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180

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 11 OF 11**

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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

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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-bc.gc.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

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Her Majesty The Queen *Appellant/
Respondent on cross-appeal*

v.

Dennis Rodgers *Respondent/Appellant on
cross-appeal*

and

**Attorney General of Canada, Attorney
General of Quebec, Attorney General of
Nova Scotia, Attorney General of New
Brunswick and Attorney General of British
Columbia** *Intervenors*

INDEXED AS: **R. v. RODGERS**

Neutral citation: **2006 SCC 15.**

File No.: 30319.

2005: November 15; **2006: April 27.**

Present: McLachlin C.J. and Bastarache, Binnie,
Deschamps, Fish, Abella and **Charron** JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR
ONTARIO

*Constitutional law — Charter of Rights — Search
and seizure — Criminal Code provision permitting pro-
vincial court judge, on ex parte application, to authorize
collection of DNA samples from three classes of previ-
ously convicted offenders — Legislative safeguards re-
stricting use of DNA data bank as an identification tool
only — Whether collection of DNA samples for data bank
purposes from designated classes of convicted offenders
reasonable — Whether data bank provisions strike an
appropriate balance between public interest in effective
identification of persons convicted of serious offences
and rights of individuals to physical integrity and con-
trol of release of information about themselves — Cana-
dian Charter of Rights and Freedoms, s. 8 — Criminal
Code, R.S.C. 1985, c. C-46, s. 487.055.*

*Constitutional law — Charter of Rights — Fun-
damental justice — Procedural fairness — Ex parte*

Sa Majesté la Reine *Appelante/Intimée au
poursuivi incident*

c.

Dennis Rodgers *Intimé/Appelant au poursui-
vi incident*

et

**Procureur général du Canada, procureur
général du Québec, procureur général de
la Nouvelle-Écosse, procureur général du
Nouveau-Brunswick et procureur général de
la Colombie-Britannique** *Intervenants*

RÉPERTORIÉ : **R. c. RODGERS**

Référence neutre : **2006 CSC 15.**

N° du greffe : 30319.

2005 : 15 novembre; 2006 : 27 avril.

Présents : La juge en chef McLachlin et les juges
Bastarache, Binnie, Deschamps, Fish, Abella et
Charron.

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

*Droit constitutionnel — Charte des droits —
Fouilles, perquisitions et saisies — Disposition du
Code criminel prévoyant qu'un juge d'une cour pro-
vinciale peut, sur demande ex parte, autoriser le pré-
lèvement d'échantillons d'ADN sur trois catégories de
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sation de la banque de données génétiques qu'à des fins
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1985, ch. C-46, art. 487.055.*

*Droit constitutionnel — Charte des droits — Justice
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proceeding — Criminal Code provision permitting provincial court judge, on ex parte application, to authorize collection of DNA samples from three classes of previously convicted offenders — Whether ex parte nature of proceeding meets minimal constitutional imperatives of procedural fairness — Canadian Charter of Rights and Freedoms, s. 7 — Criminal Code, R.S.C. 1985, c. C-46, s. 487.055.

Constitutional law — Charter of Rights — Double jeopardy — Benefit of lesser punishment — Criminal Code provision permitting provincial court judge, on ex parte application, to authorize collection of DNA samples from three classes of previously convicted offenders — Whether imposition of DNA sampling order amounts to “punishment” within meaning of ss. 11(h) and 11(i) of Canadian Charter of Rights and Freedoms — Criminal Code, R.S.C. 1985, c. C-46, s. 487.055.

Criminal law — Forensic DNA analysis — Offenders serving sentences — Criminal Code provision permitting provincial court judge, on ex parte application, to authorize collection of DNA samples from three classes of previously convicted offenders — Whether judge lost jurisdiction when he proceeded ex parte in absence of any evidence demonstrating need to do so — Whether offender’s certiorari application should be granted — Criminal Code, R.S.C. 1985, c. C-46, s. 487.055.

R was sentenced to four years in prison for a sexual assault, committed while he was on probation on a conviction for sexual interference. He was convicted prior to the proclamation of the 1998 *DNA Identification Act* and so was not ordered to provide a DNA sample when sentenced. Before his sentence expired, the Crown applied *ex parte* under s. 487.055(1)(c) of the *Criminal Code* for authorization to take DNA samples from R for inclusion in the national DNA data bank. The sample was not sought as part of an ongoing investigation of a crime. A warrant was issued and R first learned of the proceeding when served with a summons to attend to provide bodily substances. R applied for a declaration that s. 487.055 infringes ss. 7, 8, 11(h) and (i) of the *Canadian Charter of Rights and Freedoms*. Alternatively, he argued that the authorizing judge lost jurisdiction by proceeding *ex parte*. The Ontario Superior Court of Justice dismissed R’s applications. The Court of Appeal upheld the constitutional validity of s. 487.055 but interpreted the provision as presumptively requiring an *inter partes* hearing and held that the authorizing provincial court judge had committed jurisdictional error by proceeding *ex parte*. The

parte — Disposition du Code criminel prévoyant qu’un juge d’une cour provinciale peut, sur demande ex parte, autoriser le prélèvement d’échantillons d’ADN sur trois catégories de condamnés — L’audition ex parte de la demande satisfait-elle aux impératifs constitutionnels minimaux d’équité procédurale? — Charte canadienne des droits et libertés, art. 7 — Code criminel, L.R.C. 1985, ch. C-46, art. 487.055.

Droit constitutionnel — Charte des droits — Double péril — Droit de bénéficiaire de la peine la moins sévère — Disposition du Code criminel prévoyant qu’un juge d’une cour provinciale peut, sur demande ex parte, autoriser le prélèvement d’échantillons d’ADN sur trois catégories de condamnés — L’imposition d’un tel prélèvement équivaut-elle à une « peine » au sens des art. 11h) et 11i) de la Charte canadienne des droits et libertés? — Code criminel, L.R.C. 1985, ch. C-46, art. 487.055.

Droit criminel — Analyse génétique — Contrevenants purgeant une peine — Disposition du Code criminel prévoyant qu’un juge d’une cour provinciale peut, sur demande ex parte, autoriser le prélèvement d’échantillons d’ADN sur trois catégories de condamnés — Le juge a-t-il perdu compétence en entendant la demande ex parte sans que n’ait été établie la nécessité de procéder ainsi? — Y a-t-il lieu de faire droit à la requête en certiorari du contrevenant? — Code criminel, L.R.C. 1985, ch. C-46, art. 487.055.

R a été condamné à quatre ans d’emprisonnement pour une agression sexuelle commise pendant qu’il était sous probation après avoir été reconnu coupable de contacts sexuels. Sa déclaration de culpabilité étant intervenue avant la promulgation de la *Loi sur l’identification par les empreintes génétiques* en 1998, il n’a pas eu à fournir un échantillon de substances corporelles lors de sa condamnation. Avant que sa peine ne prenne fin, le ministère public a présenté, *ex parte* et sur le fondement de l’al. 487.055(1)c) du *Code criminel*, une demande d’autorisation de prélever sur R des échantillons d’ADN destinés à la banque nationale de données génétiques. Le prélèvement n’était pas requis aux fins d’une enquête criminelle en cours. Un mandat a été décerné, et R a été informé de la démarche lorsque lui a été signifiée une sommation de se présenter pour subir le prélèvement. R a demandé un jugement déclaratoire selon lequel l’art. 487.055 violait les art. 7 et 8 de la *Charte canadienne des droits et libertés*, ainsi que ses al. 11h) et i). Il a soutenu subsidiairement que le juge ayant accordé l’autorisation avait perdu compétence du fait de l’audition *ex parte* de la demande. La Cour supérieure de justice de l’Ontario a rejeté les demandes de R.

authorization was quashed and the application was re-mitted for reconsideration. The Crown appealed the quashing of the authorization and R cross-appealed against the dismissal of his constitutional challenge.

Held (Binnie, Deschamps and Fish JJ. dissenting): The appeal should be allowed and the cross-appeal should be dismissed.

Per McLachlin C.J. and Bastarache, Abella and Charron JJ.: The authorizing judge did not commit jurisdictional error in proceeding *ex parte*. The Court of Appeal erred in interpreting s. 487.055 of the *Code* as presumptively requiring an *inter partes* hearing. *Charter* values and principles should not be applied to interpret s. 487.055(1) because they only play a role in statutory interpretation if there is genuine ambiguity in the legislation. Since s. 487.055(1) is clear and unambiguous, the court must give effect to the expressed legislative intent to authorize *ex parte* applications. [6] [18-20]

Section 487.055(1) of the *Code* does not infringe s. 7 or 8 of the *Charter*. While the taking of bodily samples for DNA analysis without consent constitutes a seizure within the meaning of s. 8 of the *Charter*, the collection of DNA samples for data bank purposes from designated classes of convicted offenders is reasonable. These samples may only be used in order to create profiles in the DNA data bank. Unlike investigative DNA warrants, authorizations under the data bank provisions do not target suspected offenders nor particular offences nor do they gather evidence for use in specific prosecutions. The provisions put DNA technology to use to identify offenders in a manner analogous to fingerprinting and other identification measures. Society's interest in using this powerful new technology to assist law enforcement agencies in the identification of offenders is beyond dispute. The resulting impact on the physical integrity of the targeted offenders is minimal. Furthermore, in restricting the use of DNA sampling for data bank purposes to an identification tool only, Parliament has adequately answered any heightened concern about the potentially powerful impact that DNA sampling has on the informational privacy interests of the individual. In this case, R had no reasonable expectation of privacy in respect of his identity. Section 487.055 targets dangerous convicted offenders. Since R's identity as a multiple sex offender has become a matter of state interest, he

La Cour d'appel a confirmé la constitutionnalité de l'art. 487.055, mais elle a présumé que la disposition nécessitait une audition *inter partes* et conclu que le juge de la cour provinciale avait commis une erreur juridictionnelle en entendant la demande *ex parte*. L'autorisation a été annulée et la demande a été renvoyée au tribunal inférieur pour qu'il statue de nouveau. Le ministère public en a appelé de l'annulation, et R a formé un pourvoi incident contre le rejet de sa contestation constitutionnelle.

Arrêt (les juges Binnie, Deschamps et Fish sont dissidents) : Le pourvoi est accueilli et le pourvoi incident est rejeté.

La juge en chef McLachlin et les juges Bastarache, Abella et Charron : Le juge qui a accordé l'autorisation n'a pas commis d'erreur juridictionnelle en entendant la demande *ex parte*. La Cour d'appel a eu tort de présumer que l'art. 487.055 du *Code* nécessitait une audition *inter partes*. Le paragraphe 487.055(1) ne doit pas être interprété au regard des valeurs et des principes consacrés par la *Charte*, ceux-ci ne jouant que lorsque la disposition comporte une véritable ambiguïté. Comme la disposition en cause est claire, le tribunal doit donner effet à l'intention manifeste du législateur de permettre l'audition *ex parte*. [6] [18-20]

Le paragraphe 487.055(1) du *Code* ne porte pas atteinte aux art. 7 et 8 de la *Charte*. Le prélèvement de substances corporelles pour analyse génétique sans le consentement de l'intéressé constitue une saisie au sens de l'art. 8 de la *Charte*, mais le prélèvement sur les catégories de condamnés désignées d'échantillons d'ADN destinés à la banque de données génétiques n'est pas abusif. Ces échantillons ne servent qu'à l'établissement de profils d'identification génétique destinés à la banque de données. Contrairement au mandat ADN décerné pour les besoins d'une enquête, l'autorisation de prélèvement ne vise pas les personnes soupçonnées d'une infraction ni ne permet l'obtention d'éléments de preuve aux fins d'une poursuite. Les dispositions mettent les nouvelles techniques d'analyse génétique au service de l'identification des contrevenants, et l'analogie doit se faire avec la prise des empreintes digitales et les autres mesures d'identification. La société a indéniablement intérêt à ce que les organismes chargés du contrôle d'application de la loi recourent à cette nouvelle technique performante pour identifier les contrevenants. L'atteinte à l'intégrité physique des condamnés visés est minime. Qui plus est, en ne permettant l'utilisation des échantillons d'ADN destinés à la banque de données qu'à des fins d'identification, le législateur a dûment tenu compte de l'inquiétude accrue suscitée par l'incidence considérable qu'a le prélèvement d'échantillons d'ADN sur la

has lost any reasonable expectation of privacy in the identifying information derived from DNA sampling. The data bank provisions strike an appropriate balance between the public interest in the effective identification of persons convicted of serious offences and the rights of individuals to physical integrity and privacy. Having regard to the competing interests at play, there is no constitutional requirement to link the convicted offender, on reasonable and probable grounds, to any particular investigation. [5] [25] [37-38] [42-44]

The presumptively *ex parte* hearing is a constitutionally valid legislative option. Notice and participation are not themselves principles of fundamental justice. The constitutional norm, rather, is procedural fairness. What is fair in a particular case depends entirely on the context and the constitutional question is referable to the minimal standard mandated by the *Charter*. In the context of s. 487.055, notice and participation are not required to satisfy the minimal constitutional norm. Having regard to the interests at stake and the procedural safeguards afforded by the legislative scheme, the *ex parte* nature of the proceedings meets the dictates of procedural fairness afforded under s. 7 of the *Charter*. Further, although there is no appeal from a s. 487.055 order, the decision of the judge is reviewable on *certiorari*. Lastly, the offender, by reason of his criminal conduct, is already known to law enforcement authorities and, depending on the circumstances, may be a logical suspect in future investigations regardless of any s. 487.055 order. What an offender stands to lose on a s. 487.055 application is to have his DNA profile made available to the state for identification purposes only. In the investigation of a crime, the use of a DNA profile illegally included in the data bank itself will provide grounds for an offender to quash a subsequent DNA warrant. It will also be open to the offender to challenge the admissibility of any DNA evidence at trial. [5] [47-54]

Section 487.055(1) of the *Code* does not infringe s. 11(h) or 11(i) of the *Charter*. These sections are inapplicable because the taking of DNA samples does not constitute a punishment within the meaning of s. 11. The word “punishment” under ss. 11(h) and 11(i) does

protection des renseignements personnels. Dans la présente affaire, R n’avait pas d’attentes raisonnables en matière de vie privée quant à son identité. L’article 487.055 vise des condamnés dangereux. Comme son identité en tant que délinquant sexuel récidiviste intéresse désormais l’État, R n’a plus d’attentes raisonnables en matière de vie privée à l’égard des renseignements d’identification tirés des échantillons d’ADN. Les dispositions relatives à la banque de données génétiques établissent un juste équilibre entre l’intérêt qu’a l’État à ce que soient identifiées les personnes déclarées coupables d’infractions graves et le droit du particulier à l’intégrité physique et à la vie privée. Vu les intérêts concurrents en jeu, il n’y a pas d’obligation constitutionnelle d’établir l’existence de motifs raisonnables et probables de relier le condamné à une enquête en particulier. [5] [25] [37-38] [42-44]

Le choix d’une audition de prime abord *ex parte* est un choix législatif valable sur le plan constitutionnel. Le préavis et la participation ne sont pas en eux-mêmes des principes de justice fondamentale. La norme constitutionnelle applicable est plutôt celle de l’équité procédurale. Ce qui est équitable dans un cas donné dépend entièrement du contexte, et la question constitutionnelle se rapporte à la norme minimale imposée par la *Charte*. Dans le contexte de l’art. 487.055, le préavis et la participation ne sont pas requis pour satisfaire à la norme constitutionnelle minimale. Compte tenu des intérêts en jeu et des garanties procédurales offertes par le régime législatif, le caractère *ex parte* de l’instance respecte les exigences de l’art. 7 de la *Charte* en matière d’équité procédurale. En outre, bien qu’il n’existe aucun droit d’en appeler de l’autorisation visée à l’art. 487.055, la décision du juge est susceptible de révision par voie de *certiorari*. Enfin, à cause de son comportement criminel, le contrevenant est déjà connu des autorités chargées du contrôle d’application de la loi et, selon les circonstances, il pourrait logiquement faire l’objet de soupçons lors d’une enquête ultérieure, indépendamment de toute autorisation fondée sur l’art. 487.055. Pour le contrevenant visé par une demande, l’enjeu est la mise à la disposition de l’État de son profil génétique à des fins d’identification seulement. Lors d’une enquête sur un crime, l’utilisation d’un profil génétique illégalement versé dans la banque de données pourra justifier l’annulation, à la demande du contrevenant, d’un mandat ADN décerné subséquemment. L’admissibilité de la preuve génétique pourra également être contestée au procès. [5] [47-54]

Le paragraphe 487.055(1) du *Code* ne contrevient pas aux al. 11(h) et i) de la *Charte*, qui sont inapplicables, car le prélèvement d’un échantillon d’ADN ne constitue pas une « peine » au sens de l’art. 11. La « peine » à laquelle renvoient ces alinéas n’englobe pas nécessairement

not necessarily encompass every potential consequence of being convicted of a criminal offence. As a general rule, a consequence will constitute a punishment when it forms part of the arsenal of sanctions to which an accused may be liable in respect of a particular offence and the sanction is imposed in furtherance of the purpose and principles of sentencing. A DNA sampling is no more part of the arsenal of sanctions to which an accused may be liable in respect of a particular offence than the taking of a photograph or fingerprints. The fact that the DNA order may have a deterrent effect on the offender does not make it a punishment. [5] [63-65]

Per Binnie, Deschamps and Fish JJ. (dissenting): To hold an authorization hearing *ex parte* under s. 487.055 of the *Code*, absent any reason to proceed without notice or participation, does not satisfy the constitutional requirements of s. 8 of the *Charter*. The DNA data bank constitutes a substantial and novel invasion of privacy. Notice and an opportunity to participate should be given to those whose privacy interests are at stake except where competing interests require otherwise. While the nature and extent of procedural fairness depends on context, in this context, there is no reasonable basis to presumptively depart from the norm of providing notice and participation. Both context and principle favour *inter partes* s. 487.055 applications; *ex parte* proceedings should be exceptional. [77] [80-83] [95]

In this case, no justification was shown to proceed *ex parte*. First, it is impossible for a subject to destroy his DNA sample. Second, notice and participation in the hearing create no enhanced risk of flight. The state interest in proceeding *ex parte* where there is no reason to do so is therefore minimal, at best. In any event, an assessment of the state's interest must consider as well the competing interests of those whom the state is required to protect. A s. 487.055 target has a legitimate interest in presenting information that is relevant to the required exercise of judicial discretion and that may well persuade the judge not to issue an order. That person has the most to lose if the order is erroneously made and will often be in the best position to correct erroneous information upon which the judge might otherwise be required to rely. The statutory safeguard requiring consideration of the individual's interest is rendered illusory by proceeding *ex parte* without reason. Finally, the possibility that some errors by an issuing judge may be reviewed *ex post facto* by *certiorari* cannot be considered an adequate substitute for a fair hearing on an application for an order. *Certiorari* is only available on

toute conséquence pouvant découler du fait d'être déclaré coupable d'une infraction criminelle. En règle générale, la conséquence constitue une peine lorsqu'elle fait partie des sanctions dont est passible un accusé pour une infraction donnée et qu'elle est conforme à l'objectif et aux principes de la détermination de la peine. Le prélèvement d'échantillons d'ADN pour analyse génétique ne fait pas davantage partie des sanctions dont est passible la personne accusée d'une infraction que la prise de photographies ou des empreintes digitales. Le fait que son autorisation puisse avoir un effet dissuasif sur le contrevenant ne fait pas du prélèvement une peine pour autant. [5] [63-65]

Les juges Binnie, Deschamps et Fish (dissidents) : L'audition *ex parte* de la demande d'autorisation visée à l'art. 487.055 du *Code*, sans motif justifiant l'absence de préavis ou de participation, ne satisfait pas aux exigences constitutionnelles de l'art. 8 de la *Charte*. La banque de données génétiques constitue une atteinte nouvelle et substantielle à la vie privée. Un préavis et la possibilité de se faire entendre doivent être donnés à celui dont la vie privée est en jeu, sauf si des intérêts opposés commandent le contraire. Même si la nature et l'étendue de l'équité procédurale dépendent du contexte, en l'espèce, aucun fondement raisonnable ne permet de conclure à l'existence d'une dérogation présumée à l'exigence du préavis et de la participation. Tant le contexte que les principes militent en faveur de l'audition *inter partes* de la demande visée à l'art. 487.055; l'audition *ex parte* ne devrait avoir lieu qu'à titre exceptionnel. [77] [80-83] [95]

En l'espèce, aucun motif d'entendre la demande *ex parte* n'a été établi. Premièrement, l'intéressé ne peut détruire ses échantillons de substances corporelles. Deuxièmement, le préavis et la participation à l'audience n'accroissent pas le risque de fuite. Partant, l'intérêt qu'a l'État à ce que la demande soit entendue en l'absence de l'intéressé, lorsque rien ne justifie l'audition *ex parte*, est au mieux minimal. Quoi qu'il en soit, l'appréciation de l'intérêt de l'État doit également tenir compte des intérêts opposés de ceux que l'État est censé protéger. La personne visée à l'art. 487.055 a légitimement intérêt à saisir le juge de renseignements qui importent pour l'exercice du pouvoir discrétionnaire prescrit et qui pourraient bien le convaincre de refuser l'autorisation. C'est elle qui a le plus à perdre si l'autorisation est accordée à tort et qui est souvent la mieux placée pour corriger tout renseignement erroné que le juge pourrait autrement devoir prendre en considération. Entendre la demande *ex parte* sans raison rend illusoire l'exigence légale de prendre en compte l'intérêt de l'intéressé. Enfin, la possibilité qu'une erreur commise par le juge qui accorde l'autorisation donne

narrow jurisdictional grounds and an order wrongly made cannot be reversed on a demonstration of error alone. Recourse to proceedings in *certiorari* is of no comfort to persons who could have prevented an error from occurring but for their exclusion from the hearing and who have suffered the consequences of the errors without reason or justification. The s. 8 infringement is not justified under s. 1 of the *Charter* and, accordingly, s. 487.055 is of no force or effect to the extent of its inconsistency with s. 8. [71] [73] [86-90] [94] [98-99]

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By Charron J.

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ouverture à une révision *ex post facto* par voie de *certiorari* ne peut être considérée comme un bon substitut à l'audition équitable de la demande. La requête en *certiorari* ne peut avoir pour fondement que certains motifs précis liés à la compétence, et la simple preuve d'une erreur ne suffit pas pour faire infirmer une ordonnance. Le *certiorari* n'est d'aucun secours à celui qui, s'il n'avait pas été exclu sans raison de l'instance, aurait pu prévenir l'erreur et ne pas en subir les conséquences. L'atteinte à l'art. 8 n'est pas justifiée au regard de l'article premier de la *Charte*, de sorte que l'art. 487.055 est inopérant dans la mesure où il est incompatible avec l'art. 8. [71] [73] [86-90] [94] [98-99]

Jurisprudence

Citée par la juge Charron

Arrêts analysés : *Bell ExpressVu Limited Partnership c. Rex*, [2002] 2 R.C.S. 559, 2002 CSC 42; *Hunter c. Southam Inc.*, [1984] 2 R.C.S. 145; *R. c. Beare*, [1988] 2 R.C.S. 387; *Ruby c. Canada (Solliciteur général)*, [2002] 4 R.C.S. 3, 2002 CSC 75; *R. c. Wigglesworth*, [1987] 2 R.C.S. 541; **arrêts mentionnés :** *R. c. S.A.B.*, [2003] 2 R.C.S. 678, 2003 CSC 60; *SDGMR c. Dolphin Delivery Ltd.*, [1986] 2 R.C.S. 573; *Cloutier c. Langlois*, [1990] 1 R.C.S. 158; *R. c. Salituro*, [1991] 3 R.C.S. 654; *R. c. Golden*, [2001] 3 R.C.S. 679, 2001 CSC 83; *R. c. Mann*, [2004] 3 R.C.S. 59, 2004 CSC 52; *Symes c. Canada*, [1993] 4 R.C.S. 695; *Willick c. Willick*, [1994] 3 R.C.S. 670; *Vriend c. Alberta*, [1998] 1 R.C.S. 493; *Charlebois c. Saint John (Ville)*, [2005] 3 R.C.S. 563, 2005 CSC 74; *R. c. Mills*, [1999] 3 R.C.S. 668; *R. c. Collins*, [1987] 1 R.C.S. 265; *R. c. Stillman*, [1997] 1 R.C.S. 607; *R. c. McKinlay Transport Ltd.*, [1990] 1 R.C.S. 627; *R. c. Briggs* (2001), 157 C.C.C. (3d) 38; *R. c. Simmons*, [1988] 2 R.C.S. 495; *R. c. Jacques*, [1996] 3 R.C.S. 312; *R. c. Monney*, [1999] 1 R.C.S. 652; *R. c. Caslake*, [1998] 1 R.C.S. 51; *R. c. Grant*, [1993] 3 R.C.S. 223; *Weatherall c. Canada (Procureur général)*, [1993] 2 R.C.S. 872; *R. c. Murrins* (2002), 201 N.S.R. (2d) 288; *R. c. Lyons*, [1987] 2 R.C.S. 309; *R. c. Rose*, [1998] 3 R.C.S. 262; *R. c. Harrer*, [1995] 3 R.C.S. 562; *R. c. Finta*, [1994] 1 R.C.S. 701; *R. c. Bartle*, [1994] 3 R.C.S. 173; *Dehghani c. Canada (Ministre de l'Emploi et de l'Immigration)*, [1993] 1 R.C.S. 1053; *Thomson Newspapers Ltd. c. Canada (Directeur des enquêtes et recherches, Commission sur les pratiques restrictives du commerce)*, [1990] 1 R.C.S. 425; *Knight c. Indian Head School Division No. 19*, [1990] 1 R.C.S. 653; *Baker c. Canada (Ministre de la Citoyenneté et de l'Immigration)*, [1999] 2 R.C.S. 817; *Chiarelli c. Canada (Ministre de l'Emploi et de l'Immigration)*, [1992] 1 R.C.S. 711; *United States c. Kincade*, 379 F.3d 813 (2004); *R. c. Shubley*, [1990] 1 R.C.S. 3; *Martineau c. M.R.N.*, [2004] 3 R.C.S. 737, 2004 CSC 81.

By Fish J. (dissenting)

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APPEAL and CROSS-APPEAL from a judgment of the Ontario Court of Appeal (Doherty, Borens and Cronk JJ.A.) (*sub nom. R. v. Jackpine*) (2004), 70 O.R. (3d) 97, 237 D.L.R. (4th) 122, 184 O.A.C. 354, 182 C.C.C. (3d) 449, 21 C.R. (6th) 284, [2004] O.J. No. 1073 (QL), allowing an appeal from an order of Trainor J., [2001] O.J. No. 3866 (QL), dismissing an application to quash an authorization for the taking of bodily substances for forensic DNA analysis. Appeal allowed and cross-appeal dismissed, Binnie, Deschamps and Fish JJ. dissenting.

Kenneth L. Campbell and Michal Fairburn, for the appellant/respondent on cross-appeal.

Citée par le juge Fish (dissident)

Hunter c. Southam Inc., [1984] 2 R.C.S. 145; *Ruby c. Canada (Solliciteur général)*, [2002] 4 R.C.S. 3, 2002 CSC 75; *R. c. S.A.B.*, [2003] 2 R.C.S. 678, 2003 CSC 60; *R. c. Stillman*, [1997] 1 R.C.S. 607; *Idziak c. Canada (Ministre de la Justice)*, [1992] 3 R.C.S. 631.

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Loi sur l'identification des criminels, L.R.C. 1985, ch. I-1, art. 2(1).

Loi sur l'identification par les empreintes génétiques, L.C. 1998, ch. 37, art. 3, 4.

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Mich. Comp. Laws Serv. §§ 28.171 à 28.176 (LexisNexis 2001 & Supp. 2003).

N.J. Stat. Ann. §§ 53:1-20.17 à 53:1-20.30 (West 2001 & Supp. 2004).

N.Y. Exec. Law § 995 (Consol. 1995 & Supp. 2004).

Ohio Rev. Code Ann. § 2901.07 (LexisNexis Supp. 2005).

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POURVOI et POURVOI INCIDENT contre un arrêt de la Cour d'appel de l'Ontario (les juges Doherty, Borens et Cronk) (*sub nom. R. c. Jackpine*) (2004), 70 O.R. (3d) 97, 237 D.L.R. (4th) 122, 184 O.A.C. 354, 182 C.C.C. (3d) 449, 21 C.R. (6th) 284, [2004] O.J. No. 1073 (QL), qui a accueilli un appel contre une ordonnance du juge Trainor, [2001] O.J. No. 3866 (QL), qui avait rejeté une demande d'annulation d'une autorisation de prélèvement de substances corporelles pour analyse génétique. Pourvoi accueilli et pourvoi incident rejeté, les juges Binnie, Deschamps et Fish sont dissidents.

Kenneth L. Campbell et Michal Fairburn, pour l'appelante/intimée au pourvoi incident.

Gregory Lafontaine and Vincenzo Rondinelli,
for the respondent/appellant on cross-appeal.

Ronald C. Reimer, for the intervener the Attorney
General of Canada.

Sabin Ouellet and Annie-Claude Bergeron, for
the intervener the Attorney General of Quebec.

Peter P. Rosinski, for the intervener the Attorney
General of Nova Scotia.

William B. Richards, for the intervener the
Attorney General of New Brunswick.

Beverly MacLean, for the intervener the Attorney
General of British Columbia.

The judgment of McLachlin C.J. and Bastarache,
Abella and Charron JJ. was delivered by

CHARRON J. —

1. Overview

This appeal concerns the constitutionality of the DNA data bank provision contained in s. 487.055 of the *Criminal Code*, R.S.C. 1985, c. C-46, which permits a provincial court judge, on *ex parte* application, to authorize the collection of DNA samples from three classes of previously convicted and sentenced offenders: (a) persons already declared to be “dangerous offenders”; (b) persons convicted of “more than one murder committed at different times”; and (c) persons convicted of “more than one sexual offence” and who, on the date of the application, are still serving a sentence of imprisonment of at least two years for one or more of those offences. In contrast to ss. 487.051 and 487.052 which target convicted offenders whose cases are still before the court for sentencing, applications under this provision will be referred to as retrospective applications.

