymous. Virtually everywhere the population is very mobile. Peace officers themselves relocate and find themselves working in new communities, and thus may fail to recognize even long-time residents. In this social context, the fact that accused persons often try to conceal their true identity or criminal past, and sometimes jeopardize innocent persons in the process, will very frequently justify the imposition of a requirement to submit to fingerprinting. That is what the impugned legislation seeks to do.

[43] At pp. 403-403, the Court rejected the submission that such identification procedures stigmatized the individual:

The Court of Appeal, we saw, found that the impugned provisions constituted an infringement of the right guaranteed by the opening words of s. 7, the majority because fingerprinting offends the "dignity and self-respect" of at least those persons who because of their self-perception or the perception of the community would feel demeaned by being thus treated. In short, the majority thought that being subjected to fingerprinting was to be treated like a criminal. . . .

...

The majority in the Court of Appeal stressed that for many people it is demeaning to be subjected to the process of fingerprinting, and it cannot be denied that for many the process is distasteful. But it must be remembered that the interest of the public in law enforcement necessitates the subjection of the individual to other distasteful procedures. It is distasteful, and extremely so for some crimes, merely to be charged with an offence, to say nothing of the stigma attached to being arrested, detained and required to answer the charge in a public trial. As Chief Justice Dickson has stated in *R. v. Oakes*, [1986] 1 S.C.R. 103, at pp. 119-20:

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.

The stigma attached to such ordinary aspects of law enforcement and the criminal justice system, I would have thought, far outweighs any feeling of indignity attached to having one's fingerprints taken. Yet I do not think that where there is reasonable and probable cause to believe a person has committed an offence, it can be seriously argued that subjecting a person to these procedures violates the principles of fundamental justice

[44] The fact that the fingerprinting provisions were found to be constitutional suggests there is some tolerance for measures which promote legitimate investigatory objectives, even if somewhat disruptive of the liberty interest.

[45] Thus, while the assessment is an objective one, the "effect" of the consequence cannot be evaluated in complete isolation from its purpose. Whether a measure is, in fact, "a true penal consequence" is not determined simply by assessing the seriousness of the impact on the individual. Relatively minor consequences of a criminal offence may be considered "penal" yet those with a more serious impact on the person may be "non-punitive". The question cannot be answered in the abstract, divorced from the context in which the measure arises. I conclude that if the impact of the sanction aligns with its legislative purpose and is not of such magnitude that it reveals, instead, a punitive intent, it is not "punishment".

[46] In summary, I draw the following guidance from the authorities:

- Punishment in s. 11(i) encompasses more than the official sentence of the court;
- In interpreting s. 11(i) one must be alive to practical consideration and not overshoot the purpose of the right;
- The characteristics of punishment generally include some deprivation of liberty; unpleasant consequences; and public condemnation;
- All *ex post facto* treatments of an offender, consequent on conviction, are not viewed as punishment;
- A true penal consequence is one which, by its magnitude, would appear to be imposed for the purpose of redressing the wrong done to society;
- The **Charter** does not protect against insignificant or trivial limitations of rights.

[47] To assist in resolving the issue here I would therefore ask: ‘Objectively, is the impact of the **SOIRA** requirements on an offender such that they appear to be imposed for the purpose of redressing the wrong done to society rather than to further the objective of helping police services investigate crimes of a sexual nature’?

The Comparison of the SOIRA to the DNA Provisions:

[48] The **SOIRA** provisions are similar in structure to those which establish a DNA bank and authorize the taking of an offender’s bodily substance for the purpose of forensic DNA analysis. Appellate courts in Nova Scotia and Ontario have concluded that a DNA order (s. 487.051 or s. 487.052 **Criminal Code**) is not “punishment”. (See **R. v. Murrins** (2002), 201 N.S.R. (2d) 288; N.S.J. No. 21 (Q.L.)(C.A.); **R. v. Jackpine** (2004), 70 O.R. (3d) 97; O.J. no. 1073 (Q.L.) (Ont.C.A.)). Doherty, J.A. wrote for the Court in **Jackpine**, *supra*:

[28] Both appellants next argue that an order requiring them to provide a sample for DNA databank purposes contravenes s. 11(i) of

the *Charter*. That section provides that where the punishment for an offence has been altered between the time of the commission of the offence and the time of sentencing, the offender is entitled to the benefit of the lesser punishment. The appellants argue that the enactment of a provision providing for the taking of a DNA sample for databank purposes constitutes punishment and that since the provision was not in force when the appellants committed their offences, s. 11(i) forecloses resort to the section against them. The simple answer to this submission is that the taking of the sample is not a punishment anymore than would be the taking of fingerprints or the taking of a photograph of a convicted person: *R. v. Briggs, supra*, at p. 446 O.R., p. 72 C.C.C.; *R. v. Murrins* (2002), 162 C.C.C. (3d) 412, 92 C.R.R. (2d) 285 (N.S.C.A.) at pp. 442-48 C.C.C.

(Emphasis added)

[49] Inevitably, judges wrestling with a constitutional challenge to the **SOIRA** provisions have found guidance in the DNA jurisprudence. The resulting judgements are split, however, on the constitutional status of the provisions. While some, like Burrill, J. in the case on appeal, find the effect of a **SOIRA** order much more intrusive than is a DNA order (see, for example, **R. v. Aberdeen, supra** and **R. v. Have** (2005), 194 C.C.C. (3d) 151; O.J. No. 388 (Q.L.)(Ont. Ct. J.)) others are to the opposite effect (see, for example, **R. v. Rouschop, supra**, and, by analogy, **R. v. Dyck**, [2005] O.J. No. 5313 (Q.L.) (Ont. Sup. Ct. J.)). Most cases challenging the constitutionality of the **SOIRA** provisions have involved an alleged violation of ss. 7 and 8 of the **Charter**. Very few consider the provisions in the context of s. 11(i).

[50] There appears to be consensus that while the taking of a DNA sample is a minimal and fleeting physical intrusion (**R. v. S.A.B.**, [2003] 2 S.C.R. 678, S.C.J. No. 61 (Q.L.)), the depth of information revealed could represent a substantial invasion of the privacy interest (**R. v. R.C.**, [2005] S.C.J. No. 62 (Q.L.) at ¶28). I emphasize “could” because, by policy, the profiles for the DNA bank are taken from non-coding DNA. This so-called “junk” DNA provides no more than a genetic fingerprint of the offender and does not reveal the person’s characteristics in depth, such as an individual’s appearance or propensity for disease (*R. v. F.* (P.R.) (2001), 161 C.C.C. (3d) 275; O.J. No. 5084 (Q.L.) (Ont.C.A.) at ¶20). By comparison, a **SOIRA** order is, in my view, potentially less intrusive of an

individual's privacy, but, has a greater impact on the liberty interest, in that it requires the offender to attend a registration center to provide information, annually and in person. As stated above, the cases divide on whether **SOIRA** orders violate ss. 7 or 8 of the **Charter**.

[51] It is important to conceptually separate a constitutional challenge to the **SOIRA** provisions alleging a violation of the liberty or privacy interest from the s.11(i) issue. In adopting a restrictive interpretation of "punishment" it bears noting that a **SOIRA** order, if not "punishment" within s. 11(i), will nevertheless be subjected to the limits imposed by ss.7 and 8 of the **Charter**.

[52] Of those decisions which deal directly with the s. 11(i) issue, exemplifying the judicial divide are **R. v. Aberdeen, supra** and **R. v. Rouschop, supra**.

[53] In **Aberdeen**, Judge LeGrandeur of the Alberta Provincial Court was persuaded that a **SOIRA** order is "punishment". He wrote:

¶ 69 It is certainly arguable that any one of these impacts may not be sufficiently significant so as to lead to a finding that the making of a reporting order is a "punishment" within the meaning of s. 11(i). However, considered cumulatively the factors and consequences referred to aforesaid are far from trivial. Such an order is coercive and constraining, clearly undermining the individual's autonomy and privacy which are fundamental liberty interests. The significant ongoing nature of the application of the order and its consequences are tantamount to continuing community supervision, even after the primary sentence has been served or completed, such that any order granted under s. 490.012 looks very much like the continuation of the primary sentence which may have been a fine, a suspended sentence or a term of imprisonment. . . .

¶ 70 It seems to me, *prima facie*, when one considers all the aforementioned factors cumulatively, given that reporting orders are sanctioned by law under the *Criminal Code* and *S.O.I.R.A.*, such orders result in an interference with liberty as I have described and clearly impose an extra burden on an accused with respect to reporting and the providing of information, which is coercive in the sense that it is required on pain of criminal sanction; . . .

(Emphasis added)

[54] In support of this finding the judge relies upon a number of presumed effects of the legislation (at ¶ 68): (i) the potential that by reporting in person to the police station the offender may be “marked” or “tracked” by the police; (ii) the “stigma” attached to identifying oneself as a sex offender to the police, annually, “...will undoubtedly attract the attention of the officer or officers which has the real potential of leaving the individual open for greater scrutiny in all activity, not just with respect to investigation of sexual misconduct in society”; (iii) the “stigma” may undermine treatment, rehabilitation and reintegration into society.

LeGrandeur, J. equates the order’s impact to that of a supervision order applicable to a long term offender or to the supervisory requirements attached to a probation order, noting that the time frame for the **SOIRA** reporting exceeds that for either of those two orders.

[55] With respect, I disagree with this reasoning. Any “stigma” suffered by the offender arises from the fact of the sexual assault conviction and is not attributable to the requirement to provide the information required by **SOIRA**. Nor, should there be a stigma, does it render the provisions “punitive” rather than “preventative” (see **Budreo**, *infra*, ¶ 28 “Nor does the stigma that undoubtedly accompanies a s. 810.1 proceeding make the proceeding punitive. That stigma will attach whether the section is preventive or punitive.”).