Dennis Rodgers, a repeat sexual offender caught by this retrospective legislative scheme, challenges

Gregory Lafontaine et Vincenzo Rondinelli,
pour l’intimé/appelant au pourvoi incident.

Ronald C. Reimer, pour l’intervenant le procu-
reur général du Canada.

Sabin Ouellet et Annie-Claude Bergeron, pour
l’intervenant le procureur général du Québec.

Peter P. Rosinski, pour l’intervenant le procu-
reur général de la Nouvelle-Écosse.

William B. Richards, pour l’intervenant le pro-
cureur général du Nouveau-Brunswick.

Beverly MacLean, pour l’intervenant le procu-
reur général de la Colombie-Britannique.

Version française du jugement de la juge en
chef McLachlin et des juges Bastarache, Abella et
Charron rendu par

LA JUGE CHARRON —

1. Aperçu

Le présent pourvoi porte sur la constitutionnalité de l’art. 487.055 du *Code criminel*, L.R.C. 1985, ch. C-46, qui prévoit qu’un juge de la cour provinciale peut, sur demande *ex parte* et pour analyse génétique, autoriser le prélèvement d’échantillons d’ADN sur trois catégories de personnes déclarées coupables et condamnées à une peine d’emprisonnement : a) celles déjà déclarées « délinquants dangereux », b) celles déclarées coupables de « plusieurs meurtres commis à différents moments » et c) celles déclarées coupables de « plus d’une infraction sexuelle » et qui, à la date de la demande, purgent toujours une peine d’emprisonnement de deux ans ou plus pour l’une ou plusieurs de ces infractions. Contrairement aux demandes fondées sur les art. 487.051 et 487.052, qui visent les contrevenants déclarés coupables mais dont la peine n’a pas encore été déterminée, la demande fondée sur cette disposition est qualifiée de « rétrospective » dans les présents motifs.

Dennis Rodgers, un délinquant sexuel récidiviste auquel s’applique ce régime législatif rétrospectif,

the constitutionality of the provision arguing that it infringes ss. 7, 8, 11(h) and 11(i) of the *Canadian Charter of Rights and Freedoms*. He argues that the provision does not meet minimal constitutional norms in three respects: (a) it allows for an *ex parte* proceeding in the absence of any justification for denying fundamental procedural fairness; (b) it permits the seizure of a DNA sample from a convicted offender without first establishing reasonable and probable grounds to link the offender to a particular unsolved crime; and (c) it punishes the offender again for a predicate offence and denies him the benefit of the lesser punishment in force at the time of his conviction for that offence. Alternatively, even if the legislation is constitutional, Mr. Rodgers argues that the authorizing judge lost jurisdiction when he proceeded *ex parte* in the absence of any evidence demonstrating the need to do so.

conteste la constitutionnalité de la disposition au motif qu'elle contrevient aux art. 7 et 8 et aux al. 11(h) et i) de la *Charte canadienne des droits et libertés*. Il soutient que la disposition ne respecte pas les normes constitutionnelles minimales sous trois rapports : a) elle autorise l'audition *ex parte* de la demande sans que l'atteinte au droit fondamental à l'équité procédurale ne soit justifiée; b) elle permet la saisie d'un échantillon de l'ADN d'un condamné sans que ne soit établie au préalable l'existence de motifs raisonnables et probables de relier cette personne à un crime non résolu; c) elle punit de nouveau le contrevenant pour une infraction sous-jacente et l'empêche de bénéficier de la peine la moins sévère prévue pour cette infraction au moment de sa déclaration de culpabilité. Subsidiairement, M. Rodgers fait valoir que même si la disposition est constitutionnelle, le juge qui a autorisé le prélèvement n'avait pas compétence parce qu'il a entendu la demande *ex parte* sans que n'ait été établie la nécessité de le faire.

3 Mr. Rodgers' *Charter* application and his application for *certiorari* were dismissed in all respects by the Ontario Superior Court of Justice ([2001] O.J. No. 3866 (QL)). On appeal, the Court of Appeal for Ontario upheld the constitutional validity of the legislation but interpreted s. 487.055 as presumptively requiring an *inter partes* hearing ((2004), 70 O.R. (3d) 97). The court held that the authorizing provincial court judge had committed jurisdictional error when he proceeded *ex parte* in the absence of evidence justifying the failure to give notice to Mr. Rodgers. The authorization for the taking of bodily substances from Mr. Rodgers was therefore quashed and the application for the authorization was remitted to the Ontario Court of Justice for a determination on its merits. The Crown appeals the quashing of the authorization. Mr. Rodgers cross-appeals against the dismissal of his constitutional challenge.

La demande de M. Rodgers fondée sur la *Charte* et sa demande de *certiorari* ont été rejetées en tous points par la Cour supérieure de justice de l'Ontario ([2001] O.J. No. 3866 (QL)). La Cour d'appel de l'Ontario a confirmé la constitutionnalité de la disposition, mais elle a présumé que l'art. 487.055 nécessitait une audition *inter partes* ((2004), 70 O.R. (3d) 97). Elle a conclu que le juge de la cour provinciale ayant accordé l'autorisation avait commis une erreur juridictionnelle en entendant la demande *ex parte* à défaut de tout élément justifiant l'omission de donner un préavis à M. Rodgers. L'autorisation de prélever des substances corporelles sur ce dernier a donc été annulée, et la demande d'autorisation a été renvoyée à la Cour de justice de l'Ontario pour qu'elle statue de nouveau. Le ministère public en appelle de l'annulation de l'autorisation. M. Rodgers interjette un appel incident contre le rejet de sa contestation constitutionnelle.

4 There is no question that DNA evidence has revolutionized the way many crimes are investigated and prosecuted. The use of this new technology has not only led to the successful identification and prosecution of many dangerous criminals, it has served to exonerate many persons who were

Nul doute que la preuve génétique a révolutionné le déroulement de l'enquête et de la poursuite dans le cas de nombreux crimes. Elle a non seulement permis d'identifier et de poursuivre de nombreux criminels dangereux, mais aussi de disculper bon nombre de personnes soupçonnées ou

wrongfully suspected or convicted. The importance of this forensic development to the administration of justice can hardly be overstated. At the same time, the profound implications of government seizure and use of DNA samples on the privacy and security of the person cannot be ignored. A proper balance between these competing interests must be achieved within our constitutional framework.

For reasons that follow, I have concluded that the collection of DNA samples for data bank purposes from designated classes of convicted offenders is reasonable within the meaning of s. 8 of the *Charter*. Society's interest in using this powerful new technology to assist law enforcement agencies in the identification of offenders is beyond dispute. The resulting impact on the physical integrity of the targeted offenders is minimal. The potential invasive impact on the right to privacy has carefully been circumscribed by legislative safeguards that restrict the use of the DNA data bank as an identification tool only. As convicted offenders still under sentence, the persons targeted by s. 487.055 have a much reduced expectation of privacy. Further, by reason of their crimes, they have lost any reasonable expectation that their identity will remain secret from law enforcement authorities. Having regard to the interests at stake and the procedural safeguards afforded by the legislative scheme, I have also concluded that the *ex parte* nature of the proceedings meets the dictates of procedural fairness afforded under s. 7 of the *Charter*. Finally, ss. 11(h) and 11(i) of the *Charter* are inapplicable. The taking of DNA samples does not constitute a punishment within the meaning of s. 11 anymore than the taking of fingerprints or other identification measures.

I have also concluded that the authorizing judge did not commit jurisdictional error in proceeding *ex parte*. The Court of Appeal erred in interpreting s. 487.055 as presumptively requiring an *inter partes* hearing. The provision is unambiguous and expressly permits but does not require an *ex parte* proceeding. The failure to provide notice did not deprive Mr. Rodgers of procedural fairness. I

déclarées coupables à tort. On ne saurait trop insister sur l'importance de cette percée médico-légale pour l'administration de la justice. On ne peut non plus faire abstraction des graves répercussions de la saisie et de l'utilisation d'échantillons d'ADN par l'État sur la protection de la vie privée et sur la sécurité de la personne. Un juste équilibre doit être établi entre ces intérêts opposés, compte tenu des paramètres constitutionnels.

Pour les motifs qui suivent, j'arrive à la conclusion que le prélèvement sur les catégories de condamnés désignées d'échantillons d'ADN destinés à la banque de données génétiques n'est pas abusif au sens de l'art. 8 de la *Charte*. La société a indéniablement intérêt à ce que les organismes chargés du contrôle d'application de la loi recourent à cette technique performante pour identifier les contrevenants. L'atteinte à l'intégrité physique est minime. L'effet attentatoire possible sur le droit à la vie privée est soigneusement circonscrit par des garanties légales qui ne permettent l'utilisation de la banque de données génétiques qu'à des fins d'identification. En tant que condamnés purgeant toujours leur peine, les personnes visées à l'art. 487.055 ont des attentes considérablement réduites en matière de vie privée. De plus, leurs crimes leur ont fait perdre tout espoir raisonnable que les organismes chargés du contrôle d'application de la loi ignorent leur identité. Compte tenu des intérêts en jeu et des garanties procédurales offertes par le régime législatif, j'estime par ailleurs que le caractère *ex parte* de l'instance satisfait aux exigences de l'art. 7 de la *Charte* en matière d'équité procédurale. Enfin, les al. 11(h) et i) de la *Charte* sont inapplicables. Le prélèvement d'un échantillon d'ADN ne constitue pas davantage une peine au sens de l'art. 11 que la prise des empreintes digitales ou une autre mesure d'identification.

J'arrive également à la conclusion que le juge qui a accordé l'autorisation n'a pas commis d'erreur juridictionnelle en entendant la demande *ex parte*. La Cour d'appel a eu tort de présumer que l'art. 487.055 nécessitait une audition *inter partes*. Cette disposition claire permet expressément, sans l'exiger, le déroulement de l'instance *ex parte*. L'omission de lui donner un préavis n'a pas privé

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would therefore allow the Crown's appeal, set aside the judgment of the Court of Appeal, dismiss Mr. Rodgers' cross-appeal and dismiss his *Charter* and *certiorari* applications.

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Before turning to the facts and issues under appeal, I will review the DNA data bank provisions contained in the *DNA Identification Act*, S.C. 1998, c. 37, and the *Criminal Code*. A clear understanding of the legislative scheme and its purpose is necessary to deal with the constitutional arguments advanced by the parties.

2. The Legislative Scheme

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The *DNA Identification Act* governs the creation, operation and maintenance of a national DNA data bank. The Act must be read in conjunction with the *Criminal Code* provisions dealing with the collection and use of DNA samples. This Court in *R. v. S.A.B.*, [2003] 2 S.C.R. 678, 2003 SCC 60, described the DNA provisions as falling into two sets. The first, the constitutionality of which was upheld in *S.A.B.*, regulates the search and seizure of DNA material from a suspect for investigative purposes in respect of a designated offence. The second set of provisions governs the collection of DNA evidence from convicted persons for the purpose of inclusion in a national DNA data bank. Section 487.055, the impugned provision on this appeal, falls in this latter set.

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There are three categories of convicted offenders in respect of which a judicial authorization to seize DNA samples may be obtained for data bank purposes. First, s. 487.051 applies in respect of offenders convicted of a designated offence after the proclamation of the *DNA Identification Act*. Second, s. 487.052 deals with convicted offenders who have committed a designated offence prior to the proclamation of the *DNA Identification Act* but are still before the court. (Designated offences are defined under s. 487.04 of the *Criminal Code* and,

M. Rodgers de son droit à l'équité procédurale. Je suis donc d'avis d'accueillir le pourvoi du ministère public, d'annuler le jugement de la Cour d'appel, de rejeter le pourvoi incident de M. Rodgers, ainsi que sa demande fondée sur la *Charte* et sa demande de *certiorari*.

Avant d'analyser les faits et les questions en litige, j'examinerai les dispositions de la *Loi sur l'identification par les empreintes génétiques*, L.C. 1998, ch. 37, et du *Code criminel* relatives à la banque de données génétiques. Il importe de bien circonscrire le régime législatif et son objet pour statuer sur les prétentions constitutionnelles des parties.

2. Le régime législatif

La *Loi sur l'identification par les empreintes génétiques* régit la création, le fonctionnement et le maintien d'une banque nationale de données génétiques. Elle doit être interprétée en corrélation avec les dispositions du *Code criminel* sur le prélèvement et l'utilisation d'échantillons d'ADN. Dans l'arrêt *R. c. S.A.B.*, [2003] 2 R.C.S. 678, 2003 CSC 60, notre Cour a réparti dans deux ensembles les dispositions relatives à la preuve génétique. Le premier ensemble, dont la constitutionnalité a été confirmée dans cet arrêt, régit la fouille, la perquisition et la saisie du matériel génétique d'un suspect pour les besoins d'une enquête sur une infraction désignée. Le deuxième régit le prélèvement sur un condamné d'un échantillon d'ADN destiné à la banque nationale de données génétiques. L'article 487.055, la disposition contestée en l'espèce, fait partie de ce dernier ensemble.

Il existe trois catégories de condamnés sur lesquels le prélèvement d'un échantillon d'ADN destiné à la banque de données peut être autorisé par une cour de justice. Premièrement, l'art. 487.051 s'applique à la personne déclarée coupable d'une infraction désignée après l'entrée en vigueur de la *Loi sur l'identification par les empreintes génétiques*. Deuxièmement, l'art. 487.052 vise la personne déclarée coupable d'une infraction désignée commise avant l'entrée en vigueur de la loi, mais dont la peine n'a pas encore été déterminée. (Les

in general, may be described as the more serious offences under the *Criminal Code* in respect of which it may reasonably be expected that DNA may be left behind by the offender.) Third, s. 487.055 applies to three classes of offenders who have been convicted and sentenced prior to the proclamation of the *DNA Identification Act*: (a) persons already declared to be “dangerous offenders”; (b) persons convicted of “more than one murder committed at different times”; and (c) persons convicted of “more than one sexual offence” and who, on the date of the application, are still serving a sentence of imprisonment of at least two years for one or more of those offences. (The list of targeted offenders has since been expanded by deleting the requirement that there be “more than one murder committed at different times” and by including dangerous sexual offenders and persons convicted of manslaughter who, on the date of the application, are still serving a sentence of imprisonment of at least two years for that offence (S.C. 2005, c. 25, s. 5).) Only s. 487.055, the retrospective provision, is in issue on this appeal. However, the alleged s. 8 constitutional deficiency — the absence of reasonable and probable grounds linking the convicted offender to a particular investigation — is equally present in all three provisions.

Section 3 of the *DNA Identification Act* expressly sets out the purpose of the Act:

3. The purpose of this Act is to establish a national DNA data bank to help law enforcement agencies identify persons alleged to have committed designated offences, including those committed before the coming into force of this Act.

Parliament’s objective in establishing a national DNA data bank is further expressed in the statement of principles set out in s. 4:

4. It is recognized and declared that

(a) the protection of society and the administration of justice are well served by the early detection,

infractions désignées sont définies à l’art. 487.04 et correspondent généralement aux infractions les plus graves prévues dans le *Code criminel* et dont on peut raisonnablement s’attendre à ce que la perpétration laisse des traces d’ADN.) Troisièmement, l’art. 487.055 s’applique à trois catégories de personnes déclarées coupables et condamnées à une peine avant l’entrée en vigueur de la *Loi sur l’identification par les empreintes génétiques* : a) celles déjà déclarées « délinquants dangereux », b) celles déclarées coupables de « plusieurs meurtres commis à différents moments » et c) celles déclarées coupables de « plus d’une infraction sexuelle » et qui, à la date de la demande, purgent toujours une peine d’emprisonnement de deux ans ou plus pour l’une ou plusieurs de ces infractions. (La liste des contrevenants visés a été élargie par la suppression de l’exigence de « plusieurs meurtres commis à différents moments » et par l’inclusion des délinquants sexuels dangereux et des personnes déclarées coupables d’homicide involontaire coupable qui, à la date de la demande, purgent toujours une peine d’emprisonnement de deux ans ou plus pour cette infraction (L.C. 2005, ch. 25, art. 5).) Seul l’article 487.055, relatif à la demande rétrospective, fait l’objet du présent pourvoi. Toutefois, l’atteinte alléguée à l’art. 8 de la *Charte* — l’absence de motifs raisonnables et probables de relier le condamné à une enquête en particulier — vise les trois dispositions.

La *Loi sur l’identification par les empreintes génétiques* précise son objet à l’art. 3 :

3. La présente loi a pour objet l’établissement d’une banque nationale de données génétiques destinée à aider les organismes chargés du contrôle d’application de la loi à identifier les auteurs présumés d’infractions désignées, y compris de celles commises avant l’entrée en vigueur de la présente loi.

L’objectif de l’établissement d’une banque nationale de données génétiques ressort des principes énoncés à l’art. 4 :

4. Les principes suivants sont reconnus et proclamés :

a) la protection de la société et l’administration de la justice sont bien servies par la découverte,

arrest and conviction of offenders, which can be facilitated by the use of DNA profiles;

(b) the DNA profiles, as well as samples of bodily substances from which the profiles are derived, may be used only for law enforcement purposes in accordance with this Act, and not for any unauthorized purpose; and

(c) to protect the privacy of individuals with respect to personal information about themselves, safeguards must be placed on

(i) the use and communication of, and access to, DNA profiles and other information contained in the national DNA data bank, and

(ii) the use of, and access to, bodily substances that are transmitted to the Commissioner for the purposes of this Act.

l'arrestation et la condamnation rapides des contrevenants, lesquelles peuvent être facilitées par l'utilisation de profils d'identification génétique;

b) ces profils, de même que les substances corporelles prélevées en vue de les établir, ne doivent servir qu'à l'application de la présente loi, à l'exclusion de toute autre utilisation qui n'y est pas autorisée;

c) afin de protéger les renseignements personnels, doivent faire l'objet de protections :

(i) l'utilisation et la communication de l'information contenue dans la banque de données — notamment des profils —, de même que son accessibilité,

(ii) l'utilisation des substances corporelles qui sont transmises au commissaire pour l'application de la présente loi, de même que leur accessibilité.

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The safeguards aimed at protecting the informational privacy of individuals in accordance with the principles expressed under s. 4 are conveniently summarized by the intervenor the Attorney General of Canada, at para. 58 of its factum as follows:

a) A DNA data bank authorization must be obtained on written application to a provincial court judge. The judge is required to consider specified criteria in determining whether a DNA data bank authorization should be granted.

b) The class of persons against whom a DNA data bank authorization may be granted is confined to a specified class of convicted violent offenders: s. 487.055(1), *Criminal Code*.

c) Bodily samples collected pursuant to a DNA data bank authorization may only be used for forensic DNA analysis for inclusion in the National DNA Data Bank. Unused portion[s] of bodily samples are required to be safely stored at the National DNA Data Bank: s. 487.08(1), *Criminal Code*.

d) It is a criminal offence to use bodily samples or results of forensic DNA analysis obtained under a DNA data bank authorization other than for transmission to the national DNA data bank. A breach of that provision is a hybrid offence that when prosecuted by indictment

Au paragraphe 58 de son mémoire, l'intervenant le procureur général du Canada résume bien les mesures visant à protéger les renseignements personnels conformément aux principes énoncés à l'art. 4 :

[TRANSDUCTION]

a) Une demande d'autorisation de prélever des substances corporelles pour analyse génétique doit être présentée par écrit à un juge de la cour provinciale. Le juge doit tenir compte de critères précis pour déterminer s'il convient d'y faire droit ou non.

b) La catégorie de personnes sur lesquelles peut être autorisé le prélèvement de substances corporelles pour analyse génétique ne comprend que certains condamnés violents : par. 487.055(1) du *Code criminel*.

c) Les échantillons de substances corporelles prélevés en application d'une autorisation ne peuvent être utilisés que pour analyse génétique et inclusion dans la banque nationale de données génétiques. Toute partie non utilisée d'un échantillon doit être entreposée en lieu sûr à la banque nationale de données génétiques : par. 487.08(1) du *Code criminel*.

d) Commet une infraction criminelle quiconque utilise à d'autres fins que leur transmission à la banque nationale de données génétiques des échantillons de substances corporelles obtenus en application d'une autorisation ou les résultats de leur analyse génétique. Il s'agit

is subject to a maximum penalty of two years imprisonment: ss. 487.08(2) and (3), *Criminal Code*.

e) Use of DNA profiles and bodily samples at the National DNA Data Bank is strictly limited to the narrow purposes of comparing offender profiles with crime scene profiles. Any use of stored information or bodily samples or communication of information they may contain is strictly limited to the narrow identification purposes of the Act. Access to the bank is restricted. Breach of any of those provisions is a hybrid offence subject to a maximum penalty of two years imprisonment when prosecuted by indictment: sections 6(6), 6(7), 8, 10(3), 10(5), 11, *DNA Identification Act*.

f) Communication of information as to whether a person's DNA profile is contained in the offenders' index may only be made to appropriate law enforcement agencies or laboratories for investigative purposes or to authorized users of the RCMP automated conviction records retrieval system: s. 6, *DNA Identification Act*.

g) Although the seized bodily samples are retained for safekeeping in the DNA data bank, they may only be used for further forensic DNA analysis where that is made necessary by "significant technological advances" since the time that the original DNA profile was derived. The results of such subsequent DNA analysis and any residue of the bodily sample are subject to the same rigid controls as the original profile and sample: s. 10, *DNA Identification Act*.

h) Where a DNA profile cannot be derived from a bodily substance obtained during the execution of a DNA data bank authorization, further samples may only be taken upon further authorization from a judge: s. 487.091, *Criminal Code*.

i) A DNA Data Bank Advisory Committee has been established by regulation. The composition of the Committee is stipulated as: a Chairperson, a Vice-Chairperson, a representative of the Office of the Privacy Commissioner and up to six other members who may include representatives of the police, legal, scientific and academic communities. Retired puisne Justice Peter Cory of this Court is one of two representatives of the legal community on the current Committee. The Committee's duties encompass "any

d'une infraction mixte punissable, par voie de mise en accusation, d'un emprisonnement maximal de deux ans : par. 487.08(2) et (3) du *Code criminel*.

e) Un profil d'identification génétique ou un échantillon de substances corporelles n'est utilisé à la banque nationale de données génétiques que pour comparer le profil d'un contrevenant avec ceux du fichier de criminalistique. L'utilisation des renseignements ou des échantillons de substances corporelles entreposés et la communication des renseignements qu'ils peuvent contenir n'interviennent qu'à des fins d'identification conformément à la Loi. L'accès à la banque est limité. Le non-respect de l'une ou l'autre des dispositions en cause constitue une infraction mixte punissable, par voie de mise en accusation, d'un emprisonnement maximal de deux ans : par. 6(6), 6(7), 10(3), 10(5) et art. 8 et 11 de la *Loi sur l'identification par les empreintes génétiques*.

f) Le fait que le profil d'identification génétique d'une personne se trouve ou non dans le fichier des condamnés ne peut être communiqué qu'à un laboratoire ou un organisme chargé du contrôle d'application de la loi aux fins d'une enquête ou à un utilisateur autorisé du fichier automatisé des relevés de condamnations criminelles géré par la GRC : art. 6 de la *Loi sur l'identification par les empreintes génétiques*.

g) Conservé en lieu sûr à la banque de données génétiques par mesure de prudence, un échantillon de substances corporelles saisi ne peut être utilisé qu'aux fins d'une analyse génétique complémentaire rendue nécessaire par les « progrès techniques importants » survenus depuis l'établissement initial du profil d'identification génétique. Les résultats d'une telle analyse subséquente et tout résidu de l'échantillon de substances corporelles font l'objet des mêmes mesures de contrôle strictes que le profil et l'échantillon de départ : art. 10 de la *Loi sur l'identification par les empreintes génétiques*.

h) Lorsqu'un profil d'identification génétique ne peut être établi à partir des échantillons de substances corporelles prélevés en application de l'autorisation, l'obtention d'échantillons supplémentaires requiert une nouvelle autorisation : art. 487.091 du *Code criminel*.

i) Un Comité consultatif de la banque nationale de données génétiques a été constitué par règlement. Il se compose du président, du vice-président, du représentant du Commissariat à la protection de la vie privée et d'au plus six autres membres pouvant représenter les milieux policier, juridique, scientifique et universitaire. L'ancien juge de cette Cour aujourd'hui à la retraite, Peter Cory, est actuellement l'un des deux représentants du milieu juridique. Les fonctions du Comité englobent l'examen, de sa propre initiative ou à la demande du

matter related to the establishment and operation” of the Data Bank upon its own motion or at the request of the Commissioner. The Committee must report annually to the Commissioner: *DNA Data Bank Advisory Committee Regulations*, SOR/2000-181.

j) The Commissioner of the RCMP is required to report annually on the operation of the National DNA Data Bank: s. 13.1, *DNA Identification Act*.

k) The *DNA Identification Act* is expressly subject to a review of its provisions and operation by Parliament after five years. That review is anticipated in the fall of 2005: s. 13, *DNA Identification Act*.

l) The Act permits sharing of DNA profiles (but not stored bodily samples) with foreign governments and international organizations but only for legitimate law enforcement purposes pursuant to specific agreement or arrangement between the government of Canada and the foreign government or international organization: s. 6(4), *DNA Identification Act*. Regulations under the Act further require that such agreements or arrangements “shall include safeguards to protect the privacy of the personal information used or disclosed under it”: *DNA Identification Regulations*, SOR/2000-300. [Footnotes omitted.]

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The Crown also filed affidavit evidence from Dr. Ron Fourny, a research scientist employed by the RCMP since 1988 and the current officer in charge of the data bank, describing the practical operation of the data bank. Mr. Rodgers did not dispute the accuracy of this evidence. In his affidavit, Dr. Fourny explains in some detail how the anonymity of the samples and profiles is preserved, their physical security maintained, and the genetic privacy of the individuals ensured. Arbour J. in *S.A.B.*, at para. 49, considered similar evidence and commented as follows:

[Forensic] DNA analysis is conducted solely for forensic purposes and does not reveal any medical, physical or mental characteristics; its only use is the provision of identifying information that can be compared to an existing sample. The evidence of Dr. Ron Fourny at the *Proceedings of the Standing Senate Committee on Legal*

commissaire, de « toute question concernant l'établissement et le fonctionnement » de la banque de données. Le Comité présente chaque année son rapport au commissaire : *Règlement sur le Comité consultatif de la banque nationale de données génétiques*, DORS/2000-181.

j) Chaque année, le commissaire de la GRC présente un rapport sur l'activité de la banque nationale de données génétiques : art. 13.1 de la *Loi sur l'identification par les empreintes génétiques*.

k) La Loi prévoit expressément que ses dispositions et son application font l'objet d'un examen parlementaire cinq ans après son entrée en vigueur. Cet examen devrait avoir lieu à l'automne 2005 : art. 13 de la *Loi sur l'identification par les empreintes génétiques*.

l) La Loi permet le partage des profils d'identification génétique (mais non des échantillons de substances corporelles entreposés) avec des gouvernements étrangers et des organisations internationales, mais uniquement pour les besoins légitimes de l'application de la loi, dans le cadre d'un accord ou d'une entente intervenus entre le gouvernement du Canada et le gouvernement étranger ou l'organisation internationale : par. 6(4) de la *Loi sur l'identification par les empreintes génétiques*. Le règlement pris en vertu de la Loi exige en outre que ces accords ou ententes « prévoient des mécanismes de protection des renseignements personnels qui sont utilisés ou communiqués en application de ces accords ou ententes » : *Règlement sur l'identification par les empreintes génétiques*, DORS/2000-300. [Notes omises.]

Le ministère public a également déposé la déclaration sous serment du D^r Ron Fourny, chercheur à la GRC depuis 1988 et actuel responsable de la banque de données, pour établir le fonctionnement concret de celle-ci. M. Rodgers n'a pas mis en doute l'exactitude de cet élément de preuve. Dans sa déclaration sous serment, le D^r Fourny donne des précisions sur les mesures prises pour assurer l'anonymat des échantillons et des profils, leur sécurité physique et la confidentialité en génétique médicale des particuliers. Dans l'arrêt *S.A.B.*, par. 49, la juge Arbour a dit ce qui suit au sujet d'un élément de preuve similaire :

[L']analyse génétique est faite uniquement à des fins médico-légales et elle ne révèle aucune caractéristique médicale, physique ou mentale; elle ne sert qu'à fournir des renseignements d'identification qui peuvent être comparés à un échantillon existant. Le témoignage du D^r Ron Fourny lors des *Délibérations du comité*

and Constitutional Affairs, Issue No. 43, November 25, 1998, at p. 43:46, confirms the scientific community's understanding of the DNA used for forensic analysis:

[A]s forensic scientists, we are interested in everything that does not code for anything. That is to say, we are looking at anonymous pieces of DNA. By international convention with Venice in 1993, forensic scientists all over the world agree that we will take STR markers — that is, short tandem repeat — or pieces of DNA. By convention, the only ones that we are permitted to use in forensics are those that do not predict any medical, physical or mental characteristics.

In addition to the statutory safeguards in respect of the informational privacy of individuals, the *Criminal Code* mandates a detailed procedure for collecting DNA samples. In *S.A.B.*, Arbour J. described in considerable detail the relevant provisions governing the execution of a DNA warrant obtained for investigative purposes. Most of the provisions apply equally to the taking of a DNA sample from a convicted offender for data bank purposes. The procedure is not in issue and need not be described again here. It is not disputed that the taking of DNA samples involves a minimal intrusion on the physical integrity of the offender.

Before turning to the constitutional issues, I will deal with the question of statutory interpretation and determine whether the Court of Appeal was correct in its interpretation of s. 487.055 as presumptively requiring an *inter partes* hearing.

3. The Meaning of *Ex Parte* Within Section 487.055

Section 487.055(1) reads as follows:

487.055 (1) A provincial court judge may, on *ex parte* application made in Form 5.05, authorize, in Form 5.06, the taking, from a person who

sénatorial permanent des Affaires juridiques et constitutionnelles, fascicule n° 43, 25 novembre 1998, p. 43:46, confirme l'interprétation de la communauté scientifique quant à l'ADN qui peut être utilisé dans le cadre d'une analyse médico-légale :

[À] titre d'experts en criminalistique, nous nous intéressons à tout ce qui code pour rien. Autrement dit, nous étudions des morceaux anonymes d'ADN. De par une convention internationale adoptée à Venise en 1993, les experts en criminalistique du monde entier conviennent d'utiliser des marqueurs de STR — c'est-à-dire séquence courte répétée en tandem — ou des morceaux d'ADN. Par convention, les seuls cas permis en criminalistique sont ceux qui ne permettent pas de prédire des caractéristiques médicales, physiques ou mentales.

En sus des mesures légales de protection des renseignements personnels, le *Code criminel* prescrit les modalités de prélèvement d'un échantillon d'ADN. Dans l'arrêt *S.A.B.*, la juge Arbour a fait état avec force détails des dispositions pertinentes régissant l'exécution d'un mandat ADN obtenu aux fins d'une enquête. La plupart des dispositions s'appliquent également au prélèvement sur un condamné d'un échantillon d'ADN destiné à la banque de données. La procédure suivie n'est pas en cause et n'a pas à être décrite de nouveau en l'espèce. Nul ne conteste que le prélèvement d'un échantillon d'ADN porte minimalement atteinte à l'intégrité physique du contrevenant.

Avant de passer aux questions constitutionnelles, j'examinerai celle de l'interprétation législative et déterminerai si la Cour d'appel a eu raison de présumer que l'art. 487.055 nécessitait une audition *inter partes*.

3. Le sens de l'expression « *ex parte* » employée à l'art. 487.055

Le paragraphe 487.055(1) est libellé comme suit :

487.055 (1) Sur demande *ex parte* présentée selon la formule 5.05, le juge de la cour provinciale peut autoriser par écrit — en utilisant la formule 5.06 — le prélèvement, pour analyse génétique, du nombre d'échantillons de substances corporelles d'une personne jugé nécessaire à cette fin, dans le cas où celle-ci, selon le cas :

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(a) before the coming into force of this subsection, had been declared a dangerous offender under Part XXIV,

(b) before the coming into force of this subsection, had been convicted of more than one murder committed at different times, or

(c) before the coming into force of this subsection, had been convicted of more than one sexual offence within the meaning of subsection (3) and, on the date of the application, is serving a sentence of imprisonment of at least two years for one or more of those offences,

a) avant l'entrée en vigueur du présent paragraphe, avait été déclarée délinquant dangereux au sens de la partie XXIV;

b) avant cette entrée en vigueur, avait été déclarée coupable de plusieurs meurtres commis à différents moments;

c) avant cette même entrée en vigueur, avait été déclarée coupable de plus d'une des infractions sexuelles visées au paragraphe (3) et, à la date de la demande, purge une peine d'emprisonnement de deux ans ou plus pour l'une ou plusieurs de ces infractions.

for the purpose of forensic DNA analysis, of any number of samples of one or more bodily substances that is reasonably required for that purpose, by means of the investigative procedures described in subsection 487.06(1).

16 This Court in *S.A.B.* considered language to the same effect contained in s. 487.05 and held that the reference to *ex parte* proceedings is not mandatory. The authorizing judge may require that notice be given in a suitable case “to ensure reasonableness and fairness in the circumstances” (para. 56). Section 487.055 should be read in the same way. It only permits but does not require an *ex parte* proceeding.

17 Mr. Rodgers argues that the very discretion to proceed *ex parte* contravenes the principles of fundamental justice guaranteed under s. 7 of the *Charter*. For reasons that I will give later, I reject this contention. Doherty J.A., in writing for the Court of Appeal for Ontario, also rejected this constitutional argument finding that the power to proceed *ex parte* where circumstances warrant, in and of itself, did not contravene the principles of fundamental justice (para. 32). He upheld the constitutional validity of the provision. However, he then proceeded to incorporate s. 7 *Charter* principles in his interpretation of the meaning of *ex parte* in s. 487.055 and concluded that it should be read as presumptively requiring an *inter partes* hearing. He reasoned as follows (at paras. 33 and 45-46):

The conclusion that s. 487.055 is not unconstitutional because it permits the judge to proceed *ex parte*,

Dans l'arrêt *S.A.B.*, notre Cour s'est penchée sur le libellé semblable de l'art. 487.05 et a conclu que le recours à la procédure *ex parte* n'était pas obligatoire. Le juge saisi de la demande d'autorisation peut exiger qu'un préavis soit donné s'il l'estime opportun « afin de garantir le caractère juste et raisonnable des procédures dans les circonstances » (par. 56). L'article 487.055 doit être interprété de la même façon. Il ne fait que permettre, sans l'exiger, l'audition *ex parte*.

M. Rodgers prétend que le pouvoir discrétionnaire même d'entendre la demande *ex parte* contrevient aux principes de justice fondamentale garantis à l'art. 7 de la *Charte*. Pour les raisons que j'expose plus loin, je rejette cette prétention. Au nom de la Cour d'appel de l'Ontario, le juge Doherty a également rejeté l'allégation d'inconstitutionnalité et conclu que le pouvoir d'entendre la demande *ex parte*, lorsque les circonstances le justifient, n'est pas contraire en soi aux principes de justice fondamentale (par. 32). Il a confirmé la constitutionnalité de la disposition. Toutefois, interprétant ensuite l'expression « *ex parte* » au regard des principes de l'art. 7 de la *Charte*, il a conclu qu'il fallait présumer que l'art. 487.055 exige une audition *inter partes*. Son raisonnement a été le suivant (par. 33, 45 et 46) :

[TRADUCTION] La conclusion selon laquelle l'art. 487.055 n'est pas inconstitutionnel du fait qu'il permet

does not place the manner in which the judge exercises that discretion in an individual case beyond the pale of constitutional review. The judge must exercise that discretion in a manner which is consistent with *Charter* principles and specifically in a manner which ensures that the individual's right to liberty and security of the person will not be denied except in accordance with the principles of fundamental justice: see *Little Sisters Book and Art Emporium v. Canada (Minister of Justice)*, [2000] 2 S.C.R. 1120, 150 C.C.C. (3d) 1, at pp. 1192-94 S.C.R., p. 53 C.C.C.

. . .

The discretion granted by s. 487.055(1) to proceed *ex parte* should be exercised in a manner that is consistent with *Charter* principles. Those principles require notice to the individual whose liberty and security of the person interests are potentially affected by the order unless the Crown can establish legitimate grounds (*e.g.* a real risk of flight) for proceeding without notice.

A judge hearing a s. 487.055(1) application should start from the assumption that the target of the application whose liberty and security of the person will be significantly affected if the order is granted should receive notice of the application. It is open to the Crown to rebut the presumption of notice with evidence that in the particular circumstances, notice could frustrate the process contemplated by s. 487.055. Evidence showing a real risk of flight if notice was given, would clearly justify a decision to proceed *ex parte*.

Since the material in support of the application under s. 487.055 failed to address the need to proceed *ex parte*, Doherty J.A. concluded that the authorizing judge had no jurisdiction to grant the order (at paras. 53-54):

Absent any justification for proceeding *ex parte*, the failure to give the appellants notice of the applications amounted to a denial of natural justice resulting in a loss of jurisdiction: *R. v. Compton* (1978), 42 C.C.C. (2d) 163, 3 C.R. (3d) S7 (B.C.S.C.) at p. 165 C.C.C.

It is no answer to a finding that Glaude J. proceeded without jurisdiction, to argue, as the Crown does, that the orders were properly made. A "correct" result does not cure a loss of jurisdiction.

au juge d'entendre la demande *ex parte* ne met pas les modalités de l'exercice de ce pouvoir discrétionnaire dans un cas donné à l'abri d'un contrôle constitutionnel. Le juge doit exercer son pouvoir discrétionnaire conformément aux principes consacrés par la *Charte* et, plus précisément, de manière qu'il ne soit porté atteinte au droit à la liberté et à la sécurité de la personne qu'en conformité avec les principes de justice fondamentale : voir *Little Sisters Book and Art Emporium c. Canada (Ministre de la Justice)*, [2000] 2 R.C.S. 1120, 150 C.C.C. (3d) 1, p. 1192-1194 R.C.S., p. 53 C.C.C.

. . .

Le pouvoir discrétionnaire que confère le par. 487.055(1) d'entendre la demande *ex parte* doit être exercé conformément aux principes consacrés par la *Charte*. Ces principes exigent qu'un préavis soit donné à l'intéressé lorsque son droit à la liberté et à la sécurité de sa personne risque d'être touché par l'autorisation, à moins que le ministère public n'établisse l'existence de motifs valables d'agir sans préavis (p. ex., un risque réel de fuite).

Il incombe au juge saisi d'une demande fondée sur le par. 487.055(1) de présumer au départ qu'un préavis doit être donné à l'intéressé lorsque l'autorisation, si elle est accordée, portera sensiblement atteinte à son droit à la liberté et à la sécurité de sa personne. Le ministère public peut réfuter cette présomption en établissant que, dans les circonstances de l'espèce, un préavis pourrait nuire à la procédure prévue à l'art. 487.055. La preuve d'un risque réel de fuite en cas de préavis justifierait clairement la décision d'entendre la demande *ex parte*.

Comme les documents produits à l'appui de la demande fondée sur l'art. 487.055 ne faisaient pas mention de la nécessité d'une audition *ex parte*, le juge Doherty a conclu que le juge n'avait pas compétence pour accorder l'autorisation (par. 53-54) :

[TRADUCTION] À défaut de motifs justifiant l'audition *ex parte*, l'omission de donner aux appelants un préavis de l'audition des demandes équivalait à un déni de justice naturelle faisant perdre sa compétence au tribunal : *R. c. Compton* (1978), 42 C.C.C. (2d) 163, 3 C.R. (3d) S7 (C.S.C.-B.), p. 165 C.C.C.

Il ne suffit pas, pour repousser la conclusion que le juge Glaude a agi sans compétence, de faire valoir, à l'instar du ministère public, que les ordonnances ont été correctement rendues. Une décision « correcte » ne remédie pas à une perte de compétence.

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In my respectful view, Doherty J.A. effectively pre-empted any judicial review of the constitutional validity of the statutory provision by infusing *Charter* principles as part of the interpretative process. In doing so, he exceeded the proper limits of *Charter* values as an interpretative tool. It has long been accepted that courts should apply and develop common law rules in accordance with the values and principles enshrined in the *Charter*: *RWDSU v. Dolphin Delivery Ltd.*, [1986] 2 S.C.R. 573, at p. 603; *Cloutier v. Langlois*, [1990] 1 S.C.R. 158, at p. 184; *R. v. Salituro*, [1991] 3 S.C.R. 654, at p. 675; *R. v. Golden*, [2001] 3 S.C.R. 679, 2001 SCC 83, at para. 86; *R. v. Mann*, [2004] 3 S.C.R. 59, 2004 SCC 52, at paras. 17-19. However, it is equally well settled that, in the interpretation of a statute, *Charter* values as an interpretative tool can *only* play a role where there is a genuine ambiguity in the legislation. In other words, where the legislation permits two different, yet equally plausible, interpretations, each of which is equally consistent with the apparent purpose of the statute, it is appropriate to prefer the interpretation that accords with *Charter* principles. However, where a statute is not ambiguous, the court must give effect to the clearly expressed legislative intent and not use the *Charter* to achieve a different result. In *Bell ExpressVu Limited Partnership v. Rex*, [2002] 2 S.C.R. 559, 2002 SCC 42, at para. 62, Iacobucci J., writing for a unanimous court, firmly reiterated this rule:

... to the extent this Court has recognized a “*Charter* values” interpretive principle, such principle can *only* receive application in circumstances of genuine ambiguity, i.e., where a statutory provision is subject to differing, but equally plausible, interpretations. [Emphasis in original.]

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If this limit were not imposed on the use of the *Charter* as an interpretative tool, the application of *Charter* principles as an overarching rule of statutory interpretation could well frustrate the legislator’s intent in the enactment of the provision. Moreover, it would deprive the *Charter* of its more powerful purpose — the determination of the constitutional validity of the legislation: *Symes v. Canada*, [1993] 4 S.C.R. 695, at p. 752; *Willick v.*

À mon humble avis, en intégrant au processus d’interprétation les principes consacrés par la *Charte*, le juge Doherty a anticipé tout contrôle constitutionnel de la disposition législative. Ce faisant, il n’a pas respecté le rôle que les valeurs de la *Charte* peuvent jouer en matière d’interprétation. Il est depuis longtemps admis que les tribunaux doivent appliquer et faire évoluer les règles de common law en conformité avec les valeurs et les principes consacrés par la *Charte* : *SDGMR c. Dolphin Delivery Ltd.*, [1986] 2 R.C.S. 573, p. 603; *Cloutier c. Langlois*, [1990] 1 R.C.S. 158, p. 184; *R. c. Salituro*, [1991] 3 R.C.S. 654, p. 675; *R. c. Golden*, [2001] 3 R.C.S. 679, 2001 CSC 83, par. 86; *R. c. Mann*, [2004] 3 R.C.S. 59, 2004 CSC 52, par. 17-19. Cependant, il est également bien établi qu’une disposition législative *ne* peut être interprétée au regard des valeurs de la *Charte* *que* si elle comporte une ambiguïté véritable. En d’autres termes, lorsque la disposition législative se prête à deux interprétations différentes, mais également plausibles et compatibles avec l’objet apparent de la loi, il convient de préférer l’interprétation qui s’harmonise avec les principes de la *Charte*. Toutefois, lorsque la disposition n’est pas ambiguë, le tribunal doit donner effet à l’intention manifeste du législateur et s’abstenir de recourir à la *Charte* pour arriver à un résultat différent. Dans l’arrêt *Bell ExpressVu Limited Partnership c. Rex*, [2002] 2 R.C.S. 559, 2002 CSC 42, par. 62, par la voix du juge Iacobucci, notre Cour l’a fermement rappelé :

... dans la mesure où notre Cour a reconnu un principe d’interprétation fondé sur le respect des « valeurs de la *Charte* », ce principe [...] s’applique *uniquement* [...] en cas d’ambiguïté véritable, c’est-à-dire lorsqu’une disposition législative se prête à des interprétations divergentes mais par ailleurs tout aussi plausibles l’une que l’autre. [Souligné dans l’original.]

Si le recours à la *Charte* comme outil d’interprétation n’était pas ainsi restreint, l’application des principes qu’elle consacre, comme règle générale d’interprétation législative, pourrait bien contrecarrer l’intention du législateur. En outre, elle priverait la *Charte* de sa raison d’être plus fondamentale — la détermination de la constitutionnalité de la loi : *Symes c. Canada*, [1993] 4 R.C.S. 695, p. 752; *Willick c. Willick*, [1994] 3 R.C.S. 670,

Willick, [1994] 3 S.C.R. 670, at pp. 679-80; *Vriend v. Alberta*, [1998] 1 S.C.R. 493, at paras. 136-42; *Bell ExpressVu*, at paras. 60-66; *Charlebois v. Saint John (City)*, [2005] 3 S.C.R. 563, 2005 SCC 74, at paras. 23-24.

There is no ambiguity here. The clear language of s. 487.055(1) indicates that Parliament intended to authorize *ex parte* applications under this section. There is no room to interpret the provision as presumptively requiring that applications be brought on notice. While the Court of Appeal was correct in stating that the judge who exercises a discretion pursuant to a constitutionally valid enactment must do so in a manner which is consistent with the *Charter* principles, that is a separate question from the question of statutory interpretation. By interpreting the provision so as to accord with its view of minimal constitutional norms, the Court of Appeal effectively trumped the constitutional analysis, rewrote the legislation, and deprived the government of the means of justifying, if need be, any infringement on constitutionally guaranteed rights.

The plain and unambiguous meaning of *ex parte* in s. 487.055(1) of the *Criminal Code* is just that — *ex parte*. The question left to be determined is whether it was constitutionally permissible for Parliament to choose this procedural route for retrospective applications.

4. Constitutional Issues

As indicated earlier, Mr. Rodgers argues that s. 487.055 is unconstitutional on three grounds: (a) it allows for an *ex parte* proceeding in the absence of any justification for denying fundamental procedural fairness contrary to s. 7 of the *Charter*; (b) it permits the seizure of a DNA sample from an individual without first establishing reasonable and probable grounds to link the individual to a particular unsolved crime contrary to s. 8 of the *Charter*; and (c) it punishes the offender again for a predicate offence and denies him the benefit of the lesser punishment in force at the time of his conviction contrary to ss. 11(h) and 11(i) of the *Charter*. The relevant *Charter* provisions read as follows:

p. 679-680; *Vriend c. Alberta*, [1998] 1 R.C.S. 493, par. 136-142; *Bell ExpressVu*, par. 60-66; *Charlebois c. Saint John (Ville)*, [2005] 3 R.C.S. 563, 2005 CSC 74, par. 23-24.

Il n'y a aucune ambiguïté en l'espèce. Suivant le libellé clair du par. 487.055(1), le législateur entendait autoriser la demande *ex parte*. On ne peut présumer que la disposition exige un préavis. La Cour d'appel a eu raison d'affirmer que le juge qui exerce un pouvoir discrétionnaire en application d'une disposition législative constitutionnelle doit le faire en conformité avec les principes consacrés par la *Charte*, mais il en va différemment lorsqu'un tribunal est appelé à interpréter une disposition législative. En interprétant la disposition de façon qu'elle s'harmonise avec sa conception des normes constitutionnelles minimales, la Cour d'appel a de fait court-circuité l'analyse constitutionnelle, reformulé la loi et privé le gouvernement de la possibilité de justifier, au besoin, une atteinte à des droits garantis par la *Charte*.

L'expression « *ex parte* » employée au par. 487.055(1) du *Code criminel* est claire et non équivoque : en l'absence d'une partie. Reste à décider si la Constitution autorisait le législateur à choisir ce mode d'audition pour une demande à l'effet rétrospectif.

4. Questions constitutionnelles

Je l'ai déjà indiqué, M. Rodgers fait valoir que l'art. 487.055 est inconstitutionnel pour trois motifs : a) il autorise l'audition *ex parte* de la demande sans que l'atteinte au droit fondamental à l'équité procédurale ne soit justifiée, contrairement à l'art. 7 de la *Charte*; b) il permet la saisie d'un échantillon de l'ADN d'une personne sans que ne soit établie au préalable l'existence de motifs raisonnables et probables de relier cette personne à un crime non résolu, contrairement à l'art. 8 de la *Charte*; c) il punit de nouveau le contrevenant pour une infraction sous-jacente et l'empêche de bénéficier de la peine la moins sévère prévue pour cette infraction au moment de sa déclaration de culpabilité, contrairement aux al. 11(h) et i) de la *Charte*. Voici le texte des dispositions pertinentes de la *Charte* :

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

8. Everyone has the right to be secure against unreasonable search or seizure.

. . .

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; and

(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.

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The Crown contends that the constitutional analysis on both grounds (a) and (b) should be conducted under s. 8, not because s. 7 is not triggered, but because s. 8 provides a more specific and complete illustration of the s. 7 right in this particular context, making any s. 7 analysis redundant. I agree. Mr. Rodgers' *ex parte* argument concerns the procedural fairness of the very process that authorizes the seizure. In these circumstances, the question is necessarily encompassed in the s. 8 assessment of reasonableness and is more properly considered in that context. As we shall see, what is fair depends entirely on the context. This Court described the rapport between s. 8 and principles of fundamental justice in *R. v. Mills*, [1999] 3 S.C.R. 668, where the interests at play were the right to make full answer and defence and the complainant's privacy right. This Court stated as follows (at para. 88):

Given that s. 8 protects a person's privacy by prohibiting unreasonable searches or seizures, and given that s. 8 addresses a particular application of the principles of fundamental justice, we can infer that a reasonable search or seizure is consistent with the principles

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

8. Chacun a droit à la protection contre les fouilles, les perquisitions ou les saisies abusives.

. . .

11. Tout inculpé a le droit :

. . .

h) d'une part de ne pas être jugé de nouveau pour une infraction dont il a été définitivement acquitté, d'autre part de ne pas être jugé ni puni de nouveau pour une infraction dont il a été définitivement déclaré coupable et puni;

i) de bénéficier de la peine la moins sévère, lorsque la peine qui sanctionne l'infraction dont il est déclaré coupable est modifiée entre le moment de la perpétration de l'infraction et celui de la sentence.

Le ministère public soutient que pour les deux premiers motifs d'inconstitutionnalité allégués (a) et b)), l'analyse devrait se fonder sur l'art. 8, non pas parce que l'art. 7 n'entre pas en jeu, mais parce que l'art. 8 illustre de manière plus précise et complète le droit garanti à l'art. 7 dans le contexte considéré en l'espèce, ce qui rend superflue toute analyse axée sur l'art. 7. Je suis de cet avis. La prétention de M. Rodgers relative à l'audition *ex parte* touche à l'équité de la procédure d'autorisation de la saisie. Partant, la question soulevée est forcément comprise dans l'appréciation du caractère abusif ou non de la mesure, suivant l'art. 8, et mieux vaut l'examiner sous cet angle. Nous le verrons, l'équité dépend entièrement du contexte. Dans l'arrêt *R. c. Mills*, [1999] 3 R.C.S. 668, portant sur le droit à une défense pleine et entière et le droit à la vie privée de la plaignante, notre Cour a précisé le lien entre l'art. 8 et les principes de justice fondamentale (par. 88) :

Étant donné que l'art. 8 garantit le droit à la vie privée d'une personne en interdisant les fouilles, perquisitions ou saisies abusives, et étant donné que cet article vise une application particulière des principes de justice fondamentale, nous pouvons en déduire qu'une

of fundamental justice. Moreover, as we have already discussed, the principles of fundamental justice include the right to make full answer and defence. Therefore, a reasonable search and seizure will be one that accommodates both the accused's ability to make full answer and defence and the complainant's privacy right.

In my view, the same reasoning applies here. I will therefore deal with grounds (a) and (b) under the s. 8 analysis and then consider s. 11.

5. Section 8

5.1 *The Right to Be Secure Against Unreasonable Search or Seizure*

There is no question that the taking of bodily samples for DNA analysis without the person's consent constitutes a seizure within the meaning of s. 8 of the *Charter*. An individual's right to be secure against search and seizure, however, is not absolute. Section 8 only protects against "unreasonable" searches or seizures. To state it in the positive, s. 8 protects reasonable expectations of privacy. This Court has held that for a search to be reasonable: (a) it must be authorized by law; (b) the law itself must be reasonable; and (c) the manner in which the search was carried out must be reasonable (*R. v. Collins*, [1987] 1 S.C.R. 265, at p. 278; *R. v. Stillman*, [1997] 1 S.C.R. 607, at para. 25). We are only concerned here with the second requirement, the reasonableness of the authorizing provision itself.

The notion of what is "reasonable", by its very nature, must be assessed in context. This Court in *R. v. McKinlay Transport Ltd.*, [1990] 1 S.C.R. 627, reiterated the need for a flexible and purposive test. Wilson J. stated (at p. 645):

Since individuals have different expectations of privacy in different contexts and with regard to different kinds of information and documents, it follows that the standard of review of what is "reasonable" in a given context must be flexible if it is to be realistic and meaningful.

fouille, perquisition ou saisie non abusive est conforme aux principes de justice fondamentale. De plus, comme nous l'avons vu, les principes de justice fondamentale incluent le droit à une défense pleine et entière. Par conséquent, la fouille, perquisition ou saisie non abusive est celle qui tient compte à la fois de la capacité de l'accusé de présenter une défense pleine et entière, et du droit à la vie privée du plaignant.

À mon sens, le même raisonnement vaut en l'espèce. J'examinerai donc les motifs a) et b) au regard de l'art. 8, puis je me pencherai sur l'art. 11.

5. Article 8

5.1 *Le droit à la protection contre les fouilles, les perquisitions ou les saisies abusives*

Il ne fait aucun doute que le prélèvement de substances corporelles pour analyse génétique sans le consentement de l'intéressé constitue une saisie au sens de l'art. 8 de la *Charte*. Le droit d'une personne à la protection contre les fouilles, les perquisitions ou les saisies n'est cependant pas illimité. L'article 8 ne protège que contre la fouille, la perquisition ou la saisie « abusive ». D'un point de vue positif, il protège les attentes raisonnables en matière de protection de la vie privée. Notre Cour a conclu qu'une fouille ou une perquisition n'est pas abusive lorsqu'elle satisfait à trois conditions : a) elle est autorisée par la loi, b) qui elle-même n'est pas abusive et c) elle n'est pas effectuée de manière abusive (*R. c. Collins*, [1987] 1 R.C.S. 265, p. 278; *R. c. Stillman*, [1997] 1 R.C.S. 607, par. 25). Seule la deuxième condition nous intéresse en l'espèce, soit celle du caractère non abusif de la disposition habilitante.

De par sa nature, le caractère non abusif (ou « raisonnable ») doit être apprécié dans le contexte. Dans l'arrêt *R. c. McKinlay Transport Ltd.*, [1990] 1 R.C.S. 627, notre Cour a rappelé la nécessité d'un critère souple et téléologique. Voici ce que la juge Wilson a dit (p. 645) :

Puisque les attentes des gens en matière de protection de leur vie privée varient selon les circonstances et les différents genres de renseignements et de documents exigés, il s'ensuit que la norme d'examen de ce qui est « raisonnable » [non abusif] dans un contexte donné doit être souple si on veut qu'elle soit réaliste et ait du sens.

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Hence any assessment of reasonableness requires a balancing of the relevant competing interests. In the seminal case of *Hunter v. Southam Inc.*, [1984] 2 S.C.R. 145, at pp. 159-60, Dickson J. described the s. 8 test as follows:

[A]n assessment must be made as to whether in a particular situation the public's interest in being left alone by government must give way to the government's interest in intruding on the individual's privacy in order to advance its goals, notably those of law enforcement.

Where the constitutional line of "reasonableness" will be drawn then becomes a function of both the importance of the state objective and the degree of impact on the individual's privacy interest. As we shall see, the parties take diametrically opposed positions on where the line should be drawn, each supporting their arguments on very different views of the competing state and individual interests at stake.

5.2 *The Parties' Positions*

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Mr. Rodgers argues that the primary purpose of the DNA data bank is narrow — it is intended to assist law enforcement authorities to link suspects to unsolved crimes. He relies more particularly on s. 4(a) of the *DNA Identification Act* which recognizes and declares that "the protection of society and the administration of justice are well served by the early detection, arrest and conviction of offenders, which can be facilitated by the use of DNA profiles". He submits that s. 487.055 was enacted in furtherance of this objective as an investigative tool used by the state to gather evidence for potential use in future criminal proceedings.

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Mr. Rodgers relies on the well-established constitutional threshold for subordinating the interests of the individual to the interests of the state in crime investigations. Although the test admits of exceptions, this Court in *Hunter* established three criteria to which searches and seizures must generally

En conséquence, l'appréciation du caractère non abusif exige la mise en balance des intérêts concurrents en jeu. Dans l'arrêt de principe *Hunter c. Southam Inc.*, [1984] 2 R.C.S. 145, p. 159-160, le juge Dickson a décrit le critère d'application de l'art. 8 :

[I]l faut apprécier si, dans une situation donnée, le droit du public de ne pas être importuné par le gouvernement doit céder le pas au droit du gouvernement de s'immiscer dans la vie privée des particuliers afin de réaliser ses fins et, notamment, d'assurer l'application de la loi.

Reste à savoir où se situe la ligne de démarcation constitutionnelle entre ce qui est abusif et ce qui ne l'est pas, ce qui dépend de l'importance de l'objectif de l'État et de l'incidence de la mesure sur le droit à la vie privée de l'intéressé. Nous le verrons, les parties défendent des thèses diamétralement opposées à cet égard, l'argumentation de chacune s'appuyant sur une conception très différente des intérêts concurrents en jeu — ceux de l'État et ceux du particulier.

5.2 *Les thèses défendues par les parties*

M. Rodgers soutient que l'objectif principal de la banque de données génétiques est restreint — aider les autorités chargées du contrôle d'application de la loi à relier des suspects à des crimes non résolus. Il invoque plus particulièrement l'al. 4a) de la *Loi sur l'identification par les empreintes génétiques*, qui reconnaît et proclame que « la protection de la société et l'administration de la justice sont bien servies par la découverte, l'arrestation et la condamnation rapides des contrevenants, lesquelles peuvent être facilitées par l'utilisation de profils d'identification génétique ». Il prétend que l'art. 487.055 a été adopté aux fins de réaliser cet objectif et de permettre à l'État de recueillir des éléments de preuve susceptibles d'être utilisés lors de poursuites criminelles ultérieures.

M. Rodgers invoque le point bien établi à partir duquel, suivant la Constitution, les droits du particulier doivent céder le pas à ceux de l'État en matière d'enquêtes criminelles. Même si la règle souffre des exceptions, dans l'arrêt *Hunter*, notre Cour a énoncé trois critères auxquels une fouille,

conform in order to meet the reasonableness standard mandated by s. 8 in that context. First, where possible, the search and seizure must have been approved by prior authorization. This “puts the onus on the state to demonstrate the superiority of its interest to that of the individual” (p. 160) and thus ensures that unjustified searches will be prevented before they occur. Second, the person authorizing the search must be “capable of acting judicially” (p. 162) in assessing in a neutral and impartial fashion whether a search is appropriate in the circumstances. Finally, the interests of the individual will yield to the interests of the state where there are reasonable and probable grounds, established upon oath, to believe that an offence has been committed and that evidence of this is to be found through the search or seizure. The Court identified this threshold as “the point where credibly-based probability replaces suspicion” (p. 167). The Court added that “[h]istory has confirmed the appropriateness of this requirement as the threshold for subordinating the expectation of privacy to the needs of law enforcement” (pp. 167-68).