[56] LeGrandeur, J.’s concern that the offender will be “tracked” or scrutinized by police ignores the significant statutory limitations placed on the use of the information. Sections 8 through 13 of the **Act** address, in detail, the management of the information provided by the offender. Section 8 strictly limits the information which may be registered; the person collecting the information must ensure the offender’s privacy is respected and that the information is kept confidential (s. 9(4)); s. 10 reinforces the limits on the information that may be registered and the requirement that confidentiality be ensured; s. 11 entitles the offender to a copy of all information relating to them that is contained in the database; the offender may request correction of any misinformation (s. 12); the person who collects the information is obliged to make the correction without delay (s. 12); the information relating to a person who is subsequently exempted, acquitted or pardoned must be permanently removed from the database (s. 15); the database is maintained by the Royal Canadian Mounted Police (s. 14); under s. 17(2) it is an offence punishable by fine or imprisonment to use the information in any way not authorized by s. 16 of the **Act**. Registered information may be used only to assist in ongoing

investigations of crimes thought to be sexual in nature. Consequently, the judge's concern that registration would lead to the "marking" and "tracking" of the offender is unwarranted speculation and inconsistent with the provisions of the legislation.

[57] LeGrandeur, J.'s opinion that the reporting requirement would hinder "recovery" of the sex offender, is speculative as well. With respect, there was no evidence before him to that effect, nor, in my view, is it an inevitable consequence of an order.

[58] I do not agree that the **SOIRA** registration requirements equate to "continuing community supervision". As it affects the offender, s. 16(4) of the **Act** strictly limits the use of the information to investigation of a specific sexual crime. The provisions do not licence community supervision of an offender.

[59] In summary, with respect, I do not find the reasoning of LeGrandeur, J. persuasive.

[60] The Crown, on the other hand, relies upon **R. v. Rouschop, supra**. There, P.R. Bélanger, J., in concluding such an order was not punitive, said:

¶ 30 In my opinion, an obligation restricted to the annual provision of information such as that required by the S.O.I.R.A., unencumbered by physical or geographical restrictions of any sort in a confidential process guaranteed by criminal sanction can hardly be described as "severe handling" or "harsh or injurious treatment". While it is no doubt true that knowledge by a sex offender that his location is known to authorities may have a deterrent effect, that is an incidental consequence and is not determinative of the issue. Fingerprinting, photographing or taking of blood samples might similarly be said to have a deterrent effect on individuals contemplating criminal activity. However, appellate courts which bind me have determined that they do not constitute punishment. In any event, the words quoted in bold from *Lambert* (supra) have a circular quality when they refer to punishment as "punitive treatment".

[61] After referring to this Court's decision in **Murrins, supra**, the judge continued:

¶ 35 . . . Strictly speaking the order does not limit future behaviour in the way that a parole order, probation order, weapons order, driving

prohibition order, a prohibition order under CC s. 161, etc. can. It merely imposes an obligation to provide statistical information periodically albeit that obligation can be imposed for a very long time. The obligations imposed in my view cannot be fairly described as constituting a significant deprivation or a hardship.

[62] The Crown cites, as well, the recent decision of Hambly J. in **R. v. Dyck, supra**. At issue was the Ontario provincial legislation known as *Christopher's Law*. *Christopher's Law* creates a sexual offender registry not unlike the **SOIRA** but without a similar exemption provision. Every sexual offender resident in Ontario who has committed one of several designated offences must register. Before Hambly, J. was an appeal from the order of Hearn, J. of the Ontario Court of Justice (2004), 187 C.C.C. (3d) 73; O.J. No. 2842 (Q.L.) (Ont. Ct. J.) wherein he found that the legislation violated s. 7 of the **Charter**. It was argued that *Christopher's Law* was not valid provincial legislation because it was criminal law and therefore within exclusive federal jurisdiction. On this issue, Hearn J., in the lower court, had held that the law was not criminal in nature in that the registration requirement of *Christopher's Law* was preventative not punitive ([2004] O.J. No. 2842 (Q.L.) at ¶ 49).

[63] In allowing the appeal, Hambly, J. agreed that *Christopher's Law* was not an intrusion into the field of criminal law and thus valid provincial legislation. In conducting the s. 7 analysis Hambly, J. commented as follows:

¶ 93 What these cases demonstrate in my view is that the intrusion into a person's privacy rights by compelling him to submit to the taking of a bodily substance for DNA analysis is very serious. In my view the intrusion on a person's liberty by the requirements of *Christopher's Law* is much less serious. There is no seizure of a bodily substance. A person is required to report to the police annually unless he moves. He provides his address and other basic identifying information. The requirements are not significantly greater than the information required by the Ministry of Transportation for the renewal of a driver's license or a validation sticker for a motor vehicle license or by the Ministry of Health for a health card. A person must keep his address current with a multitude of government agencies and professional service providers.

[64] Hambly, J. concluded that *Christopher's Law* neither violated s. 7 of the **Charter** nor was it punishment within s. 11(i). In so doing he was guided by the

decisions of the Ontario Court of Appeal in **R. v. Briggs** (2001), 157 C.C.C. (3d) 38; O.J. No. 3339 (Q.L.); this Court in **Murrins**, *supra*, as well as that in **Budreo**, *supra*.

[65] In **Murrins** I wrote, for the Court:

[107] I am not persuaded that the ordering of a DNA sample is "punishment" within the meaning of s. 11(i) of the Charter. Its impact on the offender is not comparable to the control central to imprisonment, house arrest or even reporting. It does not constitute a deprivation or hardship such as that which accompanies a restitution order, a fine or even a firearms prohibition. In no direct way does the order put limits upon the future behaviour of the offender. I do not agree that it constitutes "severe handling" or "harsh treatment". Nor is it a direct consequence of the conviction. The court cannot order a DNA sample on its own motion - there must be an application by the Crown. It is not within the range of tools from which the judge may craft the sentence.

[66] Similarly, a **SOIRA** order does not, in any direct way, put limits on an offender's future behaviour. He must annually appear in person to provide current contact information. Objectively, that obligation is not burdensome. A significant measure of privacy and confidentiality attaches to the reporting and preservation of the information provided. The informational content is not highly personal, indeed, no more than what may be required to obtain a credit card or driver's licence or on the filing of an income tax return. The fact that the databank contains current information about the offender's residence may be a factor which dissuades some from re-offending. I am not persuaded, however, that such is a direct, intended or inevitable consequence of the order.

[67] Mr. Cross says the reporting required under a **SOIRA** order renders it the equivalent of a probation order. I disagree. There are important distinctions. Firstly, a probation order contains, at least, the statutory conditions to keep the peace and be of good behaviour; to appear before the court when required and to notify the court or a probation officer of any change of address (in advance) and of any change in employment or occupation (promptly) (s. 732.1(2) **Criminal Code**). The offender who breaches the requirement to keep the peace and be of good behaviour is subject to the double risk of prosecution for breach of that condition

and alteration of his original sentence (s.732.2(5) **Criminal Code**). Breach of a **SOIRA** order exposes an offender only to prosecution for that offence.

[68] Secondly, a **SOIRA** order does not authorize the probing inquiries that may be made of an offender by a probation officer. Under the reporting provisions of a probation order, an offender may be required to disclose details of his associates, his movements in the community, his consumption of alcohol or illegal substances, his employment plans and prospects and to generally account for his daily activities.

Foreign Sex Offender Legislation:

[69] Registries of sex offenders have been in place in both the United Kingdom and in various states of the United States (as well as federally) for some time.

[70] The first sex offender registry legislation was established in the United Kingdom in 1997. This was replaced in 2003 with the **Sexual Offences Act 2003**, 2003 Chapter 42. This **Act** is similar to the **SOIRA**, however, the registration requirements apply automatically on conviction. Significantly, an order under the U.K. **Act** has been recognized by the courts as non-punitive (see, for example, **Ibbotson v. United Kingdom** (1998) 27 EHRR CD 332).

[71] Ibbotson, a British citizen, had been convicted and sentenced on a number of sex offences before the coming into force of the **Sex Offenders Act 1997**, 1997 Chapter 51. He claimed that the requirement to register with the police under the reporting provisions of the U.K. **Act** amounted to the imposition of a heavier penalty than that which was applicable at the time the criminal offence was committed contrary to Article 7 of the **Convention for the Protection of Human Rights and Fundamental Freedoms**, 4 November, 1950, 213 U.N.T.S. 221. Article 7(1) provides:

No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed.

[72] The question before the European Commission on Human Rights was whether the impact of the **Act** on the applicant could be considered a “penalty” within the meaning of Article 7. That Article provides:

. . .the starting point of any assessment of the existence of a penalty is whether the measure in question was imposed following a conviction for a “criminal offence”. Other relevant factors are the nature and purpose of the measure in question, its characterisation in domestic law, the procedures involved in the making and implementation of the measure and its severity.

[73] Rejecting an assessment based on the subjective view of the applicant offender that the provisions were punitive, the Commission held that the registration requirements were preventative, noting that the offender was not required to furnish information which would not otherwise be in the public domain and that a requirement to register with the police was not, in its nature, punitive.

[74] In a similar case **Adamson v. United Kingdom** (1999) 28 EHRR CD 209, the Commission rejected as sufficient to establish that the registration requirement has a punitive effect, the applicant’s argument that registration with the police was punishing because “. . .it is “depersonalising”, robbing him of his “ability to reinvent [him]self and start a new life.” There was no evidence that the applicant was at particular risk of public humiliation or attack as a result of the registration requirements.

[75] In **Smith v. Doe** 538 U.S. 84 (2003), the Court addressed a challenge to the Alaska **Sex Offender Registration Act**. The Alaska **Act** required sex offender residing in the state to register. Much of the information provided on registration, including an offender’s name and address, was to be made public. The offender applied for relief from the registration requirements on the basis that the application in his circumstances amounted to retroactive punishment.

[76] Finding that nothing on the face of the statute suggested the legislature intended to create other than a civil scheme designed to protect the public from harm, the court considered the effect of the **Act**.

[77] Using an analytical framework from **Kennedy v. Mendoza-Martinez**, 372 U.S. 144, 168-169, 9 L. Ed. 2d 644, 83 S. Ct. 554 (1963), the majority of the Court concluded that the provisions were not punitive for the following reasons: (i) The

creation of such registries is a relatively new phenomenon and is not a traditional means of punishing offenders - the court rejected the submission that the public disclosure of the information was akin to shaming - any stigma resulted from the fact of conviction for a sexual offence, which was a public record; (ii) Registration does not impose any physical disability or restraint which would warrant a comparison to imprisonment - it does not limit an offender's activities but leaves him free to change jobs or residence (the Alaska system does not require in person updates of the information); (iii) Registration is not comparable to probation or supervised release because the offenders are free to move as they wish and to live and work with other citizens, with no supervision - "Probation and supervised release entail a series of mandatory conditions and allow the supervising officer to seek the revocation of probation or release in case of infraction." ... (¶ 37) - "A sex offender who fails to comply with the reporting requirement may be subjected to a criminal prosecution for that failure, but any prosecution is a proceeding separate from the individual's original offense. ..." (¶ 37). The fact that registration may deter crime and that deterrence is one goal of punishment, does not mean that the registration system is punishment; (iv) The **Act** does not promote the traditional aims of punishment; (v) The **Act's** rational connection to a non-punitive purpose was a most significant factor in the majority's conclusion that it was not punitive. The **Act** has a legitimate connection to a non-punitive goal — public safety — to alert the public to the risk of sex offenders in their community; (vi) The regulatory scheme is not excessive relative to the **Act's** purpose.

[78] Stevens, J., dissenting, saw the statute as imposing "significant affirmative obligations and a severe stigma" to every person to whom the registration requirements apply. Stevens, J. described those obligations in detail:

¶61 . . .an offender who has served his sentence for a single, nonaggravated crime must provide local law enforcement authorities with extensive personal information -- including his address, his place of employment, the address of his employer, the license plate number and make and model of any car to which he has access, a current photo, identifying features, and medical treatment -- at least once a year for 15 years. If one has been convicted of an aggravated offense or more than one offense, he must report this same information at least quarterly for life. Moreover, if he moves, he has one working day to provide updated information. Registrants may not shave their beards, color their hair, change their employer, or borrow a car without reporting those events to the authorities. Much of this registration

information is placed on the Internet. In Alaska, the registrant's face appears on a web page under the label "Registered Sex Offender." His physical description, street address, employer address, and conviction information are also displayed on this page.

[79] He opined that the registration and reporting duties were comparable to those imposed on other convicted offenders during periods of supervised release. He said:

¶63 It is also clear beyond peradventure that these unique consequences of conviction of a sex offense are punitive. They share three characteristics, which in the aggregate are not present in any civil sanction. The sanctions (1) constitute a severe deprivation of the offender's liberty, (2) are imposed on everyone who is convicted of a relevant criminal offense, and (3) are imposed only on those criminals. Unlike any of the cases that the Court has cited, a criminal conviction under these statutes provides both a sufficient and a necessary condition for the sanction.

[80] Justices Breyer and Ginsberg dissented as well. In their opinion, the **Mendoza- Martinez** analysis resulted in a conclusion that the registration requirements were punitive because they did not require an individual assessment of dangerousness.

[81] Burrill, J. indicated a preference for the dissenting opinion of Stevens, J. and quoted, with approval ¶ 63 from the **Smith** reasons. The trial judge did not, however, acknowledge that the reporting requirements of the Alaskan legislation are substantially more demanding and intrusive than those of the **SOIRA**, as is evident from Steven, J.'s summary in ¶ 61, above.

[82] The positions of the minority and majority in **Smith v. Doe, supra**, are not unlike the differences of opinion among the judges of the various Canadian jurisdictions. There are those who see the **SOIRA** requirements as clearly punitive, and those, who, with equal conviction, disagree. There is no bright line and it would be disingenuous to suggest otherwise.

[83] While foreign law is not determinative in assessing whether the **SOIRA** provisions equate to punishment, the above judgments reveal that the majority of

judges who have considered similar or more onerous provisions have concluded that they are not “punitive”.

Summary:

[84] A number of factors cause me to conclude that a **SOIRA** order is not “punishment” within s. 11(i) of the **Charter**:

1. The order is not a direct consequence of conviction - a judge cannot on his or her own motion, when crafting a sentence, include a **SOIRA** order. Such can only be done on application of the prosecutor;
2. The requirement to initially report in person and, thereafter, report annually, while an inconvenience does not equate to severe handling or harsh treatment;
3. The reporting of temporary absences from one’s residence can be done by registered mail - at most an inconvenience;
4. The information to be provided is not of a highly personal nature and is that which is routinely collected by many other entities and would normally be available to the authorities with some searching;
5. The creation of the registry has a logical connection to a legitimate non-punitive goal - the efficient investigation of crime and the conservation of scarce investigative resources.
6. The fact that the collection and use of the information by the authorities is strictly controlled and available only for investigation of specific crimes lends support to the **Act’s** stated objective of crime solving.
7. That the requirement of registration may deter an offender from re-offending is not a direct or inevitable consequence of registration.
8. Where the registration requirements would be particularly burdensome for an offender and approach a punitive sanction, the exemption provision provides relief from its operation.
9. The **SOIRA** requirement to provide contact information to the authorities, does not equal the intrusiveness of the reporting required under a probation order.

10. The consequences of an order do not align with the traditional *indicia* of punishment - there is no confinement or other than a trivial interference with liberty; there is no stigma attached nor a general deterrent effect - the provision of the information is done in confidence and the informational content held secure and private; the order is not directed at ensuring compliance with the law.

[85] There may be an unusual case where, due to the unique circumstances of the offender, the impact of the order could constitute the "severe handling" or "harsh treatment" that is characteristic of punishment. In such an event, the exemption provision would suffice to relieve the offender from such effect:

490.012 (4) The court is not required to make an order under this section if it is satisfied that the person has established that, if the order were made, the impact on them, including on their privacy or liberty, would be grossly disproportionate to the public interest in protecting society through the effective investigation of crimes of a sexual nature, to be achieved by the registration of information relating to sex offenders under the *Sex Offender Information Registration Act*.

[86] The exemption section succeeds in striking an appropriate balance between individual rights and societal interests. It is a "constitutional compromise" which, in this context, addresses the need to assist and streamline criminal investigations yet protect offenders from the unfairness of subjecting them to harsh or severe sanctions not contemplated at the time of the offence (see **R. v. Araujo**, [2000] 2 S.C.R. 992 at ¶ 26; **R. v. Duarte**, [1990] 1 S.C.R. 30 at ¶23 to 25; and **R. v. R.C.**, *supra* at ¶ 21). I am satisfied that the exemption clause provides adequate protection in the exceptional situation where the impact of the order on the offender could otherwise be punitive.

DISPOSITION:

[87] In my view, the judge erred in law by not making the order on the record before him. There was no evidence before the judge that would bring Mr. Cross within the exemption provision (s. 490.012(4)).

[88] I would allow the appeal and direct that an order issue under s. 490.012 (1).

Bateman, J.A.

Concurred in:

MacDonald, C.J.N.S.

Roscoe, J.A.

Please see in particular para. 38

1992 CarswellOnt 99

Ontario Court of Appeal

R. v. Durham

1992 CarswellOnt 99, 10 O.R. (3d) 596, 11 C.R.R. (2d) 258, 15 C.R.
(4th) 45, 17 W.C.B. (2d) 218, 58 O.A.C. 126, 76 C.C.C. (3d) 219

R. v. CAMERON EDWARD DURHAM; R. v. PETER STRATIGEAS

Brooke, **Arbour** and Doherty JJ.A.

Heard: April 13-14, 1992

Judgment: September 22, 1992

Docket: Docs. CA 670/91, 791/91

Counsel: *David Finley* and *Ian Smith*, for the Crown.

B. Clive Bynoe, for respondent Durham.

Marc Rosenberg, for respondent Stratigeas.

Subject: Criminal

Headnote

Criminal Law --- Firearms and other offensive weapons — Careless use of firearm — Nature and elements of offence

Criminal Law --- Firearms and other offensive weapons — Careless use of firearm

Criminal Law --- Firearms and other offensive weapons — Carrying firearm in careless manner

Criminal Law --- Firearms and other offensive weapons — Careless handling of firearm

Criminal Law --- Firearms and other offensive weapons — Storing firearms in careless manner

Charter of Rights and Freedoms — Life, liberty and security — Principles of fundamental justice — Civil standard of inadvertent negligence for **Criminal Code** offence in **s. 86(2)** of careless storage or use of firearm not violating **s. 7** — Offence having significant regulatory component and not carrying special stigma requiring subjective awareness.

In separate trials, charges under **s. 86(2) of the Criminal Code** of careless storage of a firearm and careless use of a firearm were stayed on the basis that that section of the **Criminal Code** violated **s. 7 of the Charter** and could not be saved under **s. 1**. The Crown appealed.

Held:

The appeals were allowed; the stays were set aside and matters remitted.

The imposition of criminal liability under **s. 86(2) of the Criminal Code** on the basis of a civil standard of inadvertent negligence does not violate **s. 7 of the Charter**. It was not clear whether

the Supreme Court of Canada had decided that the minimum fault requirement of civil negligence satisfies the requirement of [s. 7](#) for every criminal and regulatory offence, except for offences carrying a special stigma analogous to murder, attempted murder and theft, or whether there is still a distinction for constitutional purposes between criminal and regulatory offences, with only the defence of due diligence being constitutionally required in the case of regulatory offences. In any event, [s. 86\(2\)](#) could be safely affirmed as constitutional as the offence had a significant regulatory component and did not carry the special stigma associated with the highest form of deviance. The desirability of requiring that guilt be dependent on a subjective state of mind was a matter of legislative choice not constitutional imperative. There was no violation of [s. 7](#) and it was unnecessary to engage in a [s. 1](#) analysis.