The first two criteria are met but Mr. Rodgers submits that s. 487.055 fails to meet the minimal constitutional norm because it does not require the establishment of reasonable and probable grounds to believe that a particular offence has been committed and that the taking of a DNA sample from the convicted offender may afford evidence of that offence. By this argument, he effectively assimilates s. 487.055 to the DNA warrant provisions contained in the *Criminal Code* that allow for DNA sampling from a suspect based on the *Hunter* credibly based probability standard. He concedes that if his argument is accepted and this norm is adopted, the entire legislative scheme allowing for the collection of DNA samples from convicted offenders for data bank purposes would become redundant. All DNA samples would have been obtained under the authority of a search warrant obtained for investigative purposes in respect of a particular offence.

une perquisition ou une saisie doit généralement satisfaire pour ne pas être abusive au sens de l’art. 8 dans ce contexte. Premièrement, dans la mesure du possible, la fouille, la perquisition ou la saisie doit avoir été autorisée au préalable, ce qui « impose à l’État l’obligation de démontrer la supériorité de son droit par rapport à celui du particulier » (p. 160) et garantit contre le risque de fouille ou de perquisition injustifiée. Deuxièmement, la personne qui autorise la fouille ou la perquisition doit être « en mesure d’agir de façon judiciaire » (p. 162) et d’apprécier de manière impartiale si les circonstances justifient la mesure. Enfin, les droits du particulier cèdent le pas à ceux de l’État lorsque, selon une déclaration sous serment, il existe des motifs raisonnables et probables de croire qu’une infraction a été commise et que la fouille, la perquisition ou la saisie permettra de prouver sa perpétration. Notre Cour a fait correspondre ce point au moment à partir duquel « les soupçons font place à la probabilité fondée sur la crédibilité » (p. 168). Elle a ajouté que « [l]’histoire confirme la justesse de cette exigence comme point à partir duquel les attentes en matière de [...] vie privée doivent céder le pas à la nécessité d’appliquer la loi » (p. 168).

Les deux premiers critères sont remplis, mais M. Rodgers fait valoir que l’art. 487.055 ne satisfait pas à la norme constitutionnelle minimale en ce qu’il n’exige pas du demandeur qu’il établisse l’existence de motifs raisonnables et probables de croire qu’une infraction a été commise et que le prélèvement d’un échantillon de l’ADN du condamné pourrait prouver sa perpétration. M. Rodgers assimile en fait l’art. 487.055 aux dispositions du *Code criminel* relatives aux mandats ADN qui permettent le prélèvement d’échantillons de l’ADN d’un suspect selon la norme de la probabilité fondée sur la crédibilité énoncée dans l’arrêt *Hunter*. Il concède que s’il était fait droit à sa prétention et que cette norme était retenue, l’ensemble du régime législatif permettant de soumettre les condamnés au prélèvement d’échantillons d’ADN destinés à la banque de données génétiques n’aurait plus de raison d’être. Tout échantillon d’ADN devrait être obtenu en vertu d’un mandat de perquisition décerné aux fins d’une enquête sur une infraction précise.

31 Mr. Rodgers submits that there is no justification for a less exacting standard where DNA samples are sought from convicted offenders for collection in the DNA data bank. He does not dispute the fact that there is a reduced expectation of privacy after arrest and even further when serving a sentence after conviction. He argues however that this is not conclusive in this case and that offenders retain subsisting privacy rights despite the reduced expectation of privacy. Lastly, he submits that an individual's subsisting privacy interests are especially high upon completion of his or her sentence.

32 The Crown argues that the state's purpose in collecting DNA samples for inclusion in the national data bank is not focussed on a particular investigation in respect of a specific crime. The purpose of the legislative scheme is much broader and was correctly articulated by Weiler J.A. in *R. v. Briggs* (2001), 157 C.C.C. (3d) 38 (Ont. C.A.), at para. 22, who defined it as follows:

In this case, the state's interest is not simply one of law enforcement *vis-à-vis* an individual — it has a much broader purpose. The DNA data bank will: (1) deter potential repeat offenders; (2) promote the safety of the community; (3) detect when a serial offender is at work; (4) assist in solving cold crimes; (5) streamline investigations; and most importantly, (6) assist the innocent by early exclusion from investigative suspicion (or in exonerating those who have been wrongfully convicted).

The Crown submits that the appropriate analogy is not to investigative search warrants but to fingerprinting as a means of identifying offenders. The Crown relies on *R. v. Beare*, [1988] 2 S.C.R. 387, where this Court, in a unanimous judgment, upheld the constitutional validity of the provisions of the *Identification of Criminals Act*, R.S.C. 1970, c. I-1, and the *Criminal Code* which permit the post-arrest, pre-conviction taking of fingerprints, photographs and other identification measurements as approved by regulation, without any prior judicial authorization. The Court rejected the constitutional challenge having particular regard to the

Selon M. Rodgers, rien ne justifie l'application d'une norme moins stricte à la demande de soumettre un condamné au prélèvement d'un échantillon d'ADN destiné à la banque de données génétiques. Il ne nie pas que les attentes en matière de vie privée diminuent après une arrestation, et plus encore après une déclaration de culpabilité, lorsque la personne purge sa peine d'emprisonnement. Il soutient toutefois que cela n'est pas déterminant en l'espèce et que le contrevenant conserve un certain droit à la protection de sa vie privée malgré ses attentes réduites en la matière. Enfin, il prétend que ce droit est particulièrement grand une fois sa peine purgée.

Le ministère public fait valoir que l'État ne prélève pas d'échantillons d'ADN destinés à la banque nationale de données génétiques pour les besoins d'une enquête relative à un crime en particulier. L'objectif du régime législatif, beaucoup plus général, a été énoncé avec justesse par le juge Weiler dans l'arrêt *R. c. Briggs* (2001), 157 C.C.C. (3d) 38 (C.A. Ont.), par. 22 :

[TRADUCTION] Dans le cas qui nous occupe, l'intérêt de l'État ne réside pas seulement dans l'application de la loi à un particulier — l'objectif est beaucoup plus général. La banque de données génétiques (1) dissuadera la récidive éventuelle, (2) favorisera la sécurité de la collectivité, (3) permettra de détecter la perpétration d'infractions en série, (4) contribuera à résoudre de vieux crimes jamais résolus, (5) simplifiera les enquêtes et, surtout, (6) permettra aux personnes innocentes d'être disculpées au tout début de l'enquête (ou aux victimes d'erreurs judiciaires d'être innocentées).

Le ministère public soutient que l'analogie doit être faite non pas avec le mandat de perquisition décerné dans le cadre d'une enquête, mais avec la prise des empreintes digitales pour identifier un contrevenant. Il invoque à l'appui l'arrêt *R. c. Beare*, [1988] 2 R.C.S. 387, où notre Cour a confirmé à l'unanimité la constitutionnalité des dispositions de la *Loi sur l'identification des criminels*, S.R.C. 1970, ch. I-1, et du *Code criminel* permettant, après l'arrestation mais avant la déclaration de culpabilité, la prise d'empreintes digitales, de photographies et de mensurations conformément au règlement, sans autorisation judiciaire préalable. Notre Cour

important societal interest in identifying offenders, the arrested person's lower expectation of privacy, and the lack of any significant aggravation to the intrusion of privacy. Given that DNA profiling is just a more sophisticated, modern, efficient and reliable means of gathering identification evidence than traditional fingerprinting, the Crown takes the position that "*neither s. 7 nor s. 8 of the Charter require even prior judicial authorization, let alone a full hearing on notice, to permit the routine and minimally intrusive taking of bodily samples from the most dangerous convicted offenders in Canada, so long as such samples are used solely for identification purposes*" (appellant's factum, at para. 53 (emphasis in original)).

Mr. Rodgers strongly disputes that any such analogy is appropriate, arguing that the potential impact on the privacy of the individual is far more significant with DNA sampling than with fingerprinting. He describes the greater potential impact as follows (at para. 55 of his factum):

Fingerprints only provide evidence of the identity of a person and the unique pattern of a finger's skin. In contrast, DNA goes beyond criminal identification purposes and reveals an incredible amount of personal information about an individual including, but by no means limited to, his or her relationship to other persons, ethnic traits, physical characteristics, and medical conditions. The type of personal information that can be revealed by DNA will only expand as scientists continue their research in the area of the human genome. The fact that the DNA profiles loaded into the DNA Data Bank contain only non-coding portions of an individual's DNA is of no import since the *DNA Identification Act* mandates the permanent retention of bodily samples seized pursuant to s. 487.055. Thus, the state retains in its possession *all* genetic information that can be derived from an individual's DNA. [Emphasis in original.]

Given this significant privacy interest, Mr. Rodgers submits that, not only is the prior judicial authorization necessary but, absent individualized evidence

a rejeté la contestation constitutionnelle compte tenu, tout particulièrement, du grand intérêt qu'a la société à identifier les contrevenants, de la diminution des attentes en matière de vie privée d'une personne sous garde et de l'absence d'aggravation notable de l'atteinte à la vie privée. La technique des empreintes génétiques n'étant, par rapport à la traditionnelle prise des empreintes digitales, qu'un moyen plus perfectionné, moderne, efficace et fiable d'obtenir une preuve d'identification, le ministère public fait valoir que [TRADUCTION] « *ni l'art. 7 ni l'art. 8 de la Charte n'exigent une autorisation judiciaire préalable, et encore moins la tenue d'une audience en bonne et due forme après signification d'un préavis, pour le prélèvement usuel et peu attentatoire d'échantillons de substances corporelles sur les condamnés les plus dangereux au Canada, à condition que les échantillons ne soient utilisés qu'à des fins d'identification* » (mémoire de l'appelante, par. 53 (en italique dans l'original)).

M. Rodgers conteste fermement qu'une telle analogie soit appropriée et prétend que l'effet possible du prélèvement d'échantillons d'ADN sur la vie privée est beaucoup plus important que celui de la prise des empreintes digitales. Voici ce qu'il dit au par. 55 de son mémoire :

[TRADUCTION] Les empreintes digitales fournissent uniquement une preuve de l'identité d'une personne et les caractéristiques uniques de la peau d'un doigt. L'ADN, par contre, déborde le cadre de l'identification criminelle et révèle une quantité incroyable de renseignements sur la personne, dont sa relation avec autrui, ses traits ethniques, ses caractéristiques physiques et son état de santé. La gamme des renseignements personnels pouvant être obtenus au moyen de l'ADN ne peut que s'accroître avec la poursuite des recherches sur le génome humain. Il importe peu que les profils d'identification versés dans la banque de données génétiques ne contiennent que des parties non codantes de l'ADN de la personne puisque la *Loi sur l'identification par les empreintes génétiques* prescrit la conservation indéfinie des échantillons de substances corporelles saisis en application de l'art. 487.055. L'État reste donc en possession de *toutes* les données génétiques obtenues à partir d'un échantillon d'ADN. [Souligné dans l'original.]

Vu l'importance du droit à la vie privée qui est en jeu, M. Rodgers prétend non seulement qu'une autorisation judiciaire préalable est nécessaire,

that the subject will either flee or that evidence will be destroyed, there can be no justification for hearing s. 487.055 applications *ex parte*. Unlike the situation with investigative applications for a DNA warrant, surprise and secrecy are not essential — the subject of the application is either in prison or, if under some form of release, will be compelled by summons to attend for sampling. Further, the time and resources needed to litigate an *inter partes* hearing is not a significant factor and cannot amount to a justification for denying the offender the right to be heard. Mr. Rodgers therefore takes the position that the procedure contemplated under s. 487.055 is fundamentally unfair contrary to s. 7 of the *Charter*.

34 For reasons that follow, I am unable to accept Mr. Rodgers' position.

5.3 *The Hunter Criteria Not Applicable*

35 There is no question that, absent exceptional circumstances, where the government has embarked upon a criminal investigation and is seeking evidence to substantiate an investigative theory, the individualized credibly based probability standard established in *Hunter* will be the constitutional norm. The fact that the suspect is a convicted offender may form part of the reasonable and probable grounds advanced in support of the authorization, but it does not change the threshold that must be met. It is important to note, however, that this Court in *Hunter* itself recognized that this individualized credibly based probability standard may vary depending on the context (p. 168). Even within the narrow compass of criminal investigative activity, exceptions to the requirements of reasonable grounds to believe and prior judicial authorization have been recognized. For example, in the context of customs border searches, this Court concluded that the *Hunter* criteria for assessing the reasonableness of a search for the purposes of s. 8 were inapplicable: see *R. v. Simmons*, [1988] 2 S.C.R. 495; *R. v. Jacques*, [1996] 3 S.C.R. 312; *R. v. Monney*, [1999] 1 S.C.R. 652. See also *R. v. Caslake*, [1998] 1 S.C.R. 51, on the common law power to search incidental to arrest, and *R. v. Grant*, [1993] 3 S.C.R.

mais aussi qu'à défaut d'une preuve que l'intéressé se soustraira à la justice ou que des éléments de preuve seront détruits, rien ne peut justifier que la demande visée à l'art. 487.055 soit entendue *ex parte*. Contrairement à la demande d'un mandat ADN pour les besoins d'une enquête, la surprise et le secret ne sont pas essentiels : la personne visée par la demande est en prison ou, si elle bénéficie d'une mise en liberté, elle sera sommée de se présenter pour subir le prélèvement. De plus, le temps et les ressources nécessaires à la tenue d'une audience *inter partes* importent peu et ne sauraient priver le contrevenant du droit d'être entendu. M. Rodgers est donc d'avis que la procédure prévue à l'art. 487.055 est fondamentalement inéquitable, contrairement à l'art. 7 de la *Charte*.

Pour les motifs qui suivent, je ne peux faire droit aux prétentions de M. Rodgers.

5.3 *Inapplicabilité des critères de l'arrêt Hunter*

Il est indubitable que, sauf circonstances exceptionnelles, lorsque l'État a ouvert une enquête criminelle et qu'il tente d'obtenir des éléments de preuve confirmant ses soupçons, le critère individuel de la probabilité fondée sur la crédibilité, établi dans l'arrêt *Hunter*, correspond à la norme constitutionnelle. Le fait que le suspect est un condamné peut faire partie des motifs raisonnables et probables invoqués à l'appui de la demande d'autorisation, mais cela ne change rien au critère auquel il faut satisfaire. Signalons toutefois que, dans l'arrêt *Hunter*, notre Cour a reconnu elle-même que ce critère individuel de la probabilité fondée sur la crédibilité pouvait varier selon les circonstances (p. 168). Même dans le contexte restreint d'une enquête criminelle, des exceptions à l'exigence de motifs raisonnables de croire et à celle d'une autorisation judiciaire préalable ont été admises. Dans le contexte d'une fouille à un poste-frontière, par exemple, notre Cour a conclu à l'inapplicabilité des critères énoncés dans l'arrêt *Hunter* pour apprécier le caractère abusif ou non de la mesure au sens de l'art. 8 : voir *R. c. Simmons*, [1988] 2 R.C.S. 495; *R. c. Jacques*, [1996] 3 R.C.S. 312; *R. c. Monney*, [1999] 1 R.C.S. 652. Voir également *R. c. Caslake*, [1998] 1 R.C.S.

223, on warrantless searches in circumstances of urgency. As I will explain, the *Hunter* criteria are not applicable in this context either.

The DNA *warrant* provisions are akin to the other warrant provisions contained in the *Criminal Code*. They allow for the gathering of evidence from a suspected offender in respect of an investigation into a specific offence. Those provisions fall clearly within the scope of the *Hunter* paradigm. The subject of the proposed search and seizure, whether or not he or she is a convicted offender, has the constitutional right to be left alone by law enforcement authorities unless and until there are reasonable and probable grounds, established upon oath, to believe that an offence has been committed and that there is evidence to be found by means of the DNA sampling and analysis. The constitutional validity of these provisions was reviewed and upheld by this Court in *S.A.B.*

Unlike the warrant provisions, the DNA *data bank* provisions do not target suspected offenders in respect of particular offences. Rather, they target offenders who have been convicted of different categories of offences. They do not provide for the gathering of evidence for use in a specific prosecution. Rather, they provide for the collection of samples solely for the purpose of creating DNA profiles for inclusion in the data bank. In any future investigation, a comparison between DNA evidence obtained at a crime scene and the data bank DNA profile will either serve to exonerate or identify a suspect. However, if a crime scene DNA profile matches an existing profile in the data bank, the sample is not released. Usual investigative methods, including DNA warrants, must be resorted to in order to gather evidence in pursuit of the investigation. Dr. Fourney describes the procedure as follows:

51, quant au pouvoir conféré par la common law d'effectuer une fouille accessoire à l'arrestation, et *R. c. Grant*, [1993] 3 R.C.S. 223, relativement à la perquisition sans mandat en situation d'urgence. Comme je l'explique plus loin, les critères de l'arrêt *Hunter* ne s'appliquent pas dans le présent contexte non plus.

Les dispositions régissant le *mandat* ADN s'apparentent aux autres dispositions du *Code criminel* sur les mandats de perquisition. Elles permettent d'obtenir d'un suspect des éléments de preuve pour les besoins d'une enquête sur une infraction donnée. Le modèle de l'arrêt *Hunter* s'applique clairement à ces dispositions. La personne visée par la fouille, la perquisition ou la saisie projetée, qu'elle soit ou non un condamné, a le droit constitutionnel de ne pas être importunée par les autorités chargées du contrôle d'application de la loi, sauf motifs raisonnables et probables de croire, selon une déclaration sous serment, qu'une infraction a été commise et que le prélèvement d'échantillons d'ADN et leur analyse fourniront des éléments de preuve. Dans l'arrêt *S.A.B.*, notre Cour a confirmé la constitutionnalité de ces dispositions.

Contrairement aux dispositions sur les mandats de perquisition, celles relatives au prélèvement d'échantillons destinés à la *banque de données* génétiques ne visent pas les personnes soupçonnées d'une infraction, mais bien celles déclarées coupables de différentes catégories d'infractions. Elles ne permettent pas l'obtention d'éléments de preuve pour les besoins d'une poursuite. Elles prévoient plutôt le prélèvement d'échantillons à la seule fin d'établir des profils d'identification génétique destinés à la banque de données. Lors d'une enquête ultérieure, la comparaison des éléments de preuve génétique recueillis sur le lieu du crime avec les profils d'identification génétique contenus dans la banque de données permettra de disculper ou d'identifier un suspect. Toutefois, lorsqu'il y a correspondance, l'échantillon ne sera pas remis aux enquêteurs. Il leur faudra recourir aux méthodes habituelles, dont l'obtention d'un mandat ADN, pour recueillir des éléments de preuve et faire progresser l'enquête. Le D^r Fourney décrit la procédure comme suit :

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14. Whenever a new DNA profile is entered into one of the indices, the data bank looks to see if it matches an existing profile in either of the indices. Where there is a match or “hit”, the data bank notifies the Canadian Police Services Information Centre (CPSIC) who can then match the SUN with the identity of the donor. CPSIC has no access to the DNA profile, but has the ability to decode the SUN to determine the identity of the donor. When there is a “hit” CPSIC informs the laboratory that generated the crime scene profile that there has been a match between that crime scene sample and a particular individual. At no time is the sample or profile released to anyone outside the data bank. Instead, local investigators use traditional investigative methods, including DNA warrants, to further their investigation. [Emphasis added.]

[TRADUCTION] 14. Lorsqu’un nouveau profil d’identification génétique est introduit dans l’un des fichiers, une recherche est lancée pour vérifier s’il correspond à un profil contenu dans l’un ou l’autre des fichiers. Le cas échéant, un avis est transmis au Centre d’information des services canadiens de police (CISCP), qui peut alors établir une correspondance entre le SUN et l’identité du donneur. Le CISCP n’a pas accès au profil d’identification génétique, mais il peut décoder le SUN pour déterminer l’identité du donneur. Le CISCP informe le laboratoire qui a établi le profil à partir d’un échantillon prélevé sur le lieu du crime qu’une correspondance a été établie entre cet échantillon et une personne en particulier. La banque de données ne remet jamais l’échantillon ou le profil à une personne de l’extérieur. Les enquêteurs chargés du dossier doivent plutôt avoir recours aux méthodes d’enquête traditionnelles, y compris le mandat ADN, pour faire progresser l’enquête. [Je souligne.]

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In my view, in considering the purpose of the DNA data bank provisions, the appropriate analogy is to fingerprinting and other identification measures taken for law enforcement purposes. The purpose of the legislative scheme is expressly set out in s. 3 of the *DNA Identification Act* — “to help law enforcement agencies identify persons alleged to have committed designated offences, including those committed before the coming into force of this Act”. The DNA data bank provisions contained in the *DNA Identification Act* and the *Criminal Code* are intended to put modern DNA technology to use in the identification of potential and known offenders. The *DNA Identification Act* is a modern supplement to the *Identification of Criminals Act*, R.S.C. 1985, c. I-1, which provides as follows:

2. (1) The following persons may be fingerprinted or photographed or subjected to such other measurements, processes and operations having the object of identifying persons as are approved by order of the Governor in Council:

. . .

Section 2 goes on to identify classes of persons charged and convicted of particular offences who are subject to the identification process. It is beyond

Vu l’objet des dispositions relatives à la banque de données génétiques, j’estime que l’analogie doit se faire avec la prise des empreintes digitales et les autres mesures d’identification liées à l’application de la loi. L’objet du régime législatif est expressément énoncé à l’art. 3 de la *Loi sur l’identification par les empreintes génétiques* — « aider les organismes chargés du contrôle d’application de la loi à identifier les auteurs présumés d’infractions désignées, y compris de celles commises avant l’entrée en vigueur de la présente loi ». Les dispositions relatives à la banque de données génétiques de la *Loi sur l’identification par les empreintes génétiques* et du *Code criminel* visent à mettre les nouvelles techniques d’analyse génétique au service de l’identification des contrevenants connus ou éventuels. La *Loi sur l’identification par les empreintes génétiques* se veut le complément moderne de la *Loi sur l’identification des criminels*, L.R.C. 1985, ch. I-1, qui prévoit ce qui suit :

2. (1) Est autorisée la prise des empreintes digitales, des photographies et de toute autre mensuration — ainsi que toute autre opération anthropométrique approuvée par décret du gouverneur en conseil — sur les personnes suivantes :

. . .

L’article 2 définit ensuite les catégories de personnes inculpées ou déclarées coupables d’infractions auxquelles s’appliquent les mesures

dispute that DNA sampling is a far more powerful identification tool than fingerprinting. Therein lies the heightened societal interest in adding this modern technology to the arsenal of identification tools.

I am also of the view that a useful analogy can be drawn between DNA sampling and fingerprinting in considering the impact on the privacy interest of the concerned individuals. DNA sampling impacts on the privacy interest of the subject in two ways: it interferes with the bodily integrity of the person and it engages the informational component of privacy. With respect to the first, it is not disputed that the degree of offence to the physical integrity of the person is relatively modest and Mr. Rodgers takes no serious issue with this component of the privacy interest. The impact of DNA sampling on the physical security of the person was considered fully in *S.A.B.* and, the Court concluded that “the statutory framework alleviates any concern that the collection of DNA samples pursuant to a search warrant under ss. 487.04 to 487.09 of the *Criminal Code* constitutes an intolerable affront to the physical integrity of the person” (para. 47). The same statutory framework governs the taking of samples pursuant to DNA data bank orders and raises no greater constitutional concern in respect of the physical security of the person than does fingerprinting or the other identification procedures considered in *Beare*.

The potential impact on the informational component of privacy, however, is far more significant. It was also discussed in *S.A.B.* and the Court recognized that “[t]here is undoubtedly the highest level of personal and private information contained in an individual’s DNA” (para. 48). It is mainly for that reason that Mr. Rodgers submits that the analogy to fingerprinting does not assist in assessing the constitutionality of the DNA data bank regime. Mr. Rodgers correctly notes that DNA can reveal personal information that goes far beyond the identity of the person. However, his argument ignores

d’identification. Il est incontestable que l’analyse génétique est un moyen d’identification beaucoup plus performant que la comparaison des empreintes digitales, d’où le plus grand intérêt de la société à l’ajouter aux outils dont elle dispose en la matière.

Je suis également d’avis qu’une analogie peut être faite entre le prélèvement d’échantillons d’ADN et la prise des empreintes digitales au regard des effets sur le droit à la vie privée des intéressés. Le prélèvement d’échantillons d’ADN a deux effets : il porte atteinte à l’intégrité physique de la personne et il met en jeu la protection des renseignements personnels. En ce qui concerne le premier effet, nul ne conteste que l’atteinte à l’intégrité physique est relativement minime, et M. Rodgers ne s’élève pas vraiment contre le non-respect de cet élément de son droit à la vie privée. L’incidence du prélèvement d’échantillons d’ADN sur la sécurité physique de la personne a été dûment considérée dans l’arrêt *S.A.B.*, où notre Cour a conclu que « le cadre législatif dissipe toute crainte que le prélèvement d’échantillons d’ADN en application d’un mandat de perquisition décerné sous le régime des art. 487.04 à 487.09 du *Code criminel* constitue une atteinte intolérable à l’intégrité physique de la personne » (par. 47). Le prélèvement d’échantillons d’ADN en application de l’autorisation considérée en l’espèce est régi par le même cadre législatif et sa constitutionnalité n’est pas davantage sujette à caution que celle de la prise des empreintes digitales ou de quelque autre mesure d’identification considérée dans l’arrêt *Beare* pour ce qui est de la sécurité physique de la personne.

Par contre, l’effet possible sur les renseignements personnels est beaucoup plus important. Il en a aussi été question dans l’arrêt *S.A.B.*, et notre Cour a reconnu qu’« [i]l ne fait aucun doute que l’ADN d’une personne renferme, au plus haut degré, des renseignements personnels et privés » (par. 48). C’est principalement pour cette raison, selon M. Rodgers, que l’analogie avec la prise des empreintes digitales ne permet aucunement d’apprécier la constitutionnalité des dispositions relatives à la banque de données génétiques. M. Rodgers a raison de signaler que l’ADN peut révéler des

the legislative provisions enacted in furtherance of the statement of principle contained in s. 4 of the *DNA Identification Act* where Parliament expressly recognizes and declares that safeguards must be placed to protect the privacy of individuals. These safeguards, described earlier in this judgment, strictly limit the use that can be made of samples obtained for inclusion in the data bank to the comparison of offender profiles with crime scene profiles for *identification* only.

renseignements personnels qui vont bien au-delà de l'identité de la personne. Sa prétention ne tient cependant pas compte des dispositions législatives adoptées pour donner effet à l'énoncé de principe figurant à l'art. 4 de la *Loi sur l'identification par les empreintes génétiques*. Le législateur y reconnaît et y proclame expressément que la vie privée des particuliers doit faire l'objet de protections. Décrites précédemment, les mesures de protection établies font en sorte que les échantillons destinés à la banque de données servent uniquement à la comparaison du profil d'un contrevenant avec ceux contenus dans le fichier de criminalistique, aux fins d'*identification* seulement.

41

Given this analogy between DNA sampling and fingerprinting, I agree with the Crown that this Court's analysis in *Beare* is instructive. Similar arguments to those raised on this appeal were made in *Beare* where the requirement that a person appear for fingerprinting under the *Identification of Criminals Act* following a charge but before conviction was challenged on the ground that it contravened ss. 7, 8, 9, 10, 11(c) and 11(d) of the *Charter*. The impact on the privacy interest of the person resulting from being subjected to fingerprinting, observation, photographing, and other measurements was considered as part of the Court's s. 7 analysis. The Court rejected the constitutional challenge based, in part, on the following reasoning (at p. 413):

It seems to me that a person who is arrested on reasonable and probable grounds that he has committed a serious crime, or a person against whom a case for issuing a summons or warrant, or confirming an appearance notice has been made out, must expect a significant loss of personal privacy. He must expect that incidental to his being taken in custody he will be subjected to observation, to physical measurement and the like. Fingerprinting is of that nature. While some may find it distasteful, it is insubstantial, of very short duration, and leaves no lasting impression. There is no penetration into the body and no substance is removed from it.

Vu cette analogie entre le prélèvement d'échantillons d'ADN et la prise des empreintes digitales, je conviens avec le ministère public de la pertinence de l'analyse à laquelle s'est livrée notre Cour dans l'arrêt *Beare*. Dans cette affaire, les prétentions des parties s'apparentaient à celles formulées en l'espèce. L'obligation d'une personne de se présenter pour que soient prises ses empreintes digitales en application de la *Loi sur l'identification des criminels*, après sa mise en accusation, mais avant sa déclaration de culpabilité, y était contestée sur le fondement des art. 7, 8, 9 et 10 de la *Charte* et de ses al. 11(c) et d). L'effet sur la vie privée de la mise sous observation ainsi que de la prise des empreintes digitales, de photographies et de toute autre mensuration a été considéré au regard de l'art. 7. Notre Cour a rejeté la contestation constitutionnelle, et son raisonnement a en partie été le suivant (p. 413) :

Il me semble que, lorsqu'une personne est arrêtée parce qu'il y a des motifs raisonnables et probables de croire qu'elle a commis un crime grave ou lorsqu'il a été démontré qu'il y a lieu de délivrer une sommation ou un mandat d'arrestation ou de confirmer une citation à comparaître, l'intéressé doit s'attendre à une atteinte importante à sa vie privée. Il doit s'attendre à ce qu'en corollaire à sa mise sous garde, il sera mis sous observation et devra se soumettre à la prise de mensurations, etc. La prise des empreintes digitales est de cette nature. Certains peuvent évidemment trouver le procédé déplaisant, mais il est anodin, ne prend que très peu de temps et ne laisse aucune séquelle durable. Rien n'est introduit dans le corps et il n'en est prélevé aucune substance.

I am unable to accept that a provision providing for fingerprinting as an incident of being taken into custody for a serious crime violates the principles of fundamental justice. While a search of one's premises requires a prior authorization based on reasonable and probable grounds to believe both that the offence has been committed and that evidence will be found, the custodial fingerprinting process is entirely different. It involves none of the probing into an individual's private life and effects that mark a search.

Apart from this, the invasion of privacy on arrest on reasonable and probable grounds is a far more serious violation of the right to privacy. It is not significantly aggravated by the taking of the fingerprints of the person in custody. As already mentioned, there are many cases where the United States courts, including the Supreme Court, have refused to accord constitutional protection against a general discretion in the police to take fingerprints from persons in custody; see Moenssens, *supra*, at pp. 62-70.

The Court specifically rejected the Court of Appeal's opinion in that case that the legislation was constitutionally deficient because it did not require that reasonable and probable grounds linking the fingerprinting to the particular offence be established. La Forest J., writing for the Court, summarized the reasoning of the Court of Appeal as follows (at p. 411):

The judges in the Court of Appeal thought their objections to the discretionary features of the legislation could be met if the following conditions were satisfied: a peace officer, in addition to having reasonable and probable grounds for believing the accused had committed an offence, had reasonable and probable grounds for believing that fingerprinting would likely provide evidence relating to the offences, or reasonably doubted the identity of the accused, or believed on reasonable and probable grounds that fingerprinting would provide evidence of the subject's identity.

La Forest J. rejected this approach stating that it ignored "the wide variety of reasons for which fingerprints may legitimately be used" (p. 411). In the same way, I am of the view that Mr. Rodger's main argument on s. 8 ignores the distinct purpose of

Je ne puis admettre qu'une disposition prévoyant la prise des empreintes digitales, en corollaire d'une mise sous garde, dans le cas d'un crime grave, viole les principes de justice fondamentale. Certes la perquisition d'un domicile requiert une autorisation préalable, fondée sur des motifs raisonnables et probables de croire à la fois qu'il y a eu infraction et que l'on pourra y trouver des éléments de preuve, cependant la procédure de prise d'empreintes digitales en détention est totalement différente. Elle ne comporte pas cette immixtion dans la vie privée et les biens d'un individu qui caractérise une perquisition.

Cela mis à part, l'atteinte à la vie privée que constitue l'arrestation fondée sur des motifs raisonnables et probables, est une violation beaucoup plus grave du droit à la vie privée. Elle n'est guère aggravée par la prise des empreintes digitales du détenu. Comme je l'ai déjà mentionné, une jurisprudence fort abondante aux États-Unis, y compris certains arrêts de la Cour suprême, refuse d'accorder une protection constitutionnelle contre le pouvoir discrétionnaire général de la force policière de prendre les empreintes digitales des personnes sous garde; voir Moenssens, précité, aux pp. 62 à 70.

Dans cette affaire, notre Cour a expressément rejeté l'avis de la Cour d'appel selon lequel la disposition législative était inconstitutionnelle parce qu'elle n'exigeait pas de motifs raisonnables et probables de relier les empreintes digitales à l'infraction en cause. Au nom de notre Cour, le juge La Forest a résumé le raisonnement de la Cour d'appel (p. 411) :

Les juges de la Cour d'appel pensent qu'on peut répondre à leurs objections concernant les aspects discrétionnaires de la législation en imposant les conditions suivantes : un agent de la paix, en plus d'avoir des motifs raisonnables et probables de croire que l'inculpé a commis l'infraction, a également des motifs raisonnables et probables de croire que le prélèvement des empreintes permettra de découvrir des preuves relatives aux infractions, ou a un doute raisonnable sur l'identité de l'inculpé, ou encore a des motifs raisonnables et probables de croire que le prélèvement des empreintes apportera des éléments de preuve sur l'identité du sujet.

Le juge La Forest a rejeté cette approche au motif qu'elle ne tenait pas compte de « la grande variété de raisons pour lesquelles on peut légitimement prendre les empreintes digitales » (p. 411). De la même façon, j'estime que le principal argument de

establishing a national DNA data bank for identification purposes and the variety of reasons for which DNA profiles may legitimately be used. In assessing the reasonableness of the legislation, it is this societal interest which must be balanced against the privacy interests of the individual.

42

Mr. Rodgers correctly concedes that, as a person who has been convicted and is serving a sentence, his expectation of privacy is greatly reduced: see *Weatherall v. Canada (Attorney General)*, [1993] 2 S.C.R. 872, at p. 877; *Stillman*, at para. 61. As Weiler J.A. aptly put it in *Briggs* in the context of assessing the impact of the DNA data bank legislation (at para. 34):

A person convicted of a crime has a lesser expectation of privacy not because that person's worth as a human being is less, but because the person's right to make choices about his or her life is curtailed.

Mr. Rodgers unquestionably has a residual privacy interest in the information contained in his DNA samples. However, in restricting the use of DNA sampling for data bank purposes to an *identification tool only*, Parliament has adequately answered any heightened concern about the potentially powerful impact that DNA sampling has on the informational privacy interests of the individual. The relevant question then becomes whether Mr. Rodgers has any reasonable expectation of privacy in respect of his *identity*.

43

The class of persons against whom a DNA data bank authorization may be granted is confined to offenders who have been convicted of designated offences. As stated earlier, designated offences, as defined under s. 487.04 of the *Criminal Code*, may generally be described as the more serious offences under the *Code* and offences in respect of which it may reasonably be expected that DNA may be left behind by the offender. Section 487.055 targets

M. Rodgers fondé sur l'art. 8 ne tient compte ni de l'objectif distinct de l'établissement d'une banque de données génétiques à des fins d'identification ni de la variété de raisons pour lesquelles on peut légitimement établir un profil d'identification génétique. Pour déterminer si la disposition législative est abusive ou non, c'est ce droit de la société qui doit être mis en balance avec le droit du particulier au respect de sa vie privée.

M. Rodgers convient avec raison qu'en tant que personne déclarée coupable d'infractions et purgeant une peine d'emprisonnement, ses attentes en matière de vie privée sont considérablement réduites : voir les arrêts *Weatherall c. Canada (Procureur général)*, [1993] 2 R.C.S. 872, p. 877, et *Stillman*, par. 61. Dans l'arrêt *Briggs*, le juge Weiler a dit avec justesse au sujet de l'incidence des dispositions relatives à la banque de données génétiques (par. 34) :

[TRADUCTION] La personne déclarée coupable d'un crime a des attentes moins grandes en matière de vie privée, non pas parce que sa valeur en tant qu'être humain est moindre, mais parce que son droit de faire des choix concernant sa vie est restreint.

Certes, M. Rodgers a encore droit à la protection des renseignements que renferment ses échantillons d'ADN. Toutefois, en ne permettant l'utilisation des échantillons d'ADN destinés à la banque de données *qu'à des fins d'identification*, le législateur a dûment tenu compte de l'inquiétude accrue suscitée par l'incidence considérable qu'a le prélèvement d'échantillons d'ADN sur la protection des renseignements personnels. La question est donc de savoir si M. Rodgers a des attentes raisonnables en matière de vie privée en ce qui concerne son *identité*.

L'autorisation de prélèvement pour analyse génétique ne peut être accordée qu'à l'égard de contrevenants reconnus coupables d'infractions désignées. Je rappelle que les infractions désignées, au sens de l'art. 487.04 du *Code criminel*, correspondent généralement aux actes criminels les plus graves et dont on peut raisonnablement s'attendre à ce que la perpétration laisse des traces d'ADN. L'article 487.055 vise les condamnés les plus

the most dangerous convicted offenders — Mr. Rodgers falls in that class. Can persons convicted of designated offences, in particularly the category of offender targeted under s. 487.055, reasonably expect to retain any degree of anonymity *vis-à-vis* law enforcement authorities after their conviction? Bateman J.A. in *R. v. Murrins* (2002), 201 N.S.R. (2d) 288 (C.A.), concluded that the reasonable expectancy of a person convicted of a designated offence would be the opposite (at para. 41):

A person convicted of a designated offence would reasonably expect the authorities to gather and retain identifying information, such as fingerprints, distinctive body markings, or eye color. The bodily sample here is simply another form of identification.

I agree. In my view, Mr. Rodgers' identity as a multiple sex offender has become a matter of state interest and he has lost any reasonable expectation of privacy in the *identifying information* derived from DNA sampling in the same way as he has lost any expectation of privacy in his fingerprints, photograph or any other identifying measure taken under the authority of the *Identification of Criminals Act*.

Having regard to the competing interests at play, I conclude that there is no constitutional requirement to link the convicted offender, on reasonable and probable grounds, to any particular investigation. The data bank provisions strike an appropriate balance between the public interest in the effective identification of persons convicted of serious offences and the rights of individuals to physical integrity and the right to control the release of information about themselves.

5.4 *Procedural Fairness*

The remaining question is whether the making of s. 487.055 orders without requiring notice to and participation by the convicted offender breaches fundamental fairness. (Sections 487.051 and 487.052 which target convicted offenders whose

dangereux, une catégorie dont fait partie M. Rodgers. Une personne déclarée coupable d'une infraction désignée, y compris un contrevenant visé à l'art. 487.055, peut-elle raisonnablement s'attendre à conserver un certain anonymat vis-à-vis des autorités chargées du contrôle d'application de la loi? Dans l'arrêt *R. c. Murrins*, (2002), 201 N.S.R. (2d) 288 (C.A.), le juge Bateman a répondu par la négative (par. 41) :

[TRADUCTION] La personne déclarée coupable d'une infraction désignée peut raisonnablement s'attendre à ce que les autorités recueillent et conservent des renseignements permettant son identification, comme ses empreintes digitales, ses marques corporelles distinctives ou la couleur de ses yeux. Dans ce cas, l'échantillon de substances corporelles n'offre qu'un autre moyen d'identification.

Je suis d'accord. À mon avis, parce que M. Rodgers a été déclaré coupable de plusieurs infractions sexuelles, son identité intéresse désormais l'État et il n'a plus d'attentes raisonnables en matière de vie privée à l'égard des *renseignements d'identification* tirés des échantillons d'ADN, non plus qu'à l'égard de ses empreintes digitales, des ses photographies ou des autres mensurations prises sous le régime de la *Loi sur l'identification des criminels*.

Vu les intérêts concurrents en jeu, je conclus qu'il n'y a pas d'obligation constitutionnelle d'établir l'existence de motifs raisonnables et probables de relier le condamné à une enquête en particulier. Les dispositions relatives à la banque de données génétiques établissent un juste équilibre entre l'intérêt qu'a la société à ce que soient dûment identifiées les personnes déclarées coupables d'infractions graves et le droit du particulier à l'intégrité physique et à la communication à son gré de renseignements le concernant.

5.4 *Équité procédurale*

Reste une question à trancher. Accorder l'autorisation visée à l'art. 487.055 sans avoir exigé de préavis et en l'absence du condamné porte-t-il atteinte au droit fondamental à l'équité de la procédure? (Les articles 487.051 et 487.052, qui s'appliquent

cases are still before the court for sentencing are silent on the question of notice. Given that orders under those provisions are routinely made at the time of sentencing, the offender is usually present at the hearing.)

46

Mr. Rodgers submits that *ex parte* hearings are exceptional and limited in their use where some harm could result from the giving of notice. In support of his argument, he relies on the following words of Arbour J. in *Ruby v. Canada (Solicitor General)*, [2002] 4 S.C.R. 3, 2002 SCC 75, at paras. 25 and 38:

Ex parte, in a legal sense, means a proceeding, or a procedural step, that is taken or granted at the instance of and for the benefit of one party only, without notice to or argument by any adverse party: *Attorney General of Manitoba v. National Energy Board*, [1974] 2 F.C. 502 (T.D.). The circumstances in which a court will accept submissions *ex parte* are exceptional and limited to those situations in which the delay associated with notice would result in harm or where there is a fear that the other party will act improperly or irrevocably if notice were given. For instance, temporary injunctions are often issued *ex parte* in order to preserve the *status quo* for a short period of time before both parties can be heard (to prevent the demolition of a building, for example).

. . .

It remains to determine whether the requirement in s. 51(3) that a court accept *ex parte* submissions on request of the government institution refusing to disclose information is contrary to the principles of fundamental justice. As I have already noted, the circumstances in which a court will accept *ex parte* submissions are exceptional. The circumstances in which a court will be obliged to hear *ex parte* submissions at the request of one party are even more exceptional. [Emphasis added.]

47

I will return later to the circumstances and the conclusion of the Court in *Ruby*. However, it is important to note at the outset that the fallacy in Mr. Rodgers' argument is that it presupposes that notice and participation are themselves principles of fundamental justice, any departure from which must be justified in order to meet the minimal

aux contrevenants déclarés coupables mais dont la peine n'a pas encore été déterminée, ne font pas mention d'un avis. Comme l'ordonnance fondée sur ces dispositions est habituellement rendue lors de la détermination de la peine, le contrevenant est généralement présent à l'audience.)

M. Rodgers soutient que l'audition *ex parte* est une mesure exceptionnelle à laquelle on ne peut recourir que lorsqu'un préavis pourrait être préjudiciable. Il invoque à l'appui l'extrait suivant des motifs de la juge Arbour dans l'arrêt *Ruby c. Canada (Solliciteur général)*, [2002] 4 R.C.S. 3, 2002 CSC 75, par. 25 et 38 :

En droit, l'expression *ex parte* (« en l'absence d'une partie ») s'entend d'une procédure ou d'une étape de la procédure qui se déroule à la demande et au bénéfice d'une seule partie, sans avis à la partie adverse ou présentation d'arguments de sa part : *Procureur général du Manitoba c. Office national de l'énergie*, [1974] 2 C.F. 502 (1^{re} inst.). Les tribunaux n'entendent des arguments de cette façon qu'à titre exceptionnel, lorsque le délai occasionné par la signification d'un avis serait préjudiciable ou que l'on craint que l'autre partie n'agisse de façon irrégulière ou irrévocable si un avis lui est donné. Par exemple, il arrive souvent qu'une injonction provisoire soit décernée en l'absence de l'autre partie afin de maintenir brièvement le statu quo, jusqu'à ce que les deux parties puissent être entendues (afin de prévenir la démolition d'un immeuble par exemple).

. . .

Reste la question de savoir si l'obligation qu'a le tribunal, aux termes du par. 51(3), d'entendre sur demande les arguments de l'institution fédérale concernée en l'absence de l'autre partie est contraire aux principes de justice fondamentale. Comme je l'ai signalé précédemment, ce n'est que dans des circonstances exceptionnelles qu'un tribunal entend des arguments en l'absence d'une partie. Les cas dans lesquels un tribunal est tenu de le faire à la demande de l'une des parties sont encore plus rares. [Je souligne.]

Je reviendrai sur les faits de cette affaire et sur la conclusion de notre Cour. Il importe de signaler d'abord que la prétention de M. Rodgers ne tient pas la route en ce qu'elle présuppose que le préavis et la participation sont en eux-mêmes des principes de justice fondamentale auxquels toute dérogation doit être justifiée pour satisfaire à la norme

constitutional norm. As I read his reasons, Fish J. adopts the same reasoning. With respect, it is my view that this is not the proper approach. The constitutional norm, rather, is procedural fairness. Notice and participation may or may not be required to meet this norm — it is well settled that what is fair depends entirely on the context: see *R. v. Lyons*, [1987] 2 S.C.R. 309, at p. 362; *R. v. Rose*, [1998] 3 S.C.R. 262, at para. 99; *R. v. Harrer*, [1995] 3 S.C.R. 562, at para. 14; *R. v. Finta*, [1994] 1 S.C.R. 701, at p. 744; *R. v. Bartle*, [1994] 3 S.C.R. 173, at p. 225; *Dehghani v. Canada (Minister of Employment and Immigration)*, [1993] 1 S.C.R. 1053, at p. 1077; *Thomson Newspapers Ltd. v. Canada (Director of Investigation and Research, Restrictive Trade Practices Commission)*, [1990] 1 S.C.R. 425, at p. 540; *Knight v. Indian Head School Division No. 19*, [1990] 1 S.C.R. 653, at p. 682; *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817, at para. 21; *Chiarelli v. Canada (Minister of Employment and Immigration)*, [1992] 1 S.C.R. 711, at p. 743; *Ruby*, at para. 39.

The extent to which context is all important on questions of procedural fairness is plain from an analysis of *Ruby* itself. The ending words to para. 38 quoted above, not relied upon by Mr. Rodgers, read as follows:

The question is whether, in the context of this case, such a provision is consistent with the principles of fundamental justice. I believe that it is. [Emphasis added.]

In *Ruby* the Court was assessing the procedural fairness of a mandatory *ex parte in camera* proceeding held in response to an access to information request by Mr. Ruby under the federal *Privacy Act*. The request was challenged by the government who claimed the benefit of certain exemptions under the Act. The Court reiterated the well-established principle that what is fair will depend on the context. The Court then explained why fairness, as a general rule, will require notice and participation (at para. 40):

constitutionnelle minimale. Dans ses motifs, le juge Fish paraît partager ce point de vue. J'estime en toute déférence que ce raisonnement est erroné. La norme constitutionnelle applicable est plutôt celle de l'équité procédurale. Son respect peut exiger ou non un préavis et la présence à l'audience — il est bien établi que l'équité dépend entièrement du contexte : voir *R. c. Lyons*, [1987] 2 R.C.S. 309, p. 362; *R. c. Rose*, [1998] 3 R.C.S. 262, par. 99; *R. c. Harrer*, [1995] 3 R.C.S. 562, par. 14; *R. c. Finta*, [1994] 1 R.C.S. 701, p. 744; *R. c. Bartle*, [1994] 3 R.C.S. 173, p. 225; *Dehghani c. Canada (Ministre de l'Emploi et de l'Immigration)*, [1993] 1 R.C.S. 1053, p. 1077; *Thomson Newspapers Ltd. c. Canada (Directeur des enquêtes et recherches, Commission sur les pratiques restrictives du commerce)*, [1990] 1 R.C.S. 425, p. 540; *Knight c. Indian Head School Division No. 19*, [1990] 1 R.C.S. 653, p. 682; *Baker c. Canada (Ministre de la Citoyenneté et de l'Immigration)*, [1999] 2 R.C.S. 817, par. 21; *Chiarelli c. Canada (Ministre de l'Emploi et de l'Immigration)*, [1992] 1 R.C.S. 711, p. 743; *Ruby*, par. 39.

L'importance du contexte pour trancher en matière d'équité procédurale ressort de l'arrêt *Ruby* lui-même. Voici la suite du par. 38 précité, non invoquée par M. Rodgers :

La question qui se pose est de savoir si, dans le contexte de la présente affaire, la disposition prescrivant une telle obligation est compatible avec les principes de justice fondamentale. Je crois que oui. [Je souligne.]

Dans *Ruby*, notre Cour devait se prononcer sur le caractère équitable d'une audience tenue à huis clos en l'absence d'une partie pour donner suite à la demande de communication de renseignements présentée par M. Ruby en application de la *Loi sur la protection des renseignements personnels*, une loi fédérale. Invoquant certaines exceptions prévues par la Loi, l'État s'était opposé à la communication. Notre Cour a rappelé le principe bien établi que c'est en fonction du contexte qu'est déterminé ce qui est équitable ou non. Elle a ensuite expliqué pourquoi l'équité exige généralement la signification d'un préavis et la présence des parties (par. 40) :

As a general rule, a fair hearing must include an opportunity for the parties to know the opposing party's case so that they may address evidence prejudicial to their case and bring evidence to prove their position

The Court accepted that, in the case at hand, the exclusion of the appellant from the government's submissions was an exceptional departure from this general rule because it left him "in an informational deficit when trying to challenge the legitimacy of the exemptions claimed by the government" (para. 40). Notwithstanding this impact on Mr. Ruby, the Court recognized that "the general rule does tolerate certain exceptions" (para. 40). Following its contextual analysis, the Court concluded as follows, at para. 51, on the question of procedural fairness:

In this case, given the statutory framework, the narrow basis of the appellant's constitutional challenge and the significant and exceptional state and social interest in the protection of information involved, I find that the mandatory *ex parte* and *in camera* provisions do not fall below the level of fairness required by s. 7. [Emphasis added.]

49

The particular circumstances that informed the Court's conclusion are not relevant to this case and need not be reviewed in any greater detail. However, the analysis in *Ruby*, as in several other cases cited earlier, is very instructive. This Court has made it clear, not only that what is fair in a particular case depends entirely on the context, but that the constitutional question is referable to the *minimal* standard mandated by the *Charter*. Parliament and the legislatures can, and often do, legislate beyond minimal constitutional requirements on matters engaging constitutionally guaranteed rights and freedoms. It would be an unfortunate result if legislators became hesitant to do so for fear of expanding their constitutional obligations. This point was made in *Chiarelli*, at p. 742. The Court held that s. 7 of the *Charter* did not give a non-citizen who was otherwise deportable for criminality a right to an appeal hearing based on compassionate grounds. The Court then

En règle générale, le droit d'une partie à une audience équitable emporte celui de prendre connaissance de la preuve de la partie adverse afin de pouvoir répondre à tout élément préjudiciable à sa cause et apporter des éléments de preuve au soutien de celle-ci . . .

Notre Cour a convenu que, dans cette affaire, l'exclusion de l'appellant pendant l'audition de certains arguments de l'État constituait une dérogation exceptionnelle à cette règle générale, car l'appellant était « de ce fait désavantagé, étant privé de données susceptibles de servir à contester la légitimité des exceptions invoquées » (par. 40). Malgré cette conséquence pour M. Ruby, notre Cour a reconnu que « la règle générale souffre certaines exceptions » (par. 40). À l'issue de l'analyse contextuelle, elle a tiré la conclusion suivante au sujet de l'équité procédurale (par. 51) :

Dans la présente affaire, vu le cadre législatif applicable, la portée restreinte de la question constitutionnelle soulevée par l'appellant, de même que l'intérêt à la fois important et exceptionnel de l'État et de la société dans la protection des renseignements concernés, j'estime que les dispositions impératives requérant la tenue d'audiences à huis clos et *ex parte* respectent l'obligation d'équité découlant de l'art. 7 de la *Charte*. [Je souligne.]

Les circonstances particulières qui ont amené notre Cour à conclure en ce sens ne sont pas pertinentes en l'espèce, de sorte qu'il n'y a pas lieu d'en faire état. Cependant, son analyse, tout comme celle à laquelle elle s'est livrée dans plusieurs des autres affaires précitées, est très instructive. Notre Cour a clairement dit non seulement que ce qui est équitable dans un cas donné dépend entièrement du contexte, mais aussi que la question constitutionnelle se rapporte à la norme *minimale* imposée par la *Charte*. Le Parlement et les législatures peuvent — et ils le font souvent — légiférer en surpassant les exigences constitutionnelles minimales sur des sujets qui mettent en jeu les droits et les libertés garantis par la Constitution. Il serait regrettable qu'ils hésitent à le faire de crainte d'accroître la portée de leurs obligations constitutionnelles. L'arrêt *Chiarelli* constitue un bon exemple à cet égard (p. 742). Notre Cour y a conclu que l'art. 7 de la *Charte*

stated the following in respect of alleged constitutional deficiencies in the hearing that was provided by statute (at p. 742):

It is entirely within the discretion of Parliament whether an appeal on this basis is provided. Accordingly, Parliament could have simply provided that a certificate could issue without any hearing. Does the fact that Parliament has legislated beyond its constitutional requirement to provide that a hearing will be held enable the respondent to complain that the hearing does not comport with the dictates of fundamental justice? It could be argued that the provision of a hearing *ex gratia* does not expand Parliament's constitutional obligations. I need not resolve this issue in this case because I have concluded that, assuming that proceedings before the Review Committee were subject to the principles of fundamental justice, those principles were observed.

The Crown argues that this is a case where Parliament, in requiring prior judicial authorization under s. 487.055, has chosen to exceed minimal constitutional norms. The Crown therefore submits that the *ex parte* nature of the application cannot be constitutionally infirm because Parliament could have passed constitutionally valid legislation requiring the mandatory taking of bodily samples for DNA data bank purposes from s. 487.055 offenders *in the complete absence of any prior judicial authorization*. The Crown notes that, significantly, American appellate courts have consistently and uniformly upheld the constitutional validity of a variety of state and federal legislative initiatives requiring the compulsory DNA profiling of certain convicted offenders, without prior judicial authorization and without requiring any degree of individualized suspicion of a crime by the target. The courts have held that such legislation does not offend the Fourth Amendment right against “unreasonable searches and seizures”. In its leading decision on this point, the 9th Circuit of the U.S. Court of Appeals in *United States v. Kincaide*,

ne conférerait pas à un non-citoyen par ailleurs passible d'expulsion pour criminalité le droit à l'audition d'un appel fondé sur des motifs de compassion. Au sujet des vices constitutionnels allégués de l'audience prévue par la loi, elle a ajouté (p. 742) :

La décision de prévoir ou de ne pas prévoir un appel sur ce fondement relève exclusivement du pouvoir discrétionnaire du législateur fédéral. Le Parlement aurait donc pu prévoir simplement la délivrance d'une attestation sans la tenue d'une audience. Mais le fait que le Parlement, ne se contentant pas de satisfaire aux exigences que lui impose la Constitution, a prévu la tenue d'une audience, permet-il à l'intimé de se plaindre de ce que cette audience ne respecte pas les principes de justice fondamentale? On pourrait soutenir que le Parlement n'a pas élargi la portée de ses obligations constitutionnelles en prévoyant à titre gracieux la tenue d'une audience. C'est toutefois là une question qu'il n'est pas nécessaire de trancher en l'espèce vu ma conclusion que, dans l'hypothèse où les procédures devant le comité de surveillance seraient assujetties aux principes de justice fondamentale, ceux-ci ont été respectés.

Le ministère public prétend qu'il s'agit en l'espèce d'un cas où, en exigeant une autorisation judiciaire préalable à l'art. 487.055, le législateur a décidé de surpasser les normes constitutionnelles minimales. Il fait donc valoir que le caractère *ex parte* de la demande ne peut être tenu pour inconstitutionnel puisque le législateur aurait pu adopter une disposition législative, parfaitement constitutionnelle, obligeant les contrevenants visés à l'art. 487.055 à se soumettre au prélèvement d'échantillons de substances corporelles destinés à la banque de données génétiques *sans qu'une autorisation judiciaire ne doive être obtenue au préalable*. Qui plus est, les tribunaux d'appel américains ont toujours confirmé la constitutionnalité des diverses mesures législatives fédérales et étatiques soumettant certains condamnés à la prise des empreintes génétiques sans autorisation judiciaire préalable et sans que ne pèsent sur les intéressés de soupçons précis quant à la commission d'un crime. Les tribunaux ont conclu que ces mesures ne portaient pas atteinte au droit à la protection contre [TRADUCTION] « les fouilles, les perquisitions ou les saisies abusives » reconnu par le Quatrième amendement. Dans son arrêt de

379 F.3d 813 (2004), concluded as follows, at para. 3:

In light of conditional releasees' substantially diminished expectations of privacy, the minimal intrusion occasioned by blood sampling, and the overwhelming societal interests so clearly furthered by the collection of DNA information from convicted offenders, we must conclude that compulsory DNA profiling of qualified federal offenders is reasonable under the totality of the circumstances. Therefore, we today realign ourselves with every other state and federal appellate court to have considered these issues—squarely holding that the DNA Act satisfies the requirements of the Fourth Amendment. [Footnote omitted.]

The vast majority of state statutes also have a mandatory retrospective aspect in respect of offenders who were serving sentences for enumerated offences at the time the legislation was proclaimed in force, often as a condition of parole. By way of example, see the following statutes: Cal. Penal Code § 296.1 (West Supp. 2005); Mich. Comp. Laws Serv. §§ 28.171 to 28.176 (LexisNexis 2001 & Supp. 2003); Va. Code Ann. § 19.2-310.2 (Supp. 2005); N.Y. Exec. Law § 995 (Consol. 1995 & Supp. 2004); Fla. Stat. Ann. § 943.325 (West Supp. 2005); N.J. Stat. Ann. §§ 53:1-20.17 to 53:1-20.30 (West 2001 & Supp. 2004); Ohio Rev. Code Ann. § 2901.07 (LexisNexis Supp. 2005); Ga. Code Ann. §§ 24-4-60 to 24-4-65 (Supp. 2005); Mass. Ann. Laws ch. 22E, §§ 1-15 (LexisNexis 2003 & Supp. 2005).

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It is not necessary to decide in this case whether a similar legislative scheme would be constitutionally valid in Canada. Parliament has not chosen this route — it has provided for prior judicial authorization. Given the potential impact on the informational component of a person's right to privacy, this additional safeguard, coupled with the legislative restrictions placed on the use that can be made of collected samples for identification purposes only, may well be a wise choice — whether or not it exceeds Parliament's constitutional obligations. The determinative question becomes whether, in all the circumstances, Parliament's choice of a

principe sur le sujet, *United States c. Kincade*, 379 F.3d 813 (2004), la Cour d'appel des États-Unis, neuvième circuit, a conclu ce qui suit (par. 3) :

[TRADUCTION] Vu les attentes sensiblement réduites qu'ont les libérés sous condition en matière de vie privée, l'atteinte minimale associée au prélèvement sanguin et le grand intérêt qu'a clairement la société à recueillir des données génétiques sur les condamnés, il nous faut conclure que l'obligation faite aux condamnés fédéraux désignés de subir un prélèvement d'échantillons d'ADN n'est pas abusive au regard de toutes les circonstances. Nous nous rangeons donc à l'avis des autres tribunaux d'appel fédéraux et étatiques qui ont examiné ces questions et nous concluons catégoriquement que la loi en cause satisfait aux exigences du Quatrième amendement. [Note omise.]