It seems more likely that regulatory offences would find themselves in federal statutes other than the *Criminal Code*, where the federal activity is not solely based on the criminal law power contained in [s. 91\(27\) of the Constitution Act, 1867](#). Offences contained in the *Criminal Code* would be presumed to have been enacted solely on the basis of the federal criminal law power and would more likely be true crimes than offences enacted for the purpose of enforcing a federal head of power. However, the distinction is not determinative. Not all true crimes are contained in the *Criminal Code*, and some *Criminal Code* offences may have been enacted under the "public welfare" branch of the criminal law power. [Section 86\(2\)](#) is part of an overall regulatory scheme whereby a duty is imposed on all persons in possession of firearms not to obtain a licence to continue their lawful possession, but to handle, store and use their weapons carefully. It is directed to the regulated, although not necessarily the licensed, defendant. Consequently, it should be classified as a regulatory offence for which nothing more than a defence of due diligence is constitutionally required. Although enacted solely on the strength of the federal criminal law power, gun control legislation has undeniably a strong regulatory base. [Part III of the Criminal Code](#) is a largely administrative scheme, which regulates an often legitimate activity which happens to have a strong historical link with crime.

Even though a person convicted of an offence under [s. 86\(2\) of the Criminal Code](#) will carry the stigma of having a criminal conviction, that is not sufficient to dictate that the offence must contain a subjective mental element. There is likely to be more stigma attached to a criminal conviction than to the violation of a non-criminally related statute. Yet not all criminal offences carry the same amount of stigma. The stigma is proportional not only to the gravity of the conduct and its consequences, but to the level of fault, represented by the mental element, with which the act or omission was performed. A conviction for careless storage of a firearm, known to comport no subjective awareness of the risk created by the conduct, and otherwise not associated with any other form of social deviance, would not carry the same stigma as a conviction for careless use of a firearm by a person shown to have deliberately created or undertaken a substantial and unjustifiable risk, with full awareness of the danger created.

Table of Authorities

Cases considered:

Beaver v. R., [1957] S.C.R. 531, 26 C.R. 193, 118 C.C.C. 129 — referred to

Canada v. Pharmaceutical Society (Nova Scotia) (1992), 15 C.R. (4th) 1, (sub nom. *R. v. Nova Scotia Pharmaceutical Society*) 43 C.P.R. (3d) 1, 93 D.L.R. (4th) 36, 74 C.C.C. (3d) 289, 10 C.R.R. (2d) 34, (sub nom. *R. v. Nova Scotia Pharmaceutical Society (No. 2)*) 139 N.R. 241 (S.C.C.), affirming (sub nom. *R. v. Pharmaceutical Society (Nova Scotia)*) (1991), 64 C.C.C. (3d) 129, 102 N.S.R. (2d) 222, 279 A.P.R. 222, 80 D.L.R. (4th) 206, 36 C.P.R. (3d) 173, 7 C.R.R. (2d) 352 (C.A.), reversing (sub nom. *R. v. Nova Scotia Pharmaceutical Society*) (1990), 59 C.C.C. (3d) 30, 73 D.L.R. (4th) 500, 32 C.P.R. (3d) 259, (sub nom. *R. v. Nova Scotia Pharmaceutical Society (No. 2)*) 98 N.S.R. (2d) 296, 263 A.P.R. 296 (T.D.) — *followed*

R. v. Buzzanga (1979), 25 O.R. (2d) 705, 101 D.L.R. (3d) 488, 49 C.C.C. (2d) 369 (C.A.) — *referred to*

R. v. Derkosh (1979), 21 A.R. 243, 52 C.C.C. (2d) 252 (C.A.) — *referred to*

R. v. Durham (1991), 6 C.R. (4th) 178, 66 C.C.C. (3d) 66 (Ont. Gen. Div.) — *referred to*

R. v. Finlay (1990), 55 C.C.C. (3d) 548, 83 Sask. R. 191, 50 C.R.R. 381 (Q.B.), reversed 6 C.R. (4th) 157, [1991] 5 W.W.R. 193, 64 C.C.C. (3d) 557, 91 Sask. R. 228, 6 C.R.R. (2d) 128 (C.A.) — *referred to*

R. v. Jocelyn (1990), 90 Sask. R. 45 (Q.B.) — *referred to*

R. v. Leith (December 20, 1990), (Ont. Prov. Div.) [unreported] — *referred to*

R. v. Logan, [1990] 2 S.C.R. 731, 79 C.R. (3d) 169, 58 C.C.C. (3d) 391, 112 N.R. 144, 73 D.L.R. (4th) 40, 41 O.A.C. 330, 50 C.R.R. 152, affirming (1988), 68 C.R. (3d) 1, 30 O.A.C. 321, 67 O.R. (2d) 87, 46 C.C.C. (3d) 354, 57 D.L.R. (4th) 58, 45 C.R.R. 201 — *considered*
R. v. Metro News Ltd. (1986), 53 C.R. (3d) 289, 16 O.A.C. 319, 56 O.R. (2d) 321, 29 C.C.C. (3d) 35, 23 C.R.R. 77, 32 D.L.R. (4th) 321 (C.A.), leave to appeal to S.C.C. refused [1986] 2 S.C.R. viii, 64 C.R. (3d) xxx (note), 29 C.C.C. (3d) 35n, 32 D.L.R. (4th) 321n, 57 O.R. (2d) 638 (note), 74 N.R. 317 (note), 20 O.A.C. 160 (note) (S.C.C.) — *referred to*

R. v. Sault Ste. Marie (City), [1978] 2 S.C.R. 1299, 3 C.R. (3d) 30, 21 N.R. 295, 7 C.E.L.R. 53, 40 C.C.C. (2d) 353, 85 D.L.R. (3d) 161, affirming (1976), 13 O.R. (2d) 113, 70 D.L.R. (3d) 430, 30 C.C.C. (2d) 257 (C.A.) — *considered*

R. v. Schwartz, [1988] 2 S.C.R. 443, 66 C.R. (3d) 251, [1989] 1 W.W.R. 289, 88 N.R. 90, 45 C.C.C. (3d) 97, 56 Man. R. (2d) 92, 55 D.L.R. (4th) 1, 39 C.R.R. 260 — *referred to*

R. v. Stratigeas (1991), 66 C.C.C. (3d) 94 (Ont. Gen. Div.), affirming (1990), 61 C.C.C. (3d) 146 (Ont. Prov. Div.) — *referred to*

R. v. Vaillancourt, [1987] 2 S.C.R. 636, 60 C.R. (3d) 289, 81 N.R. 115, 68 Nfld. & P.E.I.R. 281, 209 A.P.R. 281, 10 Q.A.C. 161, 39 C.C.C. (3d) 118, 47 D.L.R. (4th) 399, 32 C.R.R. 18, reversing (1984), 31 C.C.C. (3d) 75 (Que. C.A.) — *considered*

R. v. Ward (1991), 63 C.C.C. (3d) 374, 91 Sask. R. 272 (Q.B.) — *referred to*

R. v. Wholesale Travel Group Inc., [1991] 3 S.C.R. 154, 8 C.R. (4th) 145, 67 C.C.C. (3d) 193, 84 D.L.R. (4th) 161, 130 N.R. 1, 38 C.P.R. (3d) 451, 49 O.A.C. 161, 7 C.R.R. (2d) 36, affirming (1989), 73 C.R. (3d) 320, 63 D.L.R. (4th) 325, 70 O.R. (2d) 545, 52 C.C.C. (3d) 9,

35 O.A.C. 331, 27 C.P.R. (3d) 129, 46 C.R.R. 73, reversing in part (1988), 23 C.P.R. (3d) 92, 46 C.R.R. 100 (Ont. H.C.), reversing (1988), 22 C.P.R. (3d) 328 (Ont. Prov. Ct.) — *followed* *Reference re s. 94(2) of the Motor Vehicle Act (British Columbia)*, [1985] 2 S.C.R. 486, 48 C.R. (3d) 289, 36 M.V.R. 240, [1986] 1 W.W.R. 481, 69 B.C.L.R. 145, 63 N.R. 266, 23 C.C.C. (3d) 289, 24 D.L.R. (4th) 536, 18 C.R.R. 30, (sub nom. *Constitutional Question Act, R.S.B.C. 1979, Chap. 63*) [1986] D.L.Q. 90 (headnote), affirming 33 C.R. (3d) 22, 19 M.V.R. 63, 42 B.C.L.R. 364, [1983] 3 W.W.R. 756, 4 C.C.C. (3d) 243, 147 D.L.R. (3d) 539, 5 C.R.R. 148 (C.A.) — *followed*

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

Combines Investigation Act, R.S.C. 1970, c. C-23 [R.S.C. 1985, c. C-34; retitled R.S.C. 1985, c. 19 (2nd Supp.), s. 19 (now the Competition Act)] —

s. 32(1)(c) [R.S.C. 1985, c. C-34, s. 45(1)(c)]

Constitution Act, 1867 (U.K.), 30 & 31 Vict., c. 3 —

s. 91(27)

s. 92(15)

Criminal Code, R.S.C. 1985, c. C-46 —

Pt. III

s. 84

s. 85

s. 86

s. 86(2) [re-en. S.C. 1991, c. 40, s. 3, not yet in force]

Words and phrases considered:**CARELESS**

[The wording of section 86(2) of the *Criminal Code*, R.S.C. 1985, c. C-46 demonstrates] Parliament's obvious choice of a standard of fault at the negligence level by the use of the word "careless", which has a clear jurisprudential pedigree.

USE

. . . none of the modes of commission of the offence in s. 86(2) [of the *Criminal Code*, R.S.C. 1985, c. C-46] requires proof of any consequence. The section prohibits an act or omission which constitutes the careless storage or the careless use of a firearm. The "use" of a firearm does not extend the definition to import proof of consequence.

Appeals from orders staying charges of careless storage of a firearm.

The judgment of the court was delivered by *Arbour J.A.*:

1 These two appeals by the Crown involve the constitutionality of s. 86(2) of the *Criminal Code*, R.S.C. 1985, c. C-46. In *R. v. Stratigeas*, Clarke J. dismissed an appeal by the Crown from a decision of Provincial Judge Main, ordering the stay of a charge of careless storage of a firearm on the basis that s. 86(2) of the Code infringed s. 7 of the *Canadian Charter of Rights and Freedoms* and could not be saved by s. 1 of the *Charter* (these decisions are now reported at (1991), 66 C.C.C. (3d) 94, affirming (1990), 61 C.C.C. (3d) 146). In his decision, Clarke J. adopted the more extensive reasons given by Moldaver J. in *R. v. Durham*, for staying a charge of careless use of a firearm, contrary to s. 86(2) of the Code, which are reported at (1991), 6 C.R. (4th) 178, 66 C.C.C. (3d) 66 (Ont. Gen. Div.).

I The Applicable Legislation

2 Section 86(2) of the *Criminal Code* states:

Every one who, without lawful excuse, uses, carries, handles, ships or stores any firearm or ammunition in a careless manner or without reasonable precautions for the safety of other persons

(a) is guilty of an indictable offence and liable to imprisonment

(i) in the case of a first offence, for a term not exceeding two years, and

(ii) in the case of a second or subsequent offence, for a term not exceeding five years; or

(b) is guilty of an offence punishable on summary conviction.

3 The Minister of Justice recently proclaimed that the proposed gun control legislation, Bill C-17 [S.C. 1991, c. 40, s. 3], which includes an amendment to s. 86(2) shall come into force July 27, 1992, and August 1, 1992. However, the Minister excepted s. 3 of the Bill, which was the section amending s. 86(2). Consequently, the present s. 86(2) is still the law.

4 Section 7 of the *Charter* provides that:

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.

5 Section 1 of the *Charter* provides that:

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.

6 Other courts have also pronounced on the constitutional validity of s. 86(2) and the issue is currently pending before the Supreme Court of Canada: see *R. v. Finlay* (1990), 55 C.C.C. (3d) 548, 83 Sask. R. 191, 50 C.R.R. 381 (Q.B.), reversed 6 C.R. (4th) 157, [1991] 5 W.W.R. 193, 64 C.C.C. (3d) 557, 91 Sask. R. 228, 6 C.R.R. (2d) 128 (C.A.), leave to appeal to S.C.C. granted (1991), [1992] 1 W.W.R. lxv (note), 67 C.C.C. (3d) vi (note), 6 C.R.R. (2d) 128n, 137 N.R. 77 (note) (S.C.C.); *R. v. Jocelyn* (1990), 90 Sask. R. 45 (Q.B.), 9 W.C.B. (2d) 519; *R. v. Leith*, an unreported judgment of the Ont. Prov. Div. released December 20, 1990; *R. v. Ward* (1991), 63 C.C.C. (3d) 374, 91 Sask. R. 272 (Q.B.); *R. v. Derkosh* (1979), 21 A.R. 243, 52 C.C.C. (2d) 252 (C.A.) (holding that s. 86(2) of the *Criminal Code* does not violate s. 7) and *R. v. Finlay*, supra (Sask. C.A.); *R. v. Stratigeas*, supra, (holding that s. 86(2) does violate s. 7).

II The Judgments Below

7 The judgment of Moldaver J. was released prior to the decision of the Supreme Court in *R. v. Wholesale Travel Group Inc.*, [1991] 3 S.C.R. 154, 8 C.R. (4th) 145, 67 C.C.C. (3d) 193, 84 D.L.R. (4th) 161, 130 N.R. 1, 38 C.P.R. (3d) 451, 49 O.A.C. 161, 7 C.R.R. (2d) 36, affirming (1989), 73 C.R. (3d) 320, 63 D.L.R. (4th) 325, 70 O.R. (2d) 545, 52 C.C.C. (3d) 9, 35 O.A.C. 331, 27 C.P.R. (3d) 129, 46 C.R.R. 73, reversing in part (1988), 23 C.P.R. (3d) 92, 46 C.R.R. 100 (Ont. H.C.), reversing (1988), 22 C.P.R. (3d) 328 (Ont. Prov. Ct.), which has a substantial bearing on the analysis of the constitutionality of the impugned provision. The present appeal was heard prior to *Canada v. Pharmaceutical Society (Nova Scotia)* (1992), 15 C.R. (4th) 1, (sub nom. *R. v. Nova Scotia Pharmaceutical Society*) 43 C.P.R. (3d) 1, 93 D.L.R. (4th) 36, 74 C.C.C. (3d) 289, 10 C.R.R. (2d) 34, (sub nom. *R. v. Nova Scotia Pharmaceutical Society (No. 2)*) 139 N.R. 241, a decision of the Supreme Court of Canada released on July 9, 1992, affirming (sub nom. *R. v. Pharmaceutical Society (Nova Scotia)*) (1991), 64 C.C.C. (3d) 129, 102 N.S.R. (2d) 222, 279

A.P.R. 222, 80 D.L.R. (4th) 206, 36 C.P.R. (3d) 173, 7 C.R.R. (2d) 352 (C.A.) , reversing (sub nom. *R. v. Nova Scotia Pharmaceutical Society*) (1990), 59 C.C.C. (3d) 30, 73 D.L.R. (4th) 500, 32 C.P.R. (3d) 259, (sub nom. *R. v. Nova Scotia Pharmaceutical Society (No. 2)*) 98 N.S.R. (2d) 296, 263 A.P.R. 296 (T.D.).

8 After a careful review of the present [s. 86\(2\)](#), its predecessor, and the proposed gun control legislation, Moldaver J. concluded that the present [s. 86\(2\)](#) imposes criminal liability on the basis of a civil standard of negligence. This civil standard of negligence is reflected in the history of the section and the choice of the word "careless" as referring to the concept of inadvertent negligence. Neither party suggested before Moldaver J. or before us that the section be read differently with respect to the mental element of the offence. It is common ground that the section imports a fault requirement which does not include a subjective awareness of risk as a necessary part of the offence. Moldaver J. then found, at p. 77 C.C.C., [p. 191 C.R.], that the degree of fault which is constitutionally permissible varies, depending on whether the essential element of the offence involves a "circumstance" rather than the "foreseeability of consequences". He said, at p. 78 [C.C.C., p. 191 C.R.]:

Irrespective of the present state of the law regarding the minimum mens rea requirement surrounding the circumstances of any offence, I am satisfied that the minimum degree of fault associated with civil negligence is not sufficient to attract liability for a true crime where foreseeability of consequences forms an essential element of the offence, subject, of course, to justification pursuant to [s. 1 of the Charter](#). In my opinion, the statement of Mr. Justice Sopinka in *R. v. Anderson, supra*, is determinative of this issue.

9 Having found that foreseeability of consequences forms an essential element of the offence in [s. 86\(2\)](#), Moldaver J. addressed the issue of stigma and agreed with the Saskatchewan Court of Appeal in *R. v. Finlay, supra*. In that case, the Court of Appeal held that no person should be stigmatized to the extent that they would be if convicted under [s. 86\(2\)](#), on the basis of a minimum fault amounting to no more than civil negligence. The learned trial judge thus concluded that [s. 86\(2\)](#) violates the principles of fundamental justice expressed in [s. 7 of the Charter](#), and he further concluded that the [Criminal Code](#) provision could not be saved by the operation of [s. 1 of the Charter](#).

III Analysis

(a) The Distinction between Circumstance and Consequence

10 In my respectful opinion, none of the modes of commission of the offence in [s. 86\(2\)](#) requires proof of any consequence. The section prohibits an act or omission which constitutes the careless storage or the careless use of a firearm. The "use" of a firearm does not extend the definition to import proof of consequence.

11 In any event, I do not think that the presence of a consequence in the definition of the crime is determinative of the fault analysis for the purpose of [s. 7](#). This becomes apparent in a review of the recent Supreme Court of Canada decisions on that point.

(b) Recent Supreme Court Developments

12 In its unanimous decision in *Nova Scotia Pharmaceutical*, supra, the Supreme Court upheld the constitutional validity of [s. 32\(1\)\(c\) of the *Combines Investigation Act*, R.S.C. 1970, c. C-23](#) (now [s. 45\(1\)\(c\) of the *Competition Act*, R.S.C. 1985, c. C-34](#)) which creates an indictable offence, punishable by five years' imprisonment, where fault may be established on the objective basis of what the accused should have known.

13 The reasons of Mr. Justice Gonthier deal principally with the doctrine of vagueness. However, the court also addressed the argument that [s. 32\(1\)\(c\) of the *Combines Investigation Act*](#) infringes [s. 7 of the *Charter*](#). I reproduce in full the reasons of Gonthier J. on that issue, at pp. 59 to 61 [of the judgment, pp. 42-43 C.R.]:

How then should those sections be interpreted in light of [s. 7 of the *Charter*](#)? The reasons of this court in *R. v. Vaillancourt*, supra, at p. 652 [S.C.R.], make it clear that the requirement of a mental element, sometimes referred to as an element of fault, has now been raised from an interpretative presumption to a constitutional guarantee. This reasoning was based upon the principle that the morally innocent should not be punished. An element of fault must exist before punishment can be justified.

From the reasons of this court in [R. v. Wholesale Travel Group Inc.](#), [1991] 3 S.C.R. 154, 8 C.R. (4th) 145, 67 C.C.C. (3d) 193, 84 D.L.R. (4th) 161, 130 N.R. 1, 38 C.P.R. (3d) 451, 49 O.A.C. 161, 7 C.R.R. (2d) 36, it can be seen that a minimum fault requirement with respect to every criminal or regulatory offence satisfies the requirements of [s. 7](#). That same case indicates, at p. 238 [S.C.R.]:

That fault may be demonstrated by proof of intent, whether subjective or objective, or by proof of negligent conduct, depending on the nature of the offence. ...

... Mens rea focuses on the mental state of the accused and requires proof of a positive state of mind such as intent, recklessness or wilful blindness. Negligence, on the other hand, measures the conduct of the accused on the basis of an objective standard, irrespective of the accused's subjective mental state.

The sections of the Act set out above require the proof of two fault elements: one subjective, the other objective.

To satisfy the subjective element, the Crown must prove that the accused had the intention to enter into the agreement and had knowledge of the terms of that agreement. Once that is established, it would ordinarily be reasonable to draw the inference that the accused intended to carry out the terms in the agreement, unless there was evidence that the accused did not intend to carry out the terms of the agreement.