La plupart des lois des États ont également un caractère impératif et rétrospectif à l'égard des contrevenants qui purgeaient une peine pour une infraction énumérée lors de l'entrée en vigueur des dispositions, la soumission au prélèvement faisant souvent partie des conditions de la libération conditionnelle; voir, par exemple, Cal. Penal Code § 296.1 (West Supp. 2005); Mich. Comp. Laws Serv. §§ 28.171 à 28.176 (LexisNexis 2001 & Supp. 2003); Va. Code Ann. § 19.2-310.2 (Supp. 2005); N.Y. Exec. Law § 995 (Consol. 1995 & Supp. 2004); Fla. Stat. Ann. § 943.325 (West Supp. 2005); N.J. Stat. Ann. §§ 53:1-20.17 à 53:1-20.30 (West 2001 & Supp. 2004); Ohio Rev. Code Ann. § 2901.07 (LexisNexis Supp. 2005); Ga. Code Ann. §§ 24-4-60 à 24-4-65 (Supp. 2005); Mass. Ann. Laws ch. 22E, §§ 1-15 (LexisNexis 2003 & Supp. 2005).

Pour les besoins du présent pourvoi, il n'est pas nécessaire de décider si un tel régime législatif serait jugé constitutionnel au Canada. Le législateur n'a pas choisi cette voie — il a prévu une autorisation judiciaire préalable. Vu l'effet possible sur la protection des renseignements personnels, cette garantie supplémentaire, jumelée au fait que la loi permet l'utilisation des échantillons à des fins d'identification seulement, pourrait bien constituer un choix judicieux — qu'elle surpasse ou non les exigences constitutionnelles. La question déterminante qui se pose dès lors est de savoir si, compte tenu de toutes les circonstances, le choix présumé d'une audience

presumptively *ex parte* hearing is fundamentally unfair. In my view, it is not. Keeping in mind that there is no constitutional guarantee to the most favourable procedure available, it is important to note that the chosen procedure in this case does provide the offender with the following safeguards:

- (1) prior judicial authorization must be obtained on written application to a provincial court judge: s. 487.055(1);
- (2) the applicant must establish that the targeted offender falls within one of the designated categories of offenders;
- (3) the judge has the discretion to give notice to the offender affected by the application;
- (4) the judge has the discretion not to order DNA sampling;
- (5) in deciding whether to grant the authorization, the judge is statutorily required to “consider the person’s criminal record, the nature of the offence and the circumstances surrounding its commission and the impact such an authorization would have on the privacy and security of the person”: s. 487.055(3.1);
- (6) the judge may require conditions to ensure that “the taking of the samples . . . is reasonable in the circumstances”: s. 487.06(2); and
- (7) the police must report back in writing to the provincial court judge: s. 487.057(1).

Further, although there is no appeal from a s. 487.055 order, the decision of the judge is reviewable on *certiorari*. Without doubt, errors in the record can be made. However, giving the offender notice and an opportunity to be heard is not the only procedure by which any error could be corrected. It is not as if DNA samples can be taken surreptitiously without the knowledge of the targeted person. Before taking any samples, the person acting under the authority of a DNA warrant, order or authorization, has the duty to inform the subject, among other matters, of the contents of the

ex parte est fondamentalement inéquitable. À mon avis, ce n’est pas le cas. Sans oublier qu’il n’existe aucun droit constitutionnel à la procédure la plus favorable, il importe de souligner que la procédure retenue en l’espèce par le législateur offre les garanties suivantes au contrevenant :

- (1) une autorisation judiciaire préalable doit être obtenue sur demande écrite présentée à un juge de la cour provinciale : par. 487.055(1);
- (2) le demandeur doit établir que l’intéressé appartient à l’une des catégories de contrevenants visées;
- (3) le juge a le pouvoir discrétionnaire de donner un préavis à l’intéressé;
- (4) il a le pouvoir discrétionnaire de ne pas ordonner le prélèvement d’échantillons d’ADN;
- (5) pour décider d’accorder ou non l’autorisation, le juge est légalement tenu de « prend[re] en compte l’effet qu’elle aurait sur la vie privée de l’intéressé et la sécurité de sa personne, son casier judiciaire, la nature de l’infraction et les circonstances de sa perpétration » : par. 487.055(3.1);
- (6) le juge peut fixer des modalités pour assurer « le caractère raisonnable du prélèvement dans les circonstances » : par. 487.06(2);
- (7) l’agent de la paix doit rédiger un rapport et le faire déposer auprès du juge de la cour provinciale : par. 487.057(1).

En outre, bien qu’il n’existe aucun droit d’en appeler de l’autorisation visée à l’art. 487.055, la décision du juge est susceptible de révision par voie de *certiorari*. Une erreur peut sans doute se glisser dans le dossier, mais donner au contrevenant un avis et la possibilité de se faire entendre n’est pas le seul moyen d’y remédier. Ce n’est pas comme si les échantillons d’ADN pouvaient être prélevés subrepticement, sans que l’intéressé le sache. Avant tout prélèvement, la personne munie d’un mandat, d’une ordonnance ou d’une autorisation est tenue de communiquer à l’intéressé la teneur du document et le

authorizing document and the purpose of taking the samples: s. 487.07 of the *Criminal Code*. Hence, the offender will be apprised of the basis for obtaining the order. As the absence of a precondition to the making of the order would go to jurisdiction, any such error would be reviewable on *certiorari*.

but du prélèvement, entre autres choses : art. 487.07 du *Code criminel*. Le contrevenant est donc informé des motifs qui ont permis l'obtention de l'autorisation. Comme le non-respect d'une condition préalable à celle-ci mettrait en cause la compétence du juge, une telle erreur serait susceptible de révision par voie de *certiorari*.

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Finally, in determining whether the chosen procedure meets minimal constitutional imperatives of procedural fairness, the *ex parte* nature of the proceeding must be considered in the context of what is truly at stake on a s. 487.055 application. As noted earlier, any person whose conduct has earned a s. 487.055 classification cannot reasonably expect that his or her identity will remain private *vis-à-vis* law enforcement authorities. Indeed, the offender, by reason of his criminal conduct, is already known to law enforcement authorities and, depending on the circumstances, may be a logical suspect in future investigations regardless of any s. 487.055 order. What an offender therefore stands to lose on a s. 487.055 application is to have his DNA profile made available to the state *for identification purposes only*. The inclusion of the DNA profile in the data bank can serve to effectively eliminate him as a potential suspect in future investigations, or it can serve to identify him as a person connected to the crime under investigation. If the latter, his procedural rights with respect to any potential use of the DNA data bank profile in that investigation are far from exhausted. If a “hit” is generated in the DNA data bank, and the offender’s DNA is subsequently gathered by way of a DNA warrant, it will be open to the offender to challenge the admissibility of any DNA evidence at trial on the basis that he or she was illegally included in the data bank itself, if that be the case. Where the “hit” constituted the basis of the DNA search warrant, illegal inclusion in the data bank itself may provide grounds for quashing the warrant. A warrantless search would thereafter be considered *prima facie* unreasonable and may provide ground for *Charter* relief at trial. The admissibility of the evidence will also remain subject to all the usual rules of evidence.

Enfin, pour déterminer si la procédure choisie satisfait aux impératifs constitutionnels minimaux d'équité procédurale, le caractère *ex parte* de l'instance doit être apprécié en fonction de ce que met vraiment en jeu la demande fondée sur l'art. 487.055. Je le répète, la personne dont le comportement lui a valu d'être visée par cet article ne peut raisonnablement s'attendre à ce que son identité demeure inconnue des autorités chargées du contrôle d'application de la loi. En effet, à cause de son comportement criminel, le contrevenant est déjà connu de celles-ci et, selon les circonstances, il pourrait logiquement faire l'objet de soupçons lors d'une enquête ultérieure, indépendamment de toute autorisation fondée sur l'art. 487.055. Pour le contrevenant visé par une demande, l'enjeu est la mise à la disposition de l'État de son profil d'identification génétique *à des fins d'identification seulement*. La présence de son profil dans la banque de données peut permettre de l'écarter définitivement des suspects éventuels lors d'une enquête ultérieure, ou de le relier au crime en cause. Dans ce dernier cas, ses recours quant à la possibilité d'une telle utilisation du profil contenu dans la banque de données sont loin d'être épuisés. Si une correspondance est établie avec le profil versé dans la banque de données génétiques et que l'ADN du contrevenant est ensuite prélevé en exécution d'un mandat, au procès, l'intéressé pourra toujours contester l'admissibilité de toute preuve génétique en faisant valoir que son profil génétique a été illégalement versé dans la banque de données. Si le mandat de perquisition ADN a été décerné sur le fondement de la correspondance, l'inclusion illégale dans la banque de données pourra justifier son annulation. Une perquisition sans mandat sera alors abusive *prima facie* et, au procès, elle pourra donner ouverture à une réparation fondée sur la *Charte*. L'admissibilité de la preuve demeure également assujettie à toutes les règles habituelles.

Because of the retrospective nature of the application, offenders targeted by s. 487.055 are finite in number but they are nonetheless numerous. As noted by the intervener the Attorney General of British Columbia, the National DNA Data Bank website statistics show that in excess of 1,900 samples have been obtained through this *ex parte* process. The offenders, although still under sentence at the time of the application, are no longer before the courts. Some are the most dangerous and violent criminals in Canadian prisons. The Crown submits that requiring their attendance at full *inter partes* hearings would create a significant risk to public safety and cause a substantial expenditure of public resources. While these factors alone could not justify a breach of fundamental fairness, I find no such breach in this case. In light of the interests at stake and the panoply of procedural safeguards that are in place, I conclude that a presumptively *ex parte* hearing is a constitutionally valid legislative option.

For these reasons, I conclude that the DNA data bank legislative scheme meets the constitutional requirements of s. 8 of the *Charter*.

6. Sections 11(h) and 11(i)

Finally, Mr. Rodgers contends that s. 487.055 infringes both ss. 11(h) and 11(i) of the *Charter* “because it inevitably punishes the offender again for a predicate offence and denies the offender the benefit of the lesser punishment”. For convenience, I again reproduce ss. 11(h) and 11(i):

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; and

En raison du caractère rétrospectif de la demande, le nombre de contrevenants visés à l’art. 487.055 n’est pas infini, bien qu’il soit élevé. Comme l’a fait remarquer l’intervenant le procureur général de la Colombie-Britannique, selon les statistiques du site Internet de la Banque nationale de données génétiques, plus de 1 900 échantillons ont été obtenus à l’issue d’une audience *ex parte*. Même si les contrevenants purgeaient toujours leur peine au moment de la demande, leur cause n’était plus en instance. Certains d’entre eux figurent parmi les criminels les plus dangereux et les plus violents détenus au Canada. Selon le ministère public, exiger qu’ils prennent dûment part à une audience *inter partes* exposerait la sécurité publique à un risque important et occasionnerait des dépenses considérables à l’État. Ces facteurs ne peuvent à eux seuls justifier une atteinte au droit fondamental à l’équité procédurale, mais je ne constate pas une telle atteinte en l’espèce. Compte tenu des intérêts en jeu et des nombreuses garanties procédurales, j’estime que le choix d’une audition de prime abord *ex parte* est un choix législatif valable sur le plan constitutionnel.

Pour ces motifs, je conclus que le régime législatif relatif à la banque de données génétiques satisfait aux exigences constitutionnelles de l’art. 8 de la *Charte*.

6. Alinéas 11(h) et i)

En dernier lieu, M. Rodgers soutient que l’art. 487.055 viole les al. 11(h) et i) de la *Charte* [TRADUCTION] « parce qu’il punit forcément le contrevenant de nouveau pour une infraction sous-jacente et l’empêche de bénéficier de la peine la moins sévère ». Pour faciliter leur consultation, voici à nouveau le texte des al. 11(h) et i) :

11. Tout inculpé a le droit :

. . .

h) d’une part de ne pas être jugé de nouveau pour une infraction dont il a été définitivement acquitté, d’autre part de ne pas être jugé ni puni de nouveau pour une infraction dont il a été définitivement déclaré coupable et puni;

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(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.

i) de bénéficier de la peine la moins sévère, lorsque la peine qui sanctionne l'infraction dont il est déclaré coupable est modifiée entre le moment de la perpétration de l'infraction et celui de la sentence.

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Mr. Rodgers first raised this constitutional argument before the Court of Appeal and, in that court, only in respect of s. 11(i). He now relies on both ss. 11(h) and 11(i). However, his argument is still entirely focussed on whether the imposition of a DNA sampling and analysis order amounts to a “punishment” within the meaning of s. 11. The Court of Appeal summarily dismissed Mr. Rodgers’ s. 11 argument stating 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.” (para. 28). Mr. Rodgers appeals from that finding.

C’est en Cour d’appel que M. Rodgers a soulevé cet argument constitutionnel pour la première fois et il n’a alors invoqué que l’al. 11*i*). Il s’appuie maintenant sur les al. 11*h*) et *i*). Toutefois, son argument demeure entièrement axé sur la question de savoir si l’imposition d’un prélèvement d’échantillons d’ADN pour analyse génétique équivaut à une « peine » au sens de l’art. 11. La Cour d’appel a rejeté sommairement la thèse de M. Rodgers fondée sur cet article en affirmant que [TRADUCTION] « le prélèvement d’un échantillon ne constitue pas davantage une peine que la prise des empreintes digitales ou la photographie d’une personne déclarée coupable d’une infraction : *R. c. Briggs*, précité, p. 446 O.R., p. 72 C.C.C.; *R. c. Murrins* (2002), 162 C.C.C. (3d) 412, 92 C.R.R. (2d) 285 (C.A.N.-É.), p. 442-448 C.C.C. » (par. 28). M. Rodgers en appelle de cette conclusion.

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First, it is necessary to consider whether s. 11 applies at all to a s. 487.055 application. As the introductory words of the section make it plain, the protection extended by s. 11 can only be invoked when “[a] person [is] charged with an offence”. Therefore, in and of itself, the application for a DNA order does not at all engage s. 11. It cannot be contended that Mr. Rodgers is “charged with an offence” on any reasonable meaning of the term and, as I understood his argument, he is not claiming the protection of s. 11 on that basis. He relies, rather, on the charges that were brought in respect of the index offences — namely the multiple sex offences in respect of which he was convicted and which form the basis of the application for a DNA data bank order. There is no doubt that s. 11 applies to those criminal proceedings and the question then becomes whether the imposition of a s. 487.055 order constitutes further “punishment” for those offences.

D’abord, il faut se demander si même l’art. 11 s’applique à la demande visée à l’art. 487.055. Il ressort de l’énoncé liminaire de l’art. 11 que la protection offerte ne peut être invoquée que lorsqu’une personne est « inculpé[e] ». Ainsi, comme telle, la demande d’autorisation de prélever un échantillon d’ADN ne met pas du tout en jeu l’art. 11. On ne saurait raisonnablement prétendre que M. Rodgers est « inculpé » et, si je comprends bien, ce n’est pas en cette qualité qu’il ne demande à bénéficier de la protection offerte par l’art. 11. Il invoque plutôt les infractions dont il a été accusé selon le fichier — soit les infractions sexuelles dont il a été déclaré coupable et qui fondent la demande d’autorisation. Il ne fait aucun doute que l’art. 11 s’applique aux instances criminelles y afférentes, et la question qui se pose dès lors est de savoir si le prélèvement autorisé en application de l’art. 487.055 constitue une « peine » supplémentaire pour la perpétration de ces infractions.

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What constitutes a “punishment” under s. 11 has yet to be fully explored. The Crown, in part, relies on *R. v. Wigglesworth*, [1987] 2 S.C.R. 541, and submits that this Court, in the context of a

La notion de « peine » au sens de l’art. 11 n’est pas encore parfaitement circonscrite. Le ministère public s’appuie en partie sur l’arrêt *R. c. Wigglesworth*, [1987] 2 R.C.S. 541, et soutient

complaint about “double jeopardy”, described “punishment” as the imposition of “true penal consequences” such as “imprisonment or a fine which by its magnitude would appear to be imposed for the purpose of redressing the wrong done to society at large . . .” (p. 561). The test in *Wigglesworth* was also applied in *R. v. Shubley*, [1990] 1 S.C.R. 3, at pp. 21-23, and in *Martineau v. M.N.R.*, [2004] 3 S.C.R. 737, 2004 SCC 81, at para. 57. It is important to put the *Wigglesworth* test in context. As I will explain, it applies to determine whether s. 11 is triggered but does not purport to restrict the meaning of “punishment” in the context of a criminal proceeding to encompass only imprisonment and heavy fines.

In *Wigglesworth*, the question before the Court was whether the s. 11(h) protection against double jeopardy extended to police disciplinary proceedings so as to preclude a subsequent criminal trial based on the same conduct for which the police officer had been internally disciplined. A similar question was raised in *Shubley* in respect of internal prison disciplinary proceedings. In *Martineau*, the question was whether the s. 11(c) right against self-incrimination could be invoked in the context of forfeiture proceedings commenced under the *Customs Act*. In each case, the Court applied the two-prong test established in *Wigglesworth* to determine whether the proceeding in question came within the purview of s. 11 — a person charged with an offence can claim the protection of s. 11 if either (1) the proceedings are, by their very nature, criminal proceedings; or (2) the punishment invoked involves the imposition of “true penal consequences”. It is in this context that the Court explained, at p. 561, what it meant by “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.

The Court made it clear however that, under the first branch of the test, “all prosecutions for

que dans le contexte d’une allégation de « double péril », notre Cour a assimilé la « peine » à l’imposition de « véritables conséquences pénales », tels « l’emprisonnement ou une amende qui par son importance semblerait imposée dans le but de réparer le tort causé à la société en général . . . » (p. 561). Ce critère a été repris dans les arrêts *R. c. Shubley*, [1990] 1 R.C.S. 3, p. 21-23, et *Martineau c. M.N.R.*, [2004] 3 R.C.S. 737, 2004 CSC 81, par. 57. Il importe de mettre ce critère en contexte. Comme je l’explique plus loin, il permet de déterminer si l’art. 11 entre en jeu, mais il ne vise pas à restreindre, dans une instance criminelle, le sens du terme « peine » de sorte qu’il n’englobe que l’emprisonnement et l’amende substantielle.

Dans l’arrêt *Wigglesworth*, notre Cour était appelée à décider si la protection contre le double péril prévue à l’al. 11h) s’appliquait à l’instance disciplinaire et empêchait une poursuite criminelle subséquente pour les mêmes actes lorsque le policier avait fait l’objet de mesures disciplinaires. La même question s’est posée dans l’affaire *Shubley* à l’égard de la procédure disciplinaire interne d’une prison. Dans l’arrêt *Martineau*, il s’agissait de savoir si le droit à la protection contre l’auto-incrimination garanti à l’al. 11c) pouvait être invoqué dans une instance de confiscation engagée en application de la *Loi sur les douanes*. Dans chacun des cas, notre Cour a appliqué le critère à deux volets de l’arrêt *Wigglesworth* pour décider si l’instance était assujettie ou non à l’art. 11 — une personne inculpée peut bénéficier de la protection de l’art. 11 (1) lorsque, par sa nature, l’instance est criminelle ou (2) que la peine invoquée emporte l’imposition de « véritables conséquences pénales ». C’est dans ce contexte que notre Cour a expliqué ce qu’elle entendait par de « véritables conséquences pénales » (p. 561) :

À mon avis, une véritable conséquence pénale qui entraînerait l’application de l’art. 11 est l’emprisonnement ou une amende qui par son importance semblerait imposée dans le but de réparer le tort causé à la société en général plutôt que pour maintenir la discipline à l’intérieur d’une sphère d’activité limitée.

Or, notre Cour a clairement indiqué que suivant le premier volet du critère, « toutes les

criminal offences under the *Criminal Code* and for quasi-criminal offences under provincial legislation are automatically subject to s. 11” (p. 560). Under the second branch of the test, a proceeding that is *not* criminal or quasi-criminal in nature but attracts a “true penal consequence” (such as imprisonment or a fine of a certain magnitude) will be equated to a criminal or quasi-criminal proceeding for s. 11 purposes. However, what constitutes a “punishment” within a criminal proceeding is not limited to those two sanctions. Such an interpretation would not accord with the liberal and purposive approach that must be taken in interpreting *Charter* rights. For example, if an offender is charged with a criminal offence, tried, convicted and sentenced to a term of probation or a small fine, it could not be argued that the protection of s. 11(h) would not extend to second criminal proceedings commenced in respect of the same offence because the probation or the small fine did not constitute “punishment” for his crime. Likewise, if the punishment for an offence has been varied between the time of commission and the time of sentencing so as to abolish the availability of a conditional discharge for that offence, it could not be argued that the conditional discharge did not constitute a “punishment” within the meaning of the s. 11(i) protection. The accused would be entitled to the benefit of the less severe sanction in force at the time of commission of the offence.

poursuites relatives à des infractions criminelles aux termes du *Code criminel* et à des infractions quasi criminelles que prévoient les lois provinciales sont automatiquement assujetties à l’art. 11 » (p. 560). Suivant le deuxième volet, l’instance qui n’est pas en soi criminelle ou quasi criminelle, mais qui a de « véritables conséquences pénales » (comme l’emprisonnement ou l’amende substantielle) est assimilée à une instance criminelle ou quasi criminelle pour les besoins de l’art. 11. Toutefois, dans le contexte d’une instance criminelle, la « peine » ne s’entend pas que de ces deux sanctions. Une telle interprétation serait incompatible avec l’interprétation libérale et téléologique qui s’impose à l’égard des droits garantis par la *Charte*. Par exemple, dans le cas d’un contrevenant inculpé d’une infraction criminelle, puis jugé, déclaré coupable et condamné à une probation ou à une amende minime, on ne saurait prétendre que la protection offerte par l’al. 11(h) ne s’applique pas à la seconde instance criminelle engagée pour la même infraction sous prétexte que la probation ou l’amende minime ne constituait pas une « peine ». De même, lorsque la peine qui sanctionne l’infraction a été modifiée entre le moment de la perpétration et celui de la détermination de la peine de manière à écarter toute possibilité de libération conditionnelle, on ne saurait prétendre que cette libération conditionnelle ne constituait pas une « peine » au sens de l’al. 11(i). L’accusé aurait le droit de bénéficier de la peine la moins sévère en vigueur au moment de la perpétration de l’infraction.

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In its ordinary sense, “punishment” refers to the arsenal of sanctions to which an accused may be liable upon conviction for a particular offence. The *Criminal Code* uses the words “punishment” or “punishable” to describe the range of sanctions available on sentencing. For example, an offence will be described as “punishable” on summary conviction and the offender will be “liable to a fine . . . or [a term of] imprisonment”: s. 787(1). Section 718.3(1) provides that “[w]here an enactment prescribes different degrees or kinds of punishment in respect of an offence, the punishment to be imposed is, subject to the limitations prescribed in the enactment, in the discretion of the court that convicts a person who commits the

Suivant son sens ordinaire, « peine » s’entend des sanctions dont est passible l’accusé déclaré coupable d’une infraction. Les mots « peine » ou « punissable » qu’emploie le *Code criminel* renvoient aux sanctions pouvant être infligées lors de la détermination de la peine. Par exemple, une infraction est « punissable » sur déclaration de culpabilité par voie sommaire, et le contrevenant est « passible d’une amende [. . . ou] d’un emprisonnement » : par. 787(1). Le paragraphe 718.3(1) précise que « [l]orsqu’une disposition prescrit différents degrés ou genres de peine à l’égard d’une infraction, la punition [la « peine »] à infliger est, sous réserve des restrictions contenues dans la disposition, à la discrétion du

offence”. The words “sentence” and “sanction” are also used interchangeably: see for example s. 718.2.

This does not mean, however, that “punishment” under ss. 11(h) and 11(i) necessarily encompasses every potential consequence of being convicted of a criminal offence, whether that consequence occurs at the time of sentencing or not. A number of orders can be made by a sentencing court, for example an order for forfeiture, a firearm prohibition, a driving prohibition, or an order for restitution. It is beyond the purview of this appeal to determine whether or not any of these consequences constitutes a punishment. As a general rule, it seems to me that the consequence will constitute a punishment when it forms part of the arsenal of sanctions to which an accused may be liable in respect of a particular offence and the sanction is one imposed in furtherance of the purpose and principles of sentencing. In this respect, the protection afforded by s. 11 must be contrasted with s. 12 of the *Charter* that protects against cruel and unusual “treatment” or punishment. For example, DNA sampling, ordered as a consequence of conviction, would undoubtedly constitute a “treatment” and, if the physical method for obtaining a DNA sample were cruel and unusual, redress could be obtained under s. 12.

However, I agree with the conclusion reached by the Court of Appeal and find that the imposition of a s. 487.055 order, although a consequence of the convictions on the index offences, does not constitute a punishment within the meaning of s. 11. I find none of Mr. Rodgers’ arguments persuasive. First, his concern about the potential dangers of equating the taking of DNA samples to fingerprinting is a matter for consideration under s. 8, not s. 11. Second, the fact that the DNA order may have a deterrent effect on the offender does not make it a punishment. As aptly noted by Bateman J.A. in *Murrins*:

tribunal qui condamne l’auteur de l’infraction ». Aussi, les mots « peine », « punition » et « sanction » sont interchangeables : voir, par exemple, l’art. 718.2.

Cependant, cela ne signifie pas que la « peine » à laquelle renvoient les al. 11(h) et i) englobe nécessairement toute conséquence pouvant découler du fait d’être déclaré coupable d’une infraction criminelle, que cette conséquence survienne ou non au moment de la détermination de la peine. Un certain nombre d’options s’offrent au tribunal qui détermine la peine : il peut notamment ordonner la confiscation, interdire la possession d’une arme à feu, interdire la conduite automobile ou ordonner la restitution. Il n’appartient pas à notre Cour de déterminer, en l’espèce, si l’une ou l’autre de ces conséquences constitue ou non une peine. En règle générale, il me semble que la conséquence constitue une peine lorsqu’elle fait partie des sanctions dont est passible un accusé pour une infraction donnée et qu’elle est conforme à l’objectif et aux principes de la détermination de la peine. À cet égard, il faut distinguer entre la protection offerte par l’art. 11 et celle que prévoit l’art. 12 de la *Charte* contre tous « traitements » ou peines cruels et inusités. Ainsi, le prélèvement d’un échantillon d’ADN par suite d’une déclaration de culpabilité constitue sans aucun doute un « traitement », et si le mode de prélèvement est cruel et inusité, une réparation pourra être obtenue en application de l’art. 12.

Je suis toutefois d’accord avec la conclusion de la Cour d’appel et j’estime que l’autorisation visée à l’art. 487.055, même si elle résulte des déclarations de culpabilité prononcées à l’égard des infractions inscrites au fichier, ne constitue pas une peine au sens de l’art. 11. Aucun des arguments de M. Rodgers ne me convainc. D’abord, sa crainte concernant le danger possible d’assimiler le prélèvement d’échantillons d’ADN à la prise des empreintes digitales doit être examinée au regard de l’art. 8, et non de l’art. 11. Ensuite, le fait que l’autorisation de prélèvement puisse avoir un effet dissuasif sur le contrevenant n’en fait pas une peine pour autant. Le juge Bateman a justement dit dans l’arrêt *Murrins* :

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The fact that the existence of a DNA profile may deter offenders from committing future crimes is a residual benefit but does not bring the order into the category of a punishment. The order is in furtherance of the legitimate state interest in solving crime rather than its interest in sanctioning the offender. [para. 102]

As stated by the Crown in its factum, “[w]hile it is true that many punishments are aimed at having a deterrent effect, that does not mean that every deterrent measure is, by definition, ‘punishment’. For example, random traffic stops to check for alcohol consumption hopefully have the effect of deterring people from drinking and driving, but no one could properly characterize a R.I.D.E. stop as ‘punishment’.” Finally, the argument that there is a definite stigma attached to the taking of a DNA sample is not persuasive. Other than a notation on the records of the Canadian Police Services Information Centre, there is no information that a person’s DNA sample is in the data bank. If there is any stigma, surely it flows from the convictions upon which the order is based. In any event, the fact that a treatment may occasion a certain stigma does not turn it into a punishment. Stigma may be occasioned by the simple fact of being arrested and charged with a criminal offence.

[TRADUCTION] La possibilité que l’existence d’un profil d’identification génétique décourage la récidive est un avantage secondaire qui ne fait cependant pas de l’autorisation une peine. L’intérêt légitime de l’État que sert l’autorisation est celui de résoudre les crimes et non celui de sanctionner les contrevenants. [par. 102]

Comme le dit le ministère public dans son mémoire, [TRADUCTION] « [i]l est vrai que de nombreuses peines visent la dissuasion, mais il ne s’ensuit pas que chaque mesure ayant un effet dissuasif constitue, par définition, une “peine”. Par exemple, les contrôles routiers inopinés pour vérifier l’alcoolémie des automobilistes ont pour effet, espère-t-on, de dissuader la conduite en état d’ébriété, mais on ne saurait qualifier de “peine” une mesure de répression générale de l’alcool au volant. » Enfin, l’argument voulant qu’une stigmatisation certaine se rattache au prélèvement d’un échantillon d’ADN n’est pas convaincant. À part l’inscription dans les registres du Centre d’information des services canadiens de police, rien ne permet de savoir que l’échantillon d’ADN d’une personne se trouve dans la banque de données. La stigmatisation, si elle existe, résulte assurément des déclarations de culpabilité à l’origine de l’autorisation. Quoi qu’il en soit, le fait qu’il puisse stigmatiser jusqu’à un certain point ne fait pas d’un traitement une peine. Le simple fait d’être arrêté et accusé d’une infraction criminelle peut être infamant.

65 The DNA sampling and analysis is no more part of the arsenal of sanctions to which an accused may be liable in respect of a particular offence than the taking of a photograph or fingerprints. I therefore conclude that ss. 11(h) and 11(i) have no application to this case.

7. Disposition

66 For these reasons, I would answer the constitutional questions in the negative. Section 487.055(1) of the *Criminal Code* does not infringe ss. 7, 8, 11(h) and 11(i) of the *Charter*. I would also conclude that there is no reason to interfere with the authorization judge’s discretion to proceed with the s. 487.055(1) application on an *ex parte* basis. He was statutorily authorized to do so and no suggestion has been made that, if indeed so authorized, he

Le prélèvement d’échantillons d’ADN pour analyse génétique ne fait pas davantage partie des sanctions dont est passible la personne accusée d’une infraction donnée que la prise de photographies ou des empreintes digitales. Je conclus donc que les al. 11(h) et i) ne s’appliquent pas en l’espèce.

7. Dispositif

Pour ces motifs, je suis d’avis de répondre par la négative aux questions constitutionnelles. Le paragraphe 487.055(1) du *Code criminel* ne contrevient ni aux art. 7 et 8 de la *Charte* ni à ses al. 11(h) et i). Je conclus également qu’il n’y a aucun motif de réformer la décision du juge d’entendre *ex parte* la demande visée au par. 487.055(1). La loi autorisait le juge à le faire et aucune partie n’a laissé entendre que, même s’il y était autorisé, il n’a pas bien

did not exercise his discretion judicially. I would therefore allow the Crown's appeal, set aside the decision of the Court of Appeal for Ontario, dismiss Mr. Rodgers' cross-appeal and dismiss his *Charter* and *certiorari* applications.

The reasons of Binnie, Deschamps and Fish JJ. were delivered by

FISH J. (dissenting) —

I

Overview

I agree with two of Justice Charron's principal findings. With respect, however, they lead me to a different conclusion.

First, I agree that s. 487.055(1) of the *Criminal Code*, R.S.C. 1985, c. C-46, with which we are concerned here, cannot pass constitutional muster unless it complies with s. 8 of the *Canadian Charter of Rights and Freedoms*. In Charron J.'s words, "[t]here is no question that the taking of bodily samples for DNA analysis without the person's consent constitutes a seizure within the meaning of s. 8 of the *Charter*" (para. 25). Section 8 of the *Charter* provides that "[e]veryone has the right to be secure against unreasonable search or seizure."

Accordingly, the outcome of this appeal depends on whether the impugned provision is reasonable within the meaning of s. 8.

Second, I agree with Charron J. that s. 487.055(1) contemplates discretionary judicial orders without notice to the persons against whom those orders are made. I should think it obvious that this discretion must be exercised in accordance with the relevant factors explicitly set out in s. 487.055(3.1) of the *Criminal Code* and any other factors that are implicitly relevant.

Accordingly, it seems to me that the core issue on this appeal is whether there is any

exercé son pouvoir discrétionnaire. Je suis donc d'avis d'accueillir le pourvoi du ministère public, d'annuler le jugement de la Cour d'appel de l'Ontario, de rejeter le pourvoi incident de M. Rodgers ainsi que sa demande fondée sur la *Charte* et sa demande de *certiorari*.

Version française des motifs des juges Binnie, Deschamps et Fish rendus par

LE JUGE FISH (dissident) —

I

Introduction

Je souscris à deux des principales conclusions de la juge Charron. Avec égards, cependant, elles me mènent à un résultat différent.

Je conviens premièrement que le par. 487.055(1) du *Code criminel*, L.R.C. 1985, ch. C-46, la disposition litigieuse en l'espèce, ne peut résister au contrôle constitutionnel que s'il respecte l'art. 8 de la *Charte canadienne des droits et libertés*. Comme l'affirme ma collègue, « [i]l ne fait aucun doute que le prélèvement de substances corporelles pour analyse génétique sans le consentement de l'intéressé constitue une saisie au sens de l'art. 8 de la *Charte* » (par. 25), lequel dispose que « [c]haque un a droit à la protection contre les fouilles, les perquisitions ou les saisies abusives. »

L'issue du pourvoi dépend donc du caractère abusif ou non, au sens de l'art. 8, de la disposition contestée.

Deuxièmement, comme la juge Charron, j'estime que le par. 487.055(1) prévoit l'exercice d'un pouvoir discrétionnaire sans préavis à l'intéressé. Il va de soi, à mon sens, que ce pouvoir discrétionnaire doit être exercé compte tenu des critères pertinents prescrits au par. 487.055(3.1) du *Code criminel*, ainsi que de tout autre implicitement applicable.

Il appert donc que le présent pourvoi pose essentiellement la question de savoir s'il est

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reasonable basis for presumptively excluding the subject of the order from the hearing at which it is made. That person, after all, has the most to lose if the order is erroneously made — and will often be in the best position to correct erroneous information upon which the judge might otherwise be required to rely.

72 The Crown advances several reasons that are said to justify proceeding *ex parte*. First, it is said there will be few cases in which an application for a DNA order under s. 487.055(1) can, or will, be successfully opposed. With respect, this does not appear to me to be a persuasive argument for depriving those against whom the order would otherwise be wrongfully made of the opportunity to prevent this from happening.

73 Another justification, advanced by my colleague, is that errors made by the issuing trial judge are subject to prerogative review. With respect, I find it difficult to understand how the possibility of a cumbersome and expensive *ex post facto* review on narrow jurisdictional grounds can be considered an adequate substitute for a fair hearing on the application for an order — a simple and expeditious opportunity to prevent erroneous orders and unwarranted seizures *from occurring*. As Dickson J. (later C.J.C.) stated in *Hunter v. Southam Inc.*, [1984] 2 S.C.R. 145, s. 8 of the *Charter* “requires a means of *preventing* unjustified searches before they happen, not simply of determining, after the fact, whether they ought to have occurred in the first place” (p. 160 (emphasis in original)).

74 Finally, it is argued that giving notice to the subject of a s. 487.055 order might lead to frustration of the purposes of the proposed DNA seizure. This proposition does not resist even summary analysis.

75 Section 487.055 requires convicted offenders, upon notice, to appear at a given time and place in order to provide a bodily sample. If they are no longer in custody and do not flee when they receive this notice to appear, it is difficult for me to understand why they would flee if they are instead given

raisonnablement fondé de conclure que l’intéressé est de prime abord exclu de l’audition de la demande d’autorisation. Après tout, c’est lui qui a le plus à perdre si l’autorisation est accordée à tort et qui est souvent le mieux placé pour rectifier tout renseignement erroné que le juge pourrait autrement devoir prendre en considération.

Le ministère public invoque plusieurs motifs d’entendre la demande *ex parte*. Il prétend premièrement qu’il est rare que la demande d’autorisation fondée sur le par. 487.055(1) puisse être contestée avec succès ou qu’elle le soit. Cela ne justifie pas d’empêcher l’intéressé de contester la demande lorsque l’autorisation pourrait être accordée à tort.

Ma collègue invoque un autre motif : la possibilité d’une révision par voie de *certiorari* de toute erreur commise par le juge qui accorde l’autorisation. En toute déférence, je ne vois pas comment une éventuelle révision *ex post facto*, à la fois lourde et coûteuse, ne pouvant avoir pour fondement que certains motifs précis liés à la compétence, peut être considérée comme un bon substitut à l’audition équitable de la demande — un moyen simple et expéditif de *prévenir* une autorisation et une saisie injustifiées. Comme le juge Dickson (plus tard Juge en chef) l’a affirmé dans *Hunter c. Southam Inc.*, [1984] 2 R.C.S. 145, l’art. 8 de la *Charte* « requiert un moyen de *prévenir* les fouilles et les perquisitions injustifiées avant qu’elles ne se produisent et non simplement un moyen de déterminer, après le fait, si au départ elles devaient être effectuées » (p. 160 (souligné dans l’original)).

On fait valoir en dernier lieu qu’un préavis à l’intéressé pourrait aller à l’encontre des objets de la saisie d’ADN projetée. Cet argument ne résiste même pas à l’analyse sommaire.

L’article 487.055 fait obligation au condamné de se présenter aux date, heure et lieu fixés dans l’avis pour fournir un échantillon de substances corporelles. S’il n’est plus sous garde et qu’il ne prend pas la fuite sur réception de l’avis, je vois difficilement pourquoi il le ferait s’il recevait un préavis

notice that an application for the order will be made and informed of their opportunity to make appropriate representations. If they are still in custody, then I think it absurd to suggest that they might flee if they are likewise given notice of the contemplated application.

And finally, in either instance, persons who are notified of the application before the order is made can hardly thereupon hide or destroy their bodily samples so as to prevent their seizure, should the order sought by the authorities be made by the judge!

II

Proceeding *Ex Parte*

Mr. Rodgers argues that holding the authorization hearings *ex parte*, absent any reason to proceed without notice or participation, does not satisfy the constitutional requirements of s. 8. I agree.

Like Charron J., I believe that s. 487.055(1) contemplates presumptively *ex parte* hearings. The judge is empowered to hold the hearing *inter partes*, but the statute presumes that the data bank order will be issued without notice or participation.

Speaking for a unanimous court, Doherty J.A. held that procedural fairness and *Charter* principles “require notice to the individual whose liberty and security of the person interests are potentially affected by the order unless the Crown can establish legitimate grounds . . . for proceeding without notice” (2004), 70 O.R. (3d) 97, at para. 45). Charron J., on the other hand, finds that because the constitutional norm of procedural fairness depends on context, notice and participation are not necessarily required.

This Court has indeed asserted, repeatedly, that the nature and extent of procedural fairness depends

de la demande d'autorisation et s'il était informé de son droit de se faire entendre. S'il est toujours sous garde, il est absurde de craindre qu'il puisse se soustraire à la justice si un avis l'informait de la demande projetée.

Enfin, dans l'un et l'autre cas, la personne qui reçoit un préavis peut difficilement dissimuler ou détruire ses échantillons de substances corporelles pour empêcher leur saisie éventuelle par les autorités!

II

L'audition *ex parte*

M. Rodgers soutient, avec raison selon moi, que l'audition *ex parte* de la demande, sans motif justifiant l'absence de préavis ou de participation, ne satisfait pas aux exigences constitutionnelles de l'art. 8.

Comme la juge Charron, je suis d'avis que le par. 487.055(1) établit une présomption d'audition *ex parte*. Le juge peut entendre la demande *inter partes*, mais la loi présume que l'autorisation de prélèvement d'échantillons destinés à la banque de données génétiques est accordée sans préavis ni participation.

Exprimant l'opinion unanime de la Cour d'appel, le juge Doherty a dit que l'équité procédurale et les principes consacrés par la *Charte* [TRADUCTION] « exigent qu'un préavis soit donné à l'intéressé lorsque son droit à la liberté et à la sécurité de sa personne risque d'être touché par l'autorisation, à moins que le ministère public n'établisse l'existence de motifs valables [. . .] d'agir sans préavis » ((2004), 70 O.R. (3d) 97, par. 45). Selon ma collègue, toutefois, puisque l'équité procédurale — la norme constitutionnelle applicable — dépend du contexte, préavis et participation ne sont pas nécessairement obligatoires.

Notre Cour a confirmé maintes fois que la nature et l'étendue de l'équité procédurale dépendent du

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on context (Charron J., at para. 47). In this regard, however, I find particularly instructive the most recent formulation of the governing principles.

81 In *Ruby v. Canada (Solicitor General)*, [2002] 4 S.C.R. 3, 2002 SCC 75, a unanimous Court permitted departure from the “general rule” that

a fair hearing must include an opportunity for the parties to know the opposing party’s case so that they may address evidence prejudicial to their case and bring evidence to prove their position. [para. 40]

82 And, while recognizing that this rule is not absolute, the Court took care to emphasize that “the circumstances in which a court will accept *ex parte* submissions are exceptional” (para. 38). The contextual approach does, as Charron J. states, permit departure from the norm of providing notice and permitting participation in the hearing. But only “exceptionally”, as the Court stated in *Ruby* — and, in my view, not without cause or justification.

83 In this case, context and principle both favour *inter partes* and not *ex parte* hearings. Unlike in *Ruby*, we have been shown no serious reason at all to depart from the venerable norm of providing notice and participation, and there are important grounds for not doing so.

84 The Court has noted the kind of compelling reasons for which, exceptionally, *ex parte* hearings will be permitted. In *Ruby*, Arbour J. explained that they are limited to cases where the “delay associated with notice would result in harm or where there is a fear that the other party will act improperly or irrevocably if notice were given” (para. 25). Similarly, in *R. v. S.A.B.*, [2003] 2 S.C.R. 678, 2003 SCC 60, the Court upheld the constitutionality of *ex parte* proceedings for DNA warrant orders “because of the risk that the suspect would take steps to frustrate the proper execution of the warrant” (para. 56).

contexte (motifs de la juge Charron, par. 47). À cet égard, toutefois, la formulation la plus récente des principes applicables me paraît particulièrement éclairante.

Dans l’arrêt *Ruby c. Canada (Solliciteur général)*, [2002] 4 R.C.S. 3, 2002 CSC 75, les juges unanimes de notre Cour ont permis une dérogation à la « règle générale » selon laquelle :

... le droit d’une partie à une audience équitable emporte celui de prendre connaissance de la preuve de la partie adverse afin de pouvoir répondre à tout élément préjudiciable à sa cause et apporter des éléments de preuve au soutien de celle-ci. [par. 40]

Tout en reconnaissant qu’il ne s’agissait pas d’une règle absolue, notre Cour a pris la peine de préciser que « ce n’est que dans des circonstances exceptionnelles qu’un tribunal entend des arguments en l’absence d’une partie » (par. 38). La juge Charron signale que la méthode contextuelle permet de s’écarter de la norme exigeant préavis et participation. Or, comme l’a dit notre Cour dans *Ruby*, cette dérogation n’est permise qu’à titre « exceptionnel » et, selon moi, pas sans cause ou justification.

En l’espèce, tant le contexte que les principes militent en faveur d’une audition *inter partes* plutôt qu’*ex parte*. Aucun motif sérieux de déroger à l’exigence vénérable du préavis et de la participation n’a été invoqué — alors que dans l’affaire *Ruby*, un tel motif l’avait été —, et il existe des raisons importantes de s’en abstenir.

Notre Cour a précisé quelles raisons impérieuses pouvaient, à titre exceptionnel, permettre la tenue d’une audience *ex parte*. Dans l’arrêt *Ruby*, la juge Arbour a expliqué qu’il n’y en avait que deux : lorsque « le délai occasionné par la signification d’un avis serait préjudiciable » ou que « l’on craint que l’autre partie n’agisse de façon irrégulière ou irrévocable si un avis lui est donné » (par. 25). De même, dans l’arrêt *R. c. S.A.B.*, [2003] 2 R.C.S. 678, 2003 CSC 60, notre Cour a jugé constitutionnelle l’audition *ex parte* d’une demande de mandat ADN « vu le risque que le suspect agisse de manière à compromettre la bonne exécution du mandat » (par. 56).

None of these factors justifies proceeding *ex parte* in this case.

First, it is impossible for a subject to destroy his DNA sample. “[B]odily samples . . . are usually in no danger of disappearing”: *R. v. Stillman*, [1997] 1 S.C.R. 607, at para. 49. And DNA evidence in particular can be obtained through a variety of approved tests.

Second, as mentioned earlier, notice and participation in the hearing create no enhanced risk of flight. Section 487.055 applies only to offenders who, on the date of the application, are still serving a sentence of imprisonment. Offenders in custody are not in a position to flee; those who are on parole and are minded to flee are perhaps less and not more likely to do so if they are afforded an opportunity to oppose the order. Proceeding *ex parte* carries with it no element of surprise: under s. 487.055, a data bank order simply requires the subject to report at the place, date and time set out in the summons. Neither the capacity nor the motivation to flee would in any way be enhanced by providing notice and permitting participation in the hearing. The state interest in proceeding *ex parte* where there is no reason to do so is therefore minimal, at best.

In any event, an assessment of the state’s interest must consider as well the competing interests of those whom the state is required to protect. As the Court explained in *Idziak v. Canada (Minister of Justice)*, [1992] 3 S.C.R. 631, determining the “nature and extent of procedural safeguards” requires balancing the “competing interest of the state and the individual” (p. 657).

A s. 487.055 target has a legitimate interest in presenting information that may well persuade the judge not to issue an order. Parliament contemplated that there would be instances in which an order might be properly denied, and has for this reason required the authorizing judge to consider all of the relevant factors, including “the person’s criminal record, the nature of the offence and the

En l’espèce, aucun de ces motifs ne justifie l’audition *ex parte*.

Premièrement, l’intéressé ne peut détruire ses échantillons de substances corporelles, et ceux-ci « ne risquent pas habituellement de disparaître » : *R. c. Stillman*, [1997] 1 R.C.S. 607, par. 49. Un élément de preuve génétique peut être obtenu au moyen de divers tests approuvés.

Deuxièmement, je le rappelle, le préavis et la participation à l’audience n’accroissent pas le risque de fuite. L’article 487.055 ne s’applique qu’aux contrevenants qui purgent encore une peine d’emprisonnement à la date de la demande. Un contrevenant sous garde n’est pas en mesure de fuir; celui qui, bénéficiant d’une liberté conditionnelle, songerait à fuir, y sera probablement moins enclin s’il a la possibilité de contester la demande d’autorisation. L’audition *ex parte* ne comporte aucun élément de surprise : l’autorisation accordée en vertu de l’art. 487.055 exige simplement de l’intéressé qu’il se présente aux date, heure et lieu fixés dans la sommation. Donner un préavis à l’intéressé et lui permettre de participer à l’audience ne faciliteraient pas sa fuite ni ne la favoriseraient. Partant, l’intérêt qu’a l’État à ce que la demande soit entendue en l’absence de l’intéressé, lorsque rien ne justifie l’audition *ex parte*, est au mieux minimal.

Quoi qu’il en soit, l’appréciation de l’intérêt de l’État doit également tenir compte des intérêts opposés de ceux que l’État est censé protéger. Comme notre Cour l’a expliqué dans l’arrêt *Idziak c. Canada (Ministre de la Justice)*, [1992] 3 R.C.S. 631, « [p]our déterminer la nature et l’étendue des garanties procédurales », il faut mettre en balance « les intérêts opposés de l’État et du particulier » (p. 657).

La personne visée à l’art. 487.055 a légitimement intérêt à saisir le juge de renseignements qui pourraient bien le convaincre de refuser l’autorisation. Le législateur a envisagé qu’un tel refus puisse être valablement opposé. C’est pourquoi il a fait obligation au juge de prendre en compte tous les critères pertinents, notamment « l’effet [que l’autorisation] aurait sur la vie privée de l’intéressé

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circumstances surrounding its commission”, as well as “the impact such an authorization would have on the privacy and security of the person” (s. 487.055(3.1)).

90 Proceeding *ex parte* makes it more difficult — often impossible — for the judge to consider these factors. The statutory safeguard requiring consideration of the individual’s interest is thus rendered illusory by proceeding *ex parte* without reason.

91 Offenders targeted by an application may well have information, to which they alone are privy, that is relevant to the required exercise of judicial discretion under s. 487.055(3.1). Moreover, the *DNA Identification Act*, S.C. 1998, c. 37, came into force after offenders covered by s. 487.055 had been convicted. At the time of their convictions, unlike others included in the data bank, these offenders had no reason to place on the record information that might be relevant to a DNA data bank order.

92 The risk inherent in denying them that opportunity is further heightened where the offender entered a guilty plea and there was no full trial. Factors relevant to a DNA order but not to the sentence are in such cases unlikely to have been canvassed at the time. Information that is relevant on an application under s. 487.055(3.1) would thus be absent from the record placed before the judge who must decide it.

93 Charron J. points out that under s. 487.07 of the *Criminal Code*, the person taking the sample has the duty to inform the subject of the “contents of the authorizing document and the purpose of taking the samples” (para. 52). In her view, this ensures that the offender will be apprised of the basis for the order, and if he or she feels that basis is insufficient, that error is reviewable on *certiorari*.

94 *Certiorari*, as mentioned earlier, is a costly and cumbersome *ex post facto* procedure available on

et la sécurité de sa personne, son casier judiciaire, la nature de l’infraction et les circonstances de sa perpétration » (par. 487.055(3.1)).

L’audition *ex parte* rend l’examen de ces critères plus difficile et souvent impossible, et lorsqu’elle n’est pas justifiée, elle rend illusoire l’exigence légale de prendre en compte l’intérêt du contrevenant.

Le contrevenant visé par la demande d’autorisation peut fort bien être en possession de renseignements connus de lui seul et qui importent pour l’exercice du pouvoir discrétionnaire prescrit au par. 487.055(3.1). De plus, la *Loi sur l’identification par les empreintes génétiques*, L.C. 1998, ch. 37, est entrée en vigueur après la déclaration de culpabilité des contrevenants visés à l’art. 487.055. Au moment où ils ont été reconnus coupables, ces contrevenants, contrairement aux autres fichés, n’avaient aucune raison de verser au dossier des renseignements susceptibles d’influencer la décision d’autoriser ou non un prélèvement destiné à la banque de données génétiques.

Le risque inhérent à tout refus d’entendre l’intéressé est encore plus grand lorsque ce dernier a été déclaré coupable sur plaidoyer de culpabilité, sans procès, car il est peu probable que les critères pertinents pour l’autorisation de prélèvement, mais non pour la détermination de la peine, aient alors fait l’objet d’un examen. Un renseignement pertinent suivant le par. 487.055(3.1) ne figurerait donc pas au dossier du juge appelé à statuer sur la demande.

La juge Charron signale que suivant l’art. 487.07 du *Code criminel*, la personne qui prélève les échantillons est tenue de communiquer à l’intéressé « la teneur [de l’autorisation] et le but du prélèvement » (par. 52), de sorte que, selon elle, le contrevenant est informé des motifs de l’autorisation et que, s’il les juge insuffisants, il peut obtenir la révision de l’ordonnance par voie de *certiorari*.

Je l’ai déjà signalé, la requête en *certiorari* est un recours *ex post facto* à la fois coûteux et

narrow jurisdictional grounds. An order wrongly made cannot be reversed on a demonstration of error alone. In my respectful view, recourse to proceedings in *certiorari* is of no comfort at all to persons who, but for their exclusion from the hearing, would have prevented that error from occurring — and would not have suffered the consequences, without reason or justification.

III

Summary and Conclusion

The DNA data bank constitutes a substantial and novel invasion of privacy. A “hit” between a sample in the data bank and one in the DNA crime index will often qualify as a sufficient basis for obtaining a DNA search warrant for the offender. While traditional investigative techniques are still required, the DNA data bank facilitates the process, pointing to specific offenders who remain in the data bank for life. These considerations underline the importance of providing notice and affording those whose privacy interests are at stake an opportunity to participate in the hearing except where competing interests otherwise require.

In the present matter, we have been shown no cause or justification for proceeding *ex parte*, while the reasons for giving notice are both compelling and self-evident. The judge retains discretion, in any event, to order an *ex parte* hearing when there is a reasonable basis for doing so in the particular circumstances of the case.

For all of these reasons, as stated at the outset, I have concluded that s. 487.055 of the *Criminal Code* is inconsistent with s. 8 of the *Charter*.

In its admirably succinct treatment of the remaining issue — whether the impugned statutory provision is a “reasonable limit” within the meaning of s. 1 of the *Charter* — the Crown simply “relies upon the considerations advanced in support of the conclusion that [s. 487.055] permitted only ‘reasonable’ searches and seizures”. Since those

lourd qui ne peut avoir pour fondement que certains motifs précis liés à la compétence. La simple preuve d’une erreur ne suffit pas pour faire infirmer une ordonnance. En toute déférence, le *certiorari* n’est d’aucun secours à celui qui, s’il n’avait pas été exclu sans raison de l’instance, aurait pu prévenir l’erreur et ne pas en subir les conséquences.

III

Résumé et conclusion

La banque de données génétiques constitue une atteinte nouvelle et substantielle à la vie privée. Une simple correspondance entre un profil qu’elle renferme et un autre figurant au fichier de criminalistique justifiera souvent l’obtention d’un mandat de perquisition ADN. Même s’il faut encore recourir aux techniques classiques, l’enquête est facilitée par le fait que la banque de données génétiques identifie certains contrevenants dont elle conserve indéfiniment les profils. Ces considérations font ressortir l’importance de donner à celui dont la vie privée est en jeu un préavis et la possibilité de se faire entendre, sauf si des intérêts opposés commandent le contraire.

En l’espèce, aucun motif d’entendre la demande *ex parte* n’a été établi, alors que les raisons de donner un préavis sont à la fois impérieuses et évidentes. Le juge peut toujours exercer son pouvoir discrétionnaire d’ordonner l’audition *ex parte* de la demande lorsque les circonstances le justifient.

Pour ces motifs, comme je l’ai dit au début des présents motifs, je conclus que l’art. 487.055 du *Code criminel* va à l’encontre de l’art. 8 de la *Charte*.

Dans sa plaidoirie remarquablement concise concernant la dernière question à trancher — la disposition contestée constitue-t-elle une « limite raisonnable » au sens de l’article premier de la *Charte* —, le ministère public se contente d’invoquer [TRADUCTION] « les arguments avancés pour conclure que [l’art. 487.055] ne permet que les

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considerations fail to persuade me in respect of s. 8, they necessarily fail as well with regard to s. 1.

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To the extent of its inconsistency with s. 8 of the *Charter*, s. 487.055 is therefore, in my respectful view, of no force or effect.

Appeal allowed and cross-appeal dismissed, BINNIE, DESCHAMPS and FISH JJ. dissenting.

Solicitor for the appellant/respondent on cross-appeal: Crown Law Office, Toronto.

Solicitors for the respondent/appellant on cross-appeal: Lafontaine & Associates, Toronto.

Solicitor for the intervener the Attorney General of Canada: Attorney General of Canada, Edmonton.

Solicitor for the intervener the Attorney General of Quebec: Department of Justice, Sainte-Foy.

Solicitor for the intervener the Attorney General of Nova Scotia: Attorney General of Nova Scotia, Halifax.

Solicitor for the intervener the Attorney General of New Brunswick: Office of the Attorney General, Fredericton.

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

fouilles, les perquisitions ou les saisies “non abusives” ». Ces arguments ne me convainquent pas du respect de l’art. 8, et ils ne le font certainement pas davantage quant au respect de l’article premier.

Je suis donc d’avis que l’art. 487.055 est inopérant dans la mesure où il est incompatible avec l’art. 8 de la *Charte*.

Pourvoi accueilli et pourvoi incident rejeté, les juges BINNIE, DESCHAMPS et FISH sont dissidents.

Procureur de l’appelante/intimée au pourvoi incident : Bureau des avocats de la Couronne, Toronto.

Procureurs de l’intimé/appelant au pourvoi incident : Lafontaine & Associates, Toronto.

Procureur de l’intervenant le procureur général du Canada : Procureur général du Canada, Edmonton.

Procureur de l’intervenant le procureur général du Québec : Ministère de la Justice, Sainte-Foy.

Procureur de l’intervenant le procureur général de la Nouvelle-Écosse : Procureur général de la Nouvelle-Écosse, Halifax.

Procureur de l’intervenant le procureur général du Nouveau-Brunswick : Bureau du Procureur général, Fredericton.

Procureur de l’intervenant le procureur général de la Colombie-Britannique : Ministère du Procureur général, Vancouver.

Please see in particular paras. 54, 141, 167-168

COURT OF APPEAL FOR BRITISH COLUMBIA

Leave to appeal refused: 2018 CanLII 48394 (SCC)

Citation: *R. v. Samji*,
2017 BCCA 415

Date: 20171201
Docket: CA43961

Between:

Regina

Respondent

And

Rashida Abdulrasul Samji

Appellant

Before: The Honourable Chief Justice Bauman
The Honourable Mr. Justice Hunter
The Honourable Madam Justice Fisher

On appeal from: An order of the Provincial Court of British Columbia, dated May 26, 2016 (*R. v. Samji*, 2016 BCPC 145, Vancouver Docket No. 232139).

Counsel for the Appellant: R. Peck, Q.C.
M. Shah

Counsel for the Respondent: L. Vizsolyi

Place and Date of Hearing: Vancouver, British Columbia
October 6, 2017

Place and Date of Judgment: Vancouver, British Columbia
December 1, 2017

Written Reasons by:

The Honourable Madam Justice Fisher

Concurred in by:

The Honourable Chief Justice Bauman

Concurring Reasons by:

The Honourable Mr. Justice Hunter (Page 36, para. 129)

Summary:

In administrative proceedings before the BC Securities Commission, the appellant was found to have perpetrated a fraud under s. 57(b) of the Securities Act arising from a Ponzi scheme she operated for nine years. The Commission imposed penalties against her that included an administrative monetary penalty of \$33M. The Crown also laid charges under the Criminal Code for theft and fraud arising from the same factual matrix. At her criminal trial, the appellant sought a stay of proceedings on the basis that the \$33M penalty was a “true penal consequence” and that the criminal proceedings constituted double jeopardy, contrary to s. 11(h) of the Charter, or alternatively were an abuse of process, contrary to s. 7 of the Charter. The trial judge refused to grant a stay. On the basis of an agreed statement of facts, the appellant was convicted of the criminal charges and sentenced to six years’ incarceration for the fraud convictions. She seeks to appeal her convictions on the basis that the trial judge erred in finding that (a) the administrative monetary penalty did not constitute a true penal consequence for the purposes of s. 11 of the Charter; (b) s. 11(h) of the Charter did not preclude the criminal proceedings; and (c) the criminal proceedings did not amount to an abuse of process contrary to s. 7 of the Charter.

Held: Appeal dismissed. Addressing the retrospective approach taken by the appellant, the trial judge was correct in refusing to order a stay of proceedings under s. 11(h) of the Charter. The Commission issued an administrative monetary penalty consonant with its regulatory mandate under the Securities Act. While substantial, the AMP was not punitive in purpose or effect. It was a protective and preventative order designed to deter similar fraudulent conduct, not to denounce the appellant’s conduct or reflect her moral blameworthiness. A stay under s. 7 of the Charter was not warranted either, as the appellant has not answered to society at large for her conduct, and a stay would likely cause the public to lose confidence in the integrity of the justice system. A concurring judgment, applying a prospective analysis, would dismiss the appeal on the basis that ss. 161 and 162 of the Securities Act do not create an offence within the meaning of s. 11 of the Charter.

Reasons for Judgment of the Honourable Madam Justice Fisher:**Introduction**

[1] Section 11 of the *Charter of Rights and Freedoms* provides certain rights to a person “charged with an offence”. One of those rights, in s. 11(h), is the right not to be tried or punished twice for the same offence (often described as the rule against double jeopardy).