In order to satisfy the objective element of the offence, the Crown must establish that on an objective view of the evidence adduced the accused intended to lessen competition unduly. This surely does not impose too high a burden on the Crown. [Section 32\(1\)\(c\)](#) requires that the Crown demonstrate that the effect of the agreement will be to prevent competition or to lessen it unduly. Once again, it would be a logical inference to draw that a reasonable business person who can be presumed to be familiar with the business in which he or she engages would or should have known that the likely effect of such an agreement would be to unduly lessen competition. Thus in proving the actus reus that the agreement was likely to lessen competition unduly, the Crown could, in most cases, establish the objective fault element that the accused as a reasonable business person would or should have known that this was the likely effect of the agreement.

It must be remembered that if there are two possible interpretations of a statutory provision, one of which embodies [the Charter](#) values and the other does not, that which embodies [the Charter](#) values should be adopted. (See *Hills v. Canada (Attorney General)*, [1988] 1 S.C.R. 513, 88 C.L.L.C. 14,011, 30 Admin. L.R. 187, 84 N.R. 86, 48 D.L.R. (4th) 193.)

In summary then, the Crown must establish the subjective fault elements that the accused had the intention to enter into the agreement and was aware of its terms. As well, the Crown must demonstrate that the proof, viewed objectively (i.e., by a reasonable business person), establishes that the accused was aware or ought to have been aware that the effect of the agreement entered into by the accused would be to prevent or lessen competition unduly.

Section 32(1)(c) of the Act does not therefore violate [s. 7 of the Charter](#).

[Emphasis added.]

14 It is unclear to me whether *Nova Scotia Pharmaceutical*, supra, marks a further step beyond [Wholesale Travel](#), supra, in the development of the boundaries of a constitutionally based fault doctrine. If *Nova Scotia Pharmaceutical* stands for the proposition that the minimum fault requirement of civil negligence satisfies the requirements of [s. 7 of the Charter](#) for every criminal and regulatory offence, then there is no need to analyze further the various opinions of the members of the court in [Wholesale Travel](#). The sole issue would be whether the present offence falls within the ambit of *Nova Scotia Pharmaceutical*, in which case it does not offend [s. 7 of the Charter](#) despite its lack of subjective mens rea, or whether it is an offence which carries such a special

stigma that it is analogous to murder, attempted murder, and theft, and therefore requires full subjective mens rea per *Vaillancourt*, *infra*, and *Logan*, *infra*.

15 On the other hand, *Nova Scotia Pharmaceutical* may have intended to leave open, for constitutional purposes, the distinction between criminal and regulatory offences on which the opinions of some members of the court did rest in *Wholesale Travel*. In the quote which I have set out above, Gonthier J. said, at p. 59 [of the judgment, p. 42 C.R.]: "... a minimum fault requirement with respect to every criminal or regulatory offence satisfies the requirements of s. 7". He then quoted [at p. 42 C.R.] from Cory J.'s reasons in *Wholesale Travel* as follows: "That fault may be demonstrated by proof of intent, whether subjective or objective, or by proof of negligent conduct, *depending on the nature of the offence ...*" [Emphasis added.]. A few lines before that passage, Cory J. had said, in *Wholesale Travel*, at pp. 237-238 S.C.R., p. 251 C.C.C., pp. 175-176 C.R.:

The Crown submits that the words of the Chief Justice [in *Logan*] indicate that, even for some criminal offences, it is constitutionally permissible to remove the *mens rea* requirement entirely; as a result, it is said, there is no basis upon which to impose a minimum mental element for regulatory offences. I cannot accept this contention. In the passage quoted from *Logan*, the Chief Justice was considering whether s. 7 requires subjective (as opposed to objective) intent as a minimum level of *mens rea* for all criminal offences. He was not dealing with the issue of whether s. 7 requires proof of *any mens rea* at all. It is that question which is raised by the appellant's argument.

16 If Gonthier J. meant, in *Nova Scotia Pharmaceutical*, that the constitutionally appropriate level of fault will depend on the nature of the offence, being criminal rather than merely regulatory, then that analysis must be undertaken in the present case.

17 In contrast to the brief treatment of the issue in *Nova Scotia Pharmaceutical*, the Supreme Court in *Wholesale Travel*, *supra*, had engaged in a full review of the principles underlying the constitutional guarantee that criminal responsibility be based on fault. The court reaffirmed its ruling in *Reference re s. 94(2) of the Motor Vehicle Act (British Columbia)*, [1985] 2 S.C.R. 486, 48 C.R. (3d) 289, 36 M.V.R. 240, [1986] 1 W.W.R. 481, 69 B.C.L.R. 145, 63 N.R. 266, 23 C.C.C. (3d) 289, 24 D.L.R. (4th) 536, 18 C.R.R. 30, (sub nom. *Constitutional Question Act, R.S.B.C. 1979, Chap. 63*) [1986] D.L.Q. 90 (headnote), affirming 33 C.R. (3d) 22, 19 M.V.R. 63, 42 B.C.L.R. 364, [1983] 3 W.W.R. 756, 4 C.C.C. (3d) 243, 147 D.L.R. (3d) 539, 5 C.R.R. 148 (C.A.), that when an offence is punishable by imprisonment, the offence must not be one of absolute liability as s. 7 of the *Charter* requires a minimum fault requirement of negligence; if imprisonment is a possibility, at least a defence of due diligence must be open to the accused. At the other end of the spectrum, the court recognized its jurisprudence which asserts that there are some crimes which carry such a special stigma, as well as such a severe penalty, that subjective mens rea is constitutionally required. Murder and attempted murder have been ruled to contain such a constitutional requirement (*R. v. Vaillancourt*, [1987] 2 S.C.R. 636, 60 C.R. (3d) 289, 81

N.R. 115, 68 Nfld. & P.E.I.R. 281, 209 A.P.R. 281, 10 Q.A.C. 161, 39 C.C.C. (3d) 118, 47 D.L.R. (4th) 399, 32 C.R.R. 18, reversing (1984), 31 C.C.C. (3d) 75 (Que. C.A.); *R. v. Logan*, [1990] 2 S.C.R. 731, 79 C.R. (3d) 169, 58 C.C.C. (3d) 391, 112 N.R. 144, 73 D.L.R. (4th) 40, 41 O.A.C. 330, 50 C.R.R. 152, affirming (1988), 68 C.R. (3d) 1, 30 O.A.C. 321, 67 O.R. (2d) 87, 46 C.C.C. (3d) 354, 57 D.L.R. (4th) 58, 45 C.R.R. 201. In *Vaillancourt*, supra, theft was explicitly referred to as an offence containing a stigma of dishonesty such that it would attract the constitutional requirement of full mens rea. However, in *Wholesale Travel*, supra, the Supreme Court rejected the argument that a conviction of misleading or false advertising carried a stigma of dishonesty akin to that of theft, and decided that misleading advertising was not an offence for which anything more than a defence of due diligence was constitutionally required. Chief Justice Lamer, speaking generally on that point for himself as well as for La Forest, Sopinka and McLachlin JJ., said of the constitutional requirement, at p. 186 S.C.R., p. 213 C.C.C., [p. 205 C.R.]:

... Conversely, the question raised in the appeal before this court is not what is the most appropriate government policy, but rather, what fault requirement is constitutionally required where an accused faces possible imprisonment. While an aware state of mind may well be the most appropriate minimum standard of fault for imprisonment or for any offence included in the *Criminal Code*, a matter upon which I refrain from expressing any view, it does not follow that this standard of fault is entrenched in the Charter. As I stated in *R. v. Lippé* (1991), 64 C.C.C. (3d) 513 at p. 532, 128 N.R. 1, 13 W.C.B. (2d) 169, 'the Constitution does not always guarantee the "ideal"'.

18 The focus of Cory J.'s analysis, with which L'Heureux-Dubé J. agreed, rested on the distinction between "true crimes" and "regulatory offences". He said, at p. 238 S.C.R., pp. 251-252 C.C.C., [p. 176 C.R.]:

Does s. 7 require in all cases that the Crown prove *mens rea* as an essential element of the offence? The resolution of this question requires that a contextual approach be taken to the meaning and scope of the s. 7 right. Certainly, there can be no doubt that s. 7 requires proof of some degree of fault. That fault may be demonstrated by proof of intent, whether subjective or objective, or by proof of negligent conduct, depending on the nature of the offence. While it is not necessary in this case to determine the requisite degree of fault necessary to prove the commission of particular crimes, I am of the view that with respect to regulatory offences, proof of negligence satisfies the requirement of fault demanded by s. 7. Although the element of fault may not be removed completely, the demands of s. 7 will be met in the regulatory context where liability is imposed for conduct which breaches the standard of reasonable care required of those operating in the regulated field.

19 As indicated earlier, Cory J. specifically rejected the Crown's contention that even for some criminal offences, it is constitutionally permissible to remove the mens rea requirement entirely.

Lamer C.J.C. attached less significance to the categorization of offences between true crime and regulatory offences. He said, at pp. 189-190 S.C.R., pp. 215-216 C.C.C., [p. 207 C.R.]:

The Crown, along with a number of interveners, has argued that this result should not necessarily follow where the offence in question is a 'regulatory offence' as opposed to a criminal offence and that the constitutional fault requirement, as contemplated by *Reference re s. 94(2) of Motor Vehicle Act* and *R. v. Vaillancourt*, should not necessarily apply in a regulatory setting. Much has been made in this case of the fact that the *Competition Act* is aimed at economic regulation. In my view, whether this offence (or the Act generally) is better characterized as 'criminal' or 'regulatory' is not the issue. The focus of the analysis in *Reference re s. 94(2) of Motor Vehicle Act* and *R. v. Vaillancourt* was on *the use of imprisonment* to enforce the prohibition of certain behaviour or activity. A person whose liberty has been restricted by way of imprisonment has lost no *less* liberty because he or she is being punished for the commission of a regulatory offence as opposed to a criminal offence. Jail is jail, whatever the reason for it. In my view, it is the fact that the state has resorted to the restriction of liberty through imprisonment for enforcement purposes which is determinative of the principles of fundamental justice. I cannot agree that these principles take on a different meaning simply because the offence can be labelled as 'regulatory'. Indeed, while I agree that this offence can be characterized as 'regulatory', the label loses much of its relevance when one considers that an accused faces up to five years' imprisonment upon conviction.

While a regulatory context may well influence the *Charter* analysis in particular cases (see the judgment of Justice LaForest in *Thomson Newspapers Ltd. v. Canada (Director of Investigation and Research, Restrictive Trade Practices Commission)* (1990), 54 C.C.C. (3d) 417, 67 D.L.R. (4th) 161, 29 C.P.R. (3d) 97, [1990] 1 S.C.R. 425), it is my view that the jurisprudence of this court indicates that negligence is the minimum level of fault which will accord with s. 7 of the *Charter* whenever a conviction gives rise to imprisonment.

20 Referring to Cory J.'s distinction between true criminal law and regulatory offences, La Forest J. stressed that although labels are useful, they are not as important as the values at stake in the particular context. In a passage from which the Crown takes comfort in this case, La Forest J. said, at p. 210 S.C.R., p. 231 C.C.C., [p. 223 C.R.]:

For my part, I am prepared to accept the requirement of due diligence as sufficient for *Charter* purposes in the case of regulatory offences and some criminal offences having a significant regulatory base (e.g., gun control, *R. v. Schwartz* (1988), 45 C.C.C. (3d) 97, 55 D.L.R. (4th) 1, [1988] 2 S.C.R. 443). However, for most criminal offences I would be reluctant to accept a lower level of *mens rea* than criminal negligence.

21 La Forest J. made it clear that he equated criminal negligence with recklessness, which has a subjective component, and not with the mere standard of civil negligence. McLachlin J. specifically refrained from expressing any view on the significance of "stigma", and made no

reference to the distinction between true crimes and regulatory offences. Neither did the remaining members of the court.

22 As the Supreme Court jurisprudence presently stands, it seems to me that the constitutional validity of [s. 86\(2\) of the Criminal Code](#) can be safely affirmed if either (a) the section creates a mere regulatory offence, rather than a true crime or, (b) the offence does not carry the special stigma that compels subjective mens rea. I will therefore analyze the section under both these headings.

(c) The Criminal versus Regulatory Distinction

23 The distinction between true crimes and mere regulatory offences has historical roots that predate [the Charter](#). The classification of offences along those lines was crystallized, shortly before the coming into force of [the Charter](#), in *R. v. Sault Ste. Marie (City)*, [1978] 2 S.C.R. 1299, 3 C.R. (3d) 30, 21 N.R. 295, 7 C.E.L.R. 53, 40 C.C.C. (2d) 353, 85 D.L.R. (3d) 161, affirming (1976), 13 O.R. (2d) 113, 70 D.L.R. (3d) 430, 30 C.C.C. (2d) 257 (C.A.). Dickson J., as he then was, speaking for the court said, at pp. 1302-1303 S.C.R., p. 357 C.C.C., [p. 34 C.R.]:

In the present appeal the Court is concerned with offences variously referred to as 'statutory', 'public welfare', 'regulatory', 'absolute liability', or 'strict responsibility', which are not criminal in any real sense, but are prohibited in the public interest: *Sherras v. De Rutzen*, [1985] 1 Q.B. 918. Although enforced as penal laws through the utilization of the machinery of the criminal law, the offences are in substance of a civil nature and might well be regarded as a branch of administrative law to which traditional principles of criminal law have but limited application. They relate to such everyday matters as traffic infractions, sales of impure food, violations of liquor laws, and the like. In this appeal we are concerned with pollution.

He added, at p. 1309 S.C.R., p. 362 C.C.C., [p. 40 C.R.]:

The distinction between the true criminal offence and the public welfare offence is one of prime importance. Where the offence is criminal, the Crown must establish a mental element, namely, that the accused who committed the prohibited act did so intentionally or recklessly, with knowledge of the facts constituting the offence, or with wilful blindness toward them. Mere negligence is excluded from the concept of the mental element required for conviction. Within the context of a criminal prosecution a person who fails to make such inquiries as a reasonable and prudent person would make, or who fails to know facts he should have known, is innocent in the eyes of the law.

And at p. 1310 S.C.R., p. 363 C.C.C., [pp. 40-41 C.R.]:

Public welfare offences evolved in mid-19th century Britain (*R. v. Woodrow* (1846), 15 M. & W. 404, 153 E.R. 907, and *R. v. Stephens* (1866), L.R. 1 Q.B. 702) as a means of doing away with the requirement of *mens rea* for petty police offences. The concept was

a judicial creation, founded on expediency. That concept is now firmly embedded in the concrete of Anglo-American and Canadian jurisprudence, its importance heightened by the ever-increasing complexities of modern society.

24 In that pre-*Charter* context, Dickson J. emphasized that offences that are criminal in the true sense would continue to have the benefit of the presumption of mens rea, subject, of course to Parliament's ultimate authority to remove all or part of the mental element, by express language to that effect. Short of an express exclusion of mens rea, Canadian courts had a long tradition of supplying a silent provision with the required mental element: see, for example, *Beaver v. R.*, [1957] S.C.R. 531, 26 C.R. 193, 118 C.C.C. 129; *R. v. Buzzanga* (1979), 25 O.R. (2d) 705, 101 D.L.R. (3d) 488, 49 C.C.C. (2d) 369 (C.A.) ; *R. v. Metro News Ltd.* (1986), 53 C.R. (3d) 289, 16 O.A.C. 319, 56 O.R. (2d) 321, 29 C.C.C. (3d) 35, 23 C.R.R. 77, 32 D.L.R. (4th) 321 (C.A.), leave to appeal to Supreme Court of Canada refused [1986] 2 S.C.R. viii, 64 C.R. (3d) xxx (note), 29 C.C.C. (3d) 35n, 32 D.L.R. (4th) 321n, 57 O.R. (2d) 638 (note), 74 N.R. 317 (note), 20 O.A.C. 160 (note) (S.C.C.), at p. 340 O.R., pp. 54-55 C.C.C., [p. 309 C.R.]. The analysis then was whether the offence was a true crime so as to engage the presumption of mens rea and require the courts to provide the mental element not expressly made part of the statutory definition of the crime.

25 In the context of the search for compliance with the constitutional standard implicit in s. 7 of the *Charter*, the analysis is somewhat different than it was at common law, when courts tried to determine the nature of the offence, i.e., true crime versus regulatory offence, in order to supply it with the appropriate mental element. This was done in accordance with the long established tradition of legislative silence, or at least partial silence on that point, and the court's well established function of reading in the requisite mens rea.

26 In the present context, the court's effort to classify the offence as "true crime" versus "regulatory offence" is obviously not undertaken for the purpose of determining the requisite mental element, if any. That is already known, at least in this case, and none of the parties before us, nor the trial judge, were willing to ignore Parliament's obvious choice of a standard of fault at the negligence level by the use of the word "careless", which has a clear jurisprudential pedigree. Therefore, in a pre-*Charter* context, the analysis upon which we are to embark would not have taken place as its purpose would have already been fulfilled by Parliament's clear expression of the fault requirement. In the present constitutional context, one must thus avoid concluding that an offence is merely regulatory because of Parliament's expressed choice of a negligence standard of fault. The issue being whether that choice was constitutionally open to Parliament, one must avoid the bootstrap argument of deciding that the offence is merely regulatory, and thus constitutionally valid, because it says it is.

27 Generally speaking, it seems more likely that regulatory offences would find themselves in federal statutes other than the *Criminal Code*, where the federal activity is not solely based on the criminal law power contained in s. 91(27) of the *Constitution Act, 1867* [(U.K.), 30 & 31 Vict., c.

3], but is an ancillary power akin to the provincial power in s. 92(15). Offences contained in the *Criminal Code* would be presumed to have been enacted solely on the basis of the federal criminal law power and would therefore more likely be true crimes than offences enacted for the purpose of enforcing a federal head of power, with or without reliance on the federal criminal power. The distinction, however useful, is not determinative. Not all true crimes are contained in the *Criminal Code*, and some *Criminal Code* offences may have been enacted under the "public welfare" branch of the criminal law power, and thus not be "true crimes" for our purposes. It is in any event clear from the opinion of Chief Justice Lamer in *Wholesale Travel*, *supra*, that he, along with La Forest and Sopinka JJ., and to some extent McLachlin J., consider that not all *Criminal Code* offences are constitutionally required to contain a subjective mental element.

(d) The Nature of s. 86(2) as Part of the "Gun Control" Legislation

28 The legislative history of s. 86(2) has been conveniently reviewed by the Saskatchewan Court of Appeal in *R. v. Finlay*, *supra*, and by Moldaver J. in *R. v. Durham*, *supra*. Section 86(2) is contained in Part III of the *Criminal Code*, entitled "Firearms and Other Offensive Weapons". Part III, which was then Part II.1, was described in detail by Dickson C.J.C. (dissenting) in *R. v. Schwartz*, [1988] 2 S.C.R. 443, 66 C.R. (3d) 251, [1989] 1 W.W.R. 289, 88 N.R. 90, 45 C.C.C. (3d) 97, 56 Man. R. (2d) 92, 55 D.L.R. (4th) 1, 39 C.R.R. 260, at pp. 470-472 [S.C.R.], pp. 117-119 [C.C.C., pp. 272-274 C.R.]. Section 86 is part of a sub-heading entitled "Offences Related to the Use of Firearms and other Offensive Weapons". Under that sub-heading, s. 85 deals with the use of firearms during the commission of an offence and s. 86 deals with pointing a firearm, as well as with careless use, handling, shipping or storage of a firearm.

29 The next sub-headings in Part III deal with "Offences Related to Possession of Firearms and other Offensive Weapons" and "Offences Related to Sale, Delivery or Acquisition of Firearms and other Offensive Weapons". Subsequent sub-headings do not refer to "offences" but appear to organize a regulatory or administrative scheme under headings such as "Prohibition Orders, Seizure and Forfeiture", "Firearms and other Businesses" followed by various sections dealing with certificates, permits and registry.

30 Taken as a whole, Part III of the *Criminal Code* is largely regulatory. Indeed, many offences contained in Part III are directed at what Cory J. called in *Wholesale Travel*, *supra*, "the regulated defendant". He said, at p. 228 S.C.R., p. 245 C.C.C., [p. 168 C.R.]:

The licensing argument is directed to this question of choice. Thus, while in the criminal context, the essential question to be determined is whether the accused has made the choice to act in the manner alleged in the indictment, the regulated defendant is, by virtue of the licensing argument, assumed to have made the choice to engage in the regulated activity. The question then becomes not whether the defendant chose to enter the regulated sphere

but whether, having done so, the defendant has fulfilled the responsibilities attending that decision.

31 Before this court, Mr. Rosenberg argued, on behalf of both respondents, that [s. 86\(2\)](#) is too broad to be confined to "the regulated defendant". [Section 86\(2\)](#) is not directed solely at the storage of firearms which are otherwise regulated by Part III. The Code regulates the acquisition and transfer of firearms and people who engage in any such and similar activities can genuinely be described as "regulated defendants" if they infringe the provisions related to these activities. Mr. Rosenberg stressed, however, that the Code does not purport to regulate in any way the possession of long-guns, millions of which were estimated to be already in the hands of people who never required acquisition certificates at the time of purchase (M.L. Friedland, "Gun Control: The Options" (1975-76) 18 Crim. L.Q. 29, at p. 58). Mr. Rosenberg argued that people who possess, store and use long-guns, which are neither prohibited nor restricted weapons within the meaning of [s. 84 of the Criminal Code](#), are not engaged in a regulated activity and therefore they qualify for treatment as criminal, rather than as regulated defendants. The criminal defendant, in contrast to the regulated one, is answerable only to the criminal law, described by Cory J. in [Wholesale Travel](#), *supra*, in the following terms, at p. 228 S.C.R., p. 244 C.C.C., [p. 168 C.R.]:

Criminal law is rooted in the concepts of individual autonomy and free will and the corollary that each individual is responsible for his or her conduct. It assumes that all persons are free actors, at liberty to choose how to regulate their own actions in relation to others. The criminal law fixes the outer limits of acceptable conduct, constraining individual freedom to a limited degree in order to preserve the freedom of others. Thus, the basis of criminal responsibility is that the accused person has made a deliberate and conscious choice to engage in activity prohibited by the [Criminal Code](#).

32 It could of course be argued that Parliament intended to regulate the handling and storage of otherwise unregulated firearms by creating the offence contained in [s. 86\(2\)](#). This regulation can be contrasted with the outright prohibition against possession of prohibited weapons. Friedland, *supra*, argued in 1984 against the licensing of all existing long-guns. He said, at p. 58:

One of the key questions is whether a licence should be required for all persons who now possess long-guns. The problem is that there may now be close to 10,000,000 long-guns in Canada. Many persons will not apply for a licence. One does not want to establish a system which automatically makes a large number of persons guilty of offences, or that requires considerable invasions of privacy in order to license the owners of all long-guns. The best solution is to provide that no one can *purchase* or *use* a controlled firearm or any ammunition without a licence. This will slowly sweep into the licensing system most of those who now have guns.

33 In my view, [s. 86\(2\)](#) is part of an overall regulatory scheme whereby a duty was imposed on all persons in possession of firearms not to obtain a licence to continue their lawful possession, but to handle, store and use their weapons carefully. A regulatory character is more easily discernible in [s. 3](#) of Bill C-17, assented to December 5, 1991, which repeals [s. 86\(2\)](#) of the Code and replaces it by the following:

(2) Every person who uses, carries, handles, ships or stores any firearm or ammunition in a manner that shows wanton or reckless disregard for the lives or safety of other persons

(a) is guilty of an indictable offence and liable to imprisonment for a term not exceeding five years; or

(b) is guilty of an offence punishable on summary conviction.

(3) Every person who stores, displays, handles or transports any firearm in a manner contrary to a regulation made under [paragraph 116\(1\)\(g\)](#)

(a) is guilty of an indictable offence and liable to imprisonment for a term not exceeding two years; or

(b) is guilty of an offence punishable on summary conviction.

34 Detailed regulations, presented to us in draft form, provide for the storage of firearms, distinguishing between restricted and non- restricted firearms.

35 As the law presently stands, I think that [s. 86\(2\)](#) is directed to the regulated, although not necessarily the licensed, defendant. Consequently, it should be classified as a regulatory offence for which nothing more than a defence of due diligence is constitutionally required. Looking at the section in context, it is clearly part and parcel of the entire field of gun control regulation which the federal government has occupied, more or less, in part through a licensing-type form of control, in part through outright prohibitions, and, in the case of [s. 86\(2\)](#), through punishing negligence. Although enacted solely on the strength of the federal criminal law power contained in [s. 91\(27\) of the Constitution Act, 1867](#), gun control has undeniably a strong regulatory base. This dual aspect of the legislation was embodied in the comments of Chief Justice Dickson in *Schwartz*, *supra*, where he said, at p. 117 C.C.C., p. 470 S.C.R., [pp. 272-273 C.R.]:

It [Part III of the Code] embodies wholly legitimate societal concerns for stricter regulations and control of guns and other offensive weapons.

36 Yet he added, at p. 119 C.C.C., p. 472 S.C.R. [p. 274 C.R.]:

The Code thus contains ... 'a comprehensive "gun control" legislative scheme intended to discourage the use of firearms by the criminal element of our society.'

37 There is obviously enough of a criminal underpinning to the gun control legislation to have it validly enacted by Parliament under its criminal law power, and for the entire legislation to have found its place in the *Criminal Code*. On the other hand, along with the gaming provisions, Part III of the Code stands out as a largely administrative scheme, which regulates an often legitimate activity which happens to have a strong historical link with crime. In that context, had it been the sole criterion applicable, I would have concluded that it was open to Parliament, without infringing s. 7 of the *Charter*, to impose liability on the civil standard of negligence for careless use or storage of firearms, as part of its effort to regulate and control the possession and handling of firearms. As stated above, in light of the various opinions expressed in *Wholesale Travel*, supra, I believe that I should conduct an alternative analysis and examine whether the stigma attached to a conviction for that offence is such as to dictate a higher constitutionally mandated standard.

(e) The Stigma Attached to Conviction

38 Generally speaking, there is likely to be more stigma attached to a criminal conviction than to the violation of a non-criminally related statute. Yet not all criminal offences carry the same amount of stigma. The stigma is proportional not only to the gravity of the conduct and of its consequences, but to the level of fault, represented by the mental element, with which the act or omission was performed. This can be no better illustrated than by comparing the difference between a conviction for murder and a conviction for manslaughter. In the same way, the social stigma attached to a conviction for careless use or storage of a firearm will adjust over time to reflect an understanding of the gravity of the conduct, which in turn will be determined by the degree of fault, the moral blameworthiness of the offender. The social stigma comes not only from the fact of a criminal conviction, with its attendant criminal record, fingerprinting etc., but from the likelihood of imprisonment, the possibility of a penitentiary term, rather than a mere reformatory one, being imposed, and the association of the crime with other forms of social deviance. Therefore, in determining the degree of stigma likely to attach to a conviction for careless use of a firearm, it is important to take into account the mental element of the offence. A conviction for careless storage of a firearm, known to comport no subjective awareness of the risk created by the conduct, and otherwise not associated with any other form of social deviance, would not carry the same stigma as a conviction for careless use of a firearm by a person shown to have deliberately created or undertaken a substantial and unjustifiable risk, with full awareness of the danger created. Aside from the basic assertion that every criminal conviction generates a significant social stigma, which is true as far as it goes, the more precise appreciation of what distinguishes the stigma attached to a conviction for fraud, from the stigma of a conviction for sexual assault, possession of counterfeit money or careless storage of a firearm, depends on a multitude of factors, including not only the social repugnance of the conduct, but the degree of fault with which it is committed.

39 It is constitutionally impermissible for Parliament to treat as murder a conduct devoid of the essential characteristic upon which the stigmatization of murderers came to be based, the moral

turpitude represented by the intention to kill. In the same way, if it is his dishonesty that stigmatizes the convicted thief, Parliament will not be permitted, absent justification under [s. 1 of the Charter](#), to brandish as a thief someone who has not been shown to be dishonest. In my opinion, this is the extent to which cases such as *Vaillancourt*, supra, and *Reference re s. 94(2) of the Motor Vehicle Act (British Columbia)*, supra, compel the consideration of stigma as a factor from which compliance with [s. 7](#) may be determined. Even though a person convicted of an offence under [s. 86\(2\)](#) of the Code will carry the stigma of having a criminal conviction, that is not sufficient to dictate that the offence must contain a subjective mental element.

IV Conclusion

40 If *Nova Scotia Pharmaceutical*, supra, means that proof of negligent conduct is sufficient to meet the constitutional requirement of fault for all criminal offences, save murder, attempted murder and the like, [s. 86\(2\)](#) is constitutionally unimpeachable. In any event, I find that [s. 86\(2\)](#) creates an offence which has a significant regulatory component and which does not carry the special stigma associated with the highest form of deviance, accompanied by the equivalent highest degree of moral blameworthiness. The desirability of requiring that guilt be dependent on a subjective state of mind is, in that case, a matter of legislative choice, not a constitutional imperative. Having found no violation of [s. 7](#), I find it unnecessary to engage in a [s. 1](#) analysis.

41 With the greatest respect for those who have expressed a contrary view, I have concluded that in both appeals before us the trial judges erred in declaring [s. 86\(2\) of the Criminal Code](#) unconstitutional and in staying the proceedings against the respondents. Both appeals are allowed, the stays of proceedings are set aside and the matters are remitted to the trial court for disposition.

Appeals allowed.