[2] The primary issue in this appeal is whether an accused is entitled to a stay of criminal proceedings in respect of a matter that has already been addressed in

regulatory proceedings in which a very substantial monetary penalty has been imposed. It asks the question of when an administrative sanction becomes a “true penal consequence” that triggers the application of s. 11 of the *Charter*.

[3] The appellant, Rashida Abdulrasul Samji, was charged with 14 counts of theft and 14 counts of fraud, contrary to ss. 334(a) and 380(1) of the *Criminal Code*, R.S.C. 1985, c. C-46. She was also subject to regulatory proceedings before the British Columbia Securities Commission (the Commission), which found that she had committed fraud, contrary to s. 57(b) of the *Securities Act*, R.S.B.C. 1996, c. 418 (the *Act*). Both the criminal and regulatory proceedings arose from a fraudulent Ponzi scheme that the appellant was found to have operated over a period of nine years, which put at risk approximately \$100M from more than 200 investors. The Commission proceeded against the appellant before the criminal trial commenced, and imposed sanctions against her that included a disgorgement order under s. 161(1)(g) of the *Act* in the amount of \$10,811,799 and an administrative monetary penalty (AMP) under s. 162 in the amount of \$33M.

[4] At her criminal trial in Provincial Court, the appellant sought a stay of proceedings under s. 24(1) of the *Charter* on the basis that the \$33M AMP constituted “a true penal consequence”, such that a subsequent criminal proceeding was precluded by s. 11(h) of the *Charter*, or alternatively constituted an abuse of process contrary to s. 7 of the *Charter*. The trial judge dismissed the appellant’s application and convicted her of all counts in the indictment on the basis of an agreed statement of facts (*R. v. Samji*, 2016 BCPC 145). He subsequently imposed a sentence of six years’ imprisonment for the fraud convictions (*R. v. Samji*, 2016 BCPC 301).

[5] The appellant now appeals her convictions on the grounds that the trial judge erred in law by finding that (a) the AMP did not constitute a true penal consequence; (b) s. 11(h) of the *Charter* did not preclude the criminal proceedings; and (c) the criminal proceedings did not amount to an abuse of process contrary to s. 7 of the *Charter*.

[6] For the reasons which follow, I would dismiss the appeal.

The facts

1. The Ponzi scheme

[7] The trial judge succinctly described a Ponzi scheme as

... a fraudulent investment operation that lures investors by promising high returns. It pays investors with the money contributed by subsequent investors and not with profits earned by a genuine investment. It is named after Charles Ponzi, who famously perpetrated such a scheme in the United States in the early 20th century.

(at para. 1)

[8] The appellant, who was a licenced notary public, operated a Ponzi scheme from 2003 to early 2012. She falsely told investors that the investment was connected to the wine business through a private company in Vancouver known as the Mark Anthony Group Inc. She promised investors that their money would be kept safe in her notary trust account and would be used to secure letters of comfort for the Mark Anthony Group. She also promised investors that they would receive a 12% annual return, payable one month after the date of investment. Many investors opted to roll over their investments in lieu of their capital being repaid.

[9] The Mark Anthony Group had no involvement in this scheme. None of the investors' money was held in the appellant's trust account, none was used to invest in wineries or wine-related businesses, and no letters of comfort were ever provided. Investors' money was received and distributed by the appellant's two companies and used to pay other investors.

[10] The appellant's status as a notary public played a significant role in her perpetuation of the fraudulent scheme. In *Jer v. Society of Notaries Public of British Columbia*, 2015 BCCA 257, leave to appeal ref'd [2015] S.C.C.A. No. 345, a class proceeding launched against the appellant and others, this court affirmed the trial judge's conclusion that the funds invested by the investor class members were entrusted to and received by the appellant in her capacity as a notary public.

[11] By the end of January 2012, both the Royal Canadian Mounted Police (RCMP) and the Commission had commenced investigations into the appellant's activities, the RCMP on January 30 and the Commission on January 31. The Commission also made an order freezing the appellant's bank accounts and assets.

[12] On February 7, 2012, the Society of Notaries Public of British Columbia suspended the appellant and appointed a custodian over her notary practice. On March 6, 2012, the appellant resigned from the Society.

[13] In April 2012, the Commission issued a notice of hearing. News of the allegations prompted several lawsuits, including the class action proceeding referred to above.

[14] On December 5, 2012, the appellant and her companies were assigned into bankruptcy.

2. The criminal investigation

[15] The criminal investigation focused on 14 investors who deposited \$16,503,397 into the appellant's bank accounts in relation to the Ponzi scheme. Of the 14 investors, 13 of them incurred net losses totaling \$10,497,217.

[16] An information was sworn on November 6, 2013.

3. The Commission proceedings

[17] The Commission proceeded against the appellant under ss. 161 and 162 of the *Act*. These provisions authorize the Commission to impose administrative sanctions it considers to be in the public interest where it has found, after a hearing, that a person has contravened the *Act*, the regulations or a decision. Monetary sanctions include disgorgement orders under s. 161(1)(g) and AMPs under s. 162. Section 162 authorizes the Commission to order an AMP of "not more than \$1 million for each contravention".

[18] The Commission held a hearing into the liability of the appellant and her companies over a period of 13 days in November and December 2013 and March

2014. The appellant was represented by counsel but did not attend in person. In a decision dated July 16, 2014, indexed as *Samji (Re)*, 2014 BCSECCOM 286, the Commission found that the appellant had perpetrated a fraud, contrary to s. 57(b) of the *Act*, by trading securities to at least 200 investors for proceeds of at least \$100M. It also found that the companies, wholly owned and controlled by the appellant, had participated in the fraud by receiving and distributing the funds raised by the Ponzi scheme.

[19] The Commission held a hearing into sanctions on December 9, 2014. Again, the appellant was represented by counsel but did not attend in person. The executive director sought sanctions against the appellant and her companies that included a disgorgement order of not less than \$100M and an AMP of not less than \$100M. The appellant opposed the imposition of either a disgorgement order or AMP but submitted that if either was considered, a disgorgement order should be for an amount equal to the monies she obtained less monies received from related bankruptcy, civil and/or criminal proceedings, and an AMP should be for no more than \$1M.

[20] The Commission considered orders in the magnitude proposed by the executive director to be punitive and inappropriate, and those proposed by the appellant insufficient. In a decision dated January 16, 2015, indexed as *Samji (Re)*, 2015 BCSECCOM 29 (the Sanctions Decision), it imposed the disgorgement order of \$10,811,799 based on a forensic accounting analysis of the difference between the monies deposited by investors and the monies paid out to them. It imposed the AMP of \$33M as an amount that reflected the seriousness of the appellant's misconduct and "the other factors relevant to sanctions", and served "as a meaningful and substantial general deterrent to others who would engage in similar misconduct" (Sanctions Decision at para. 56). Both sanctions were imposed against the appellant and her two companies.

[21] The appellant, who was assigned into bankruptcy before the Commission hearings began, is unable to pay, and has not made any payments in respect of

either the disgorgement order or the AMP. She has not sought to challenge the Sanctions Decision by way of an appeal to this Court, which is provided under s. 167 of the *Act*.

Section 11 of the *Charter* and the *Wigglesworth* test

[22] As the appellant's primary submission before us and before the trial judge was grounded in s. 11 of the *Charter* and the test established in *R. v. Wigglesworth*, [1987] 2 S.C.R. 541, I will first review this test and how it has been interpreted in several key cases.

[23] In *Wigglesworth*, the Supreme Court of Canada set parameters for determining when a person is "charged with an offence" within the meaning of s. 11 of the *Charter*. Wilson J., for the Court, favoured a narrow interpretation of s. 11 rights, restricted to "the most serious offences known to our law" and only available to "persons prosecuted by the State for public offences involving punitive sanctions, i.e. criminal, quasi-criminal and regulatory offences, either federally or provincially enacted" (at 554, 558).

[24] In *Wigglesworth*, an RCMP officer assaulted a civilian and was charged and found guilty of a "major service offence" contrary to the *Royal Canadian Mounted Police Act*, R.S.C. 1970, c. R-9. He was also charged with assault contrary to what was then s. 245 of the *Criminal Code*. Like this case, the officer sought a stay of the criminal proceedings on the basis that he was being tried and punished for the same offence and was entitled to the protection of s. 11(h) of the *Charter*.

[25] To determine whether a person is "charged with an offence" under s. 11, Wilson J. developed a two-part test: a matter can fall within s. 11 because (1) it is a criminal proceeding by its nature, or (2) a conviction in respect of the offence may lead to a true penal consequence (at 559). She defined a "true penal consequence" that would attract the application of s. 11 as

... imprisonment or a fine which by its magnitude would appear to be imposed for the purpose of redressing the wrong done to society at large rather than to the maintenance of internal discipline within the limited sphere of activity.

(at 561)

[26] She added two caveats:

First, the possibility of a fine may be fully consonant with the maintenance of discipline and order within a limited private sphere of activity and thus may not attract the application of s. 11. It is my view that if a body or an official has an unlimited power to fine, and if it does not afford the rights enumerated under s. 11, it cannot impose fines designed to redress the harm done to society at large. Instead, it is restricted to the power to impose fines in order to achieve the particular private purpose. One *indiciu*m of the purpose of a particular fine is how the body is to dispose of the fines that it collects. If, as in the case of proceedings under the *Royal Canadian Mounted Police Act*, the fines are not to form part of the Consolidated Revenue Fund but are to be used for the benefit of the Force, it is more likely that the fines are purely an internal or private matter of discipline: *Royal Canadian Mounted Police Act*, s. 45. The second caveat I would raise is that it is difficult to conceive of the possibility of a particular proceeding failing what I have called the “by nature” test but passing what I have called the “true penal consequence” test. I have grave doubts whether any body or official which exists in order to achieve some administrative or private disciplinary purpose can ever imprison an individual. Such a deprivation of liberty seems justified as being in accordance with fundamental justice under s. 7 of the *Charter* only when a public wrong or transgression against society, as opposed to an internal wrong, is committed. However, as this was not argued before us in this appeal I shall assume that it is possible that the “by nature” test can be failed but the “true penal consequence” test passed. Assuming such a situation is possible, it seems to me that in cases where the two tests conflict the “by nature” test must give way to the “true penal consequence” test. If an individual is to be subject to penal consequences such as imprisonment—the most severe deprivation of liberty known to our law—then he or she, in my opinion, should be entitled to the highest procedural protection known to our law.

(at 561-562)

[27] Applying the test, Wilson J. determined that the proceedings before the RCMP Service Court failed the “by nature” test but passed the “true penal consequence test” because an officer charged under the Code of Discipline risked imprisonment for a maximum period of one year. This was so despite the fact that the officer in that case received only a \$300 fine. Nevertheless, she did not accept that the officer was entitled to the protection of s. 11(h) because he was not being tried and punished for the same offence in the subsequent criminal proceeding.

Finding the “offences” quite different, she held that the accused had accounted to his profession and also had to account to society at large for his conduct (at 563, 566).

[28] The *Wigglesworth* test was somewhat refined in *Martineau v. Canada (Minister of National Revenue)*, 2004 SCC 81 and *Guindon v. Canada*, 2015 SCC 41.

[29] The issue in *Martineau* was whether the appellant could avail himself of the right against self-incrimination guaranteed by s. 11(c) of the *Charter* in the course of a proceeding under s. 135 of the *Customs Act*, R.S.C. 1985, c. 1 (2nd Supp.). In *Guindon*, the issue was whether proceedings under s. 163.2 of the *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.) created a true criminal offence and therefore engaged the procedural protections in s. 11. The analysis by the Supreme Court in both cases demonstrates that there is some overlap between the first and second parts of the *Wigglesworth* test.

[30] In *Martineau*, Fish J. for the court considered the purpose of the sanction (there a demand for payment of the value of goods) to be relevant to the first part of the test, determining the nature of the proceeding. In rejecting an argument that the purpose of the sanction was punitive, he found that its purpose was not to redress a wrong done to society at large, but rather to ensure compliance with the *Customs Act* and to deter others from noncompliance. In assessing whether the amount demanded (\$315,000) constituted a true penal consequence under the second part, Fish J. again considered the purpose of the sanction as well as its magnitude. He found that the purpose was neither to punish the offender nor to elicit societal condemnation, and the amount, being determined by a mathematical calculation, was civil in nature and purely economic (at para. 62).

[31] In *Guindon*, the court was divided as to whether the merits of the appeal should be considered in the absence of notice of constitutional question. The majority was of the view that the court should exercise its discretion to do so, and went on to consider whether the appellant was a person “charged with an offence” under s. 11 of the *Charter*. In doing so, the majority acknowledged that the

“*Wigglesworth/Martineau* tests” have been subject to criticism, in that “the distinction between the criminal in nature and true penal consequence tests is unclear, the reasoning is circular, or the tests cannot properly account for the particular context of modern administrative monetary penalties” (at para. 48).

[32] However, they went on to explain the independent value of each part of the test despite some overlap in the analysis, emphasizing the importance of considering all relevant factors:

[49] When the criminal in nature test is understood as considering only the nature of the proceedings, the independent value of each test becomes clear. The criminal in nature test identifies provisions that are criminal because Parliament or the legislature has provided for proceedings whose attributes and purpose show that the penalty is to be imposed via criminal proceedings. The true penal consequence test, on the other hand, looks at whether an ostensibly administrative or regulatory provision nonetheless engages s. 11 of the *Charter* because it may result in punitive consequences. While there is inevitably some overlap in the analysis, the important thing is to consider all relevant factors, acknowledging that only rarely, as in *Wigglesworth*, will the two branches of the test lead to different conclusions.

[50] Moreover, the analysis is not circular: both tests ask distinct questions that evaluate the two different ways in which a provision could be a criminal offence for the purpose of s. 11. The criminal in nature test focuses on the process while the penal consequences test focuses on its potential impact on the person subject to the proceeding.

[33] That said, to avoid “unnecessary repetition”, the majority considered the purpose of the sanction only in assessing whether it was a true penal consequence (at para. 52). In doing so, they addressed the issue of monetary penalties in some detail, indicating that a penalty can be punitive in purpose *or* effect:

[76] ... A monetary penalty may or may not be a true penal consequence. It will be so when it is, in purpose or effect, punitive. Whether this is the case is assessed by looking at considerations such as the magnitude of the fine, to whom it is paid, whether its magnitude is determined by regulatory considerations rather than principles of criminal sentencing, and whether stigma is associated with the penalty: see, e.g., *Canada (Attorney General) v. United States Steel Corp.*, 2011 FCA 176 (CanLII), 333 D.L.R. (4th) 1, at paras. 76-77.

[34] The majority made it clear that the magnitude of the sanction by itself is not determinative. A sanction may constitute a true penal consequence where the

amount is out of proportion to what is required to achieve regulatory purposes. In doing so, they recognized that very large penalties can be imposed and may be necessary in order to deter non-compliance with an administrative scheme:

[80] Some statutes prescribe very high administrative monetary penalties, at times over a million dollars, and these have been upheld where it is demonstrated that the penalty serves regulatory purposes. In some cases, sizable penalties are necessary so the penalty is not simply considered a cost of doing business ...

[35] They concluded that the relevant question is not the amount of the penalty “in absolute terms” but rather whether the amount serves regulatory, not penal purposes (at para. 81).

The decision of the Provincial Court judge

[36] The trial judge considered the *Wigglesworth* test as “expanded” in *Martineau* and “confirmed” in *Guindon* along with additional factors relevant to the true penal consequence test. He noted that a very large AMP does not automatically render it a true penal consequence and, as recognized in *Guindon*, the amount must be sufficient so that it is not simply considered “a cost of doing business” (at para. 20). He considered all of this in the context of the provisions of the *Act*, the facts of the case, the appellant’s personal and financial circumstances, and the possible stigma associated with the Commission proceedings.

[37] The trial judge noted that relief from an excessively harsh AMP can be sought through an appeal but the appellant in her stay application was not seeking to avoid the consequences of the AMP; she was attacking only its purpose and effect. He stated that his ruling did not review the appropriateness of the sanctions imposed by the Commission but only whether the \$33M AMP was imposed to redress the wrong done to society at large (at paras. 21, 82–83).

[38] Despite the appellant’s acknowledgement that the Commission proceedings were not criminal in nature, the trial judge contrasted the administrative process leading to the imposition of the AMP with the “hallmarks” of a criminal proceeding. He noted that the Commission in this case elected to proceed with administrative

penalties pursuant to ss. 161 and 162 of the *Act* rather than quasi-criminal offences pursuant to s. 155(1). He considered the broad scope of s. 57(b), which prohibits anyone from directly or indirectly engaging or participating in conduct relating to securities if the person knows or reasonably should know that the conduct perpetrates a fraud. Viewing s. 57(b) along with ss. 161 and 162, he concluded that together they have a regulatory purpose to promote honesty, protect investors and foster public confidence in the capital markets. He described how hearings pursuant to ss. 161 and 162 differ quite significantly from criminal proceedings and concluded that the process leading up to the imposition of the \$33M AMP was not criminal in nature (at paras. 90–93).

[39] In assessing whether the AMP constituted a true penal consequence, the trial judge assessed both its purpose and its effect on the appellant.

[40] In assessing its purpose, the judge relied “almost exclusively” on the reasoning of the Commission in its Sanctions Decision, discussing the magnitude of the AMP, its recipient, and the applicability of sentencing principles (at para. 101). Implicit in his reasons is his acceptance of the Commission’s assessment that the magnitude of the AMP was directly tied to its objective of deterring non-compliance with the *Act*. He considered that the recipient of any payments made towards the AMP was not the Consolidated Revenue Fund, but a fund to be used for operational regulation of the markets, investor education and payments to individuals making successful claims. He also considered that sentencing principles such as deterrence and proportionality were not unique to criminal proceedings. He accepted the Commission’s application of the relevant factors to consider in making orders under ss. 161 and 162, as set out in its decision, *Re Eron Mortgage Corporation*, [2000] 7 BCSC Weekly Summary 22 [*Eron Mortgage*].

[41] The judge accepted the Commission’s conclusion that the sanctions imposed against the appellant were “protective and preventative”, intended to serve as “a meaningful and substantial deterrent” to the appellant and others.

[42] In assessing the effect of the AMP on the appellant, the trial judge found that the stigma attached to her arose largely from the Commission's findings that she perpetrated a fraud, and not from the proceedings themselves. He noted that these findings attracted media attention and negatively impacted the appellant's life in many facets. In addition to losing her professional standing, the appellant had been excluded by her family and community and had found it difficult to obtain employment. However, he found that the stigma caused by the media publications was to be expected, stating that "[i]ndividuals who commit securities fraud should reasonably expect that their misconduct would likely be scrutinized by the Commission" (at para. 124). He acknowledged that the label "fraudster" carried a significant social stigma but concluded that this reflected only the social repugnance of the appellant's misconduct and was not comparable to that attached to a criminal conviction (at para. 129).

[43] Importantly, the judge concluded that the stigma suffered by the appellant did not reflect the degree of fault for her perpetration of the Ponzi scheme. He found that the factors considered by the Commission "were only considered in the context of the Commission's mandate to regulate the securities industry and to deter participants in the securities industry from non-compliance with the *Act*", and the sanctions imposed on the appellant "did not redress or condemn the moral blameworthiness" of her conduct (at para. 130).

[44] The judge accepted that the AMP was significant and he assumed that the appellant would remain obligated to pay it after a discharge from bankruptcy. However, he did not consider that it interfered with her life, liberty or security: she was unlikely to ever be able to pay any part of either the AMP or the disgorgement order, the Commission had taken no steps to enforce payment, and default of payment would not result in imprisonment. He also considered the fact that the appellant had elected not to challenge the sanctions as she was entitled to do under s. 167 of the *Act*.

[45] Accordingly, the trial judge concluded that the sanctions imposed on the appellant, including the AMP, did not amount to a true penal consequence and therefore s. 11(h) of the *Charter* did not preclude a criminal prosecution against her.

[46] The trial judge also concluded that the criminal proceedings did not amount to an abuse of process contrary to s. 7 of the *Charter*. He found that the appellant's fair trial interests had not been compromised or prejudiced by the criminal proceedings, which provided all of the protections in s. 11 of the *Charter*, including the presumption of innocence. He noted that the appellant was being tried for two different offences by two separate and independent entities and held that her misconduct had not been redressed to society at large.

[47] Accordingly, he found no basis to grant a stay of proceedings.

On appeal

[48] In this appeal, the appellant acknowledged that the proceedings before the Commission were administrative in nature such that the first part of the *Wigglesworth* test does not apply, but submitted that the \$33M AMP imposed constitutes a true penal consequence. On this basis, the appellant says that she is entitled to the protections in s. 11 of the *Charter*, including the protection against double jeopardy in s. 11(h).

[49] The appellant contends that the trial judge erred in finding that an AMP of \$33M was not a true penal consequence in the circumstances of this case. She says that if a penalty of this magnitude does not meet the second part of the *Wigglesworth* test, no case involving a fine ever can.

[50] The appellant submitted that the factors relevant in assessing a true penal consequence support a finding in her favour. She says that \$33M is out of proportion to what is required for deterrence and the effect on her is punitive, especially when considered along with the \$10,811,799 disgorgement order. She says that this is illustrated by the Commission's consideration of traditional criminal law sentencing principles that include denunciation, retribution, and an assessment of moral

blameworthiness. All of this, she says, supports a conclusion, contrary to that of the trial judge, that the AMP was imposed to redress society at large.

[51] The respondent submitted that the trial judge committed no error in concluding that the \$33M AMP was not a true penal consequence, as it was appropriate in the context of the seriousness of the appellant's fraudulent scheme, the factors relevant to sanctions, and the Commission's statutory mandate.

[52] The respondent pointed out that if the AMP is found to be a true penal consequence, the implications are significant: not only would the Commission have acted outside of its jurisdiction and mandate in imposing the penalty, but also, all of the rights guaranteed under s. 11 of the *Charter* would apply to the Commission's proceedings. This would call into question all of the Commission's administrative procedures that allow it to act quickly in the public interest.

Analysis

[53] This appeal was presented and argued on the basis of the \$33M AMP that was actually imposed on the appellant. This approach posed an analytical dilemma for this court in the context in which the appeal was brought. The implications of a determination that this AMP is a true penal consequence would mean that all of the rights guaranteed in s. 11 of the *Charter* apply to the Commission's proceedings against the appellant under ss. 161 and 162 of the *Act*, notwithstanding that she seeks only a stay of subsequent criminal proceedings. Such a determination on a retrospective basis would call into question the validity of proceedings already concluded, yet the question of validity is not before us. Related to this, the appellant's assertion that the AMP is a true penal consequence yet a valid sanction is irreconcilable with recognized limitations on the Commission's statutory power.

[54] Justice Hunter has addressed this dilemma directly by taking a prospective approach and analyzing only the statutory power of the Commission to impose AMPs. I agree with his approach, as it provides a solid basis for constitutional analysis in the context here. I also agree, consistent with *Lavallee v. Alberta Securities Commission*, 2010 ABCA 48 and *Rowan v. Ontario Securities*

Commission, 2012 ONCA 208, that s. 162 does not authorize AMPs that are true penal consequences and that this appeal could be disposed of on that basis.

[55] That said, as the entire foundation for this appeal is the actual penalty imposed, I have conducted my analysis on this basis. As I discuss below, there is authority to support this approach generally and this was not a matter of disagreement between the parties. However, as my analysis will show, the dilemma I describe above illustrates why an appeal under s. 167 of the *Act*, rather than an application for a stay of proceedings under s. 11(h) of the *Charter*, is the appropriate way to address whether an AMP constitutes a true penal consequence.

[56] I will address the following issues:

1. What is the standard of review?
2. Was the appellant, in the proceedings before the Commission, a person charged with an offence within the meaning of s. 11 of the *Charter*?
3. If s. 11 of the *Charter* is engaged, does s. 11(h) preclude a criminal prosecution for the “same offence”?
4. If s. 11 is not engaged, is the criminal proceeding an abuse of process contrary to s. 7 of the *Charter*?

1. The standard of review

[57] The circumstances here are somewhat unusual, in that the trial judge was asked to consider the remedy of a stay under s. 24(1) of the *Charter* primarily on the basis of a determination that a monetary penalty imposed by an administrative tribunal constituted a true penal consequence that engaged the application of s. 11 of the *Charter*. In addressing this, the trial judge was careful to state that his ruling did not review “the appropriateness of the sanctions imposed by the Commission” but rather whether the AMP was imposed to redress the wrong done to society at large. In doing so, the judge relied in part on the Commission’s expertise; in

determining whether the purpose of the AMP was punitive, he relied “almost exclusively” on the Commission’s reasoning in the Sanctions Decision.

[58] Were this court reviewing the Sanctions Decision by way of an appeal under the *Act*, the reasonableness standard would apply where the issue concerned the tribunal’s interpretation of its home statute, especially in its determination of how the statute should be interpreted to further its public interest mandate: *Poonian v. British Columbia Securities Commission*, 2017 BCCA 207 at paras. 30, 49; *Cartaway Resources Corp. (Re)*, 2004 SCC 26 at paras. 46, 63–64; *Walker v. British Columbia (Securities Commission)*, 2011 BCCA 415 at para. 21. It is likely that the reasonableness standard would also apply to a determination of what AMP would be sufficient to deter the misconduct in issue.

[59] However, the primary issue before the trial judge, and indeed before us in this appeal, is whether the appellant was a person charged with an offence in the proceedings before the Commission on the basis that the AMP imposed against her constituted a true penal consequence within the meaning of s. 11 of the *Charter*.

[60] Notwithstanding that an assessment of the amount of an AMP requires consideration of the public interest that is within the expertise of the Commission, the question of whether the AMP is a true penal consequence under s. 11 of the *Charter* is a question of law to be reviewed on a standard of correctness.

[61] I am satisfied that the trial judge came to the correct conclusions of law on the questions before him, which I will now address.

2. Was the appellant, in the proceedings before the Commission, a person charged with an offence within the meaning of s. 11 of the *Charter*?

[62] It is clear, as conceded by the appellant, that an AMP issued by the Commission under s. 162 of the *Act* does not involve a process that is criminal in nature. Such a process can be contrasted with s. 155 of the *Act*, which creates true offences that are prosecuted by the Crown, with all of the protections of s. 11 of the *Charter*.

[63] The appellant relied on *Rowan* as authority for framing her case on the basis of the \$33M AMP that was actually imposed.

[64] In *Rowan*, the appellants were seeking, through the appeal process, to strike down s. 127(1) of the *Securities Act*, R.S.O. 1990, c. S.5, which allowed the imposition of AMPs of \$1M “for each failure to comply” (the equivalent of s. 162 of the *Act*). They argued that the potential size of an AMP was so large that it carried the risk of true penal consequences, such that a person was “charged with an offence” from the outset and the procedural protections under s. 11(d) of the *Charter* were engaged.

[65] Sharpe J.A. for the court held (at para. 46) that there is “now an established line of authority holding that the power of an administrative tribunal to impose substantive monetary penalties is to be assessed on the basis of the penalty imposed rather than on penalties that are theoretically possible”. He considered this to be consistent with the general principle that legislation which confers an imprecise discretion does not confer the power to infringe *Charter* rights (*per Slaight Communications Inc. v. Davidson*, [1989] 1 S.C.R. 1038) and with the following passage in *Wigglesworth*:

... if a body or an official has an unlimited power to fine, and if it does not afford the rights enumerated under s. 11, it cannot impose fines designed to redress the harm done to society at large. Instead, it is restricted to the power to impose fines in order to achieve the particular private purpose.

[66] However, in *Wigglesworth*, it was the possibility of imprisonment, not the actual penalty imposed, which was determinative of a true penal consequence. In *Rowan*, Sharpe J.A. rejected the argument of the appellants to follow the actual holding in *Wigglesworth* and assess whether s. 11 applied *ex ante*, on the basis of the potential penalty, not *ex post*, on the basis of the actual penalty. He did so on the basis that the power to order imprisonment was “so obviously penal in nature and so exceptional in the setting of administrative tribunals that the mere possibility of a sentence of imprisonment” was sufficient to constitute a true penal consequence. He declined to extend reasoning “intended to meet the exceptional and rarely

encountered power to imprison” to the power to impose monetary penalties, preferring to apply the language in the passage in *Wigglesworth* quoted above which, he stated, dealt with “the power to fine that is commonly encountered in administrative proceedings” (at paras. 44–45).

[67] In contrast to *Rowan*, the appellant in this case is not seeking to challenge the AMP by way of an appeal under the *Act* and the validity of the AMP is not before us. As Justice Hunter points out, the court’s examination of the penalty imposed in *Rowan* is consistent with its exercise of appellate jurisdiction in relation to the Commission’s decision. Here, the matter is before us in the same way as it was before the court in *Wigglesworth*. I agree with my colleague that in this context, the *Wigglesworth* test should be applied to any potential penalty – not just imprisonment – which may lead to a true penal consequence.

[68] However, the appellant’s reliance on *Rowan* to support a general retrospective, or *ex post*, approach is not without foundation. While I agree with Justice Hunter that *Rowan* and the other authorities he cites are distinguishable from the circumstances here in various ways, (most notably, none of them considered this issue in the context of an appeal from conviction due to the refusal to grant a stay of proceedings under s. 11(h) of the *Charter*), some of them do lend support to an *ex post* approach in assessing whether monetary penalties issued by valid administrative agencies are true penal consequences.

[69] In *Guindon*, the majority described the true penal consequences test as one focused on the purpose and effect on the person subject to the proceeding, but it distinguished imprisonment from a monetary penalty (at para. 76):

Imprisonment is always a true penal consequence. A provision that includes the possibility of imprisonment will be criminal no matter the actual sanction imposed: see *Wigglesworth*, at p. 562. A monetary penalty may or may not be a true penal consequence. It will be so when it is, in purpose or effect, punitive. Whether this is the case is assessed by looking at considerations such as the magnitude of the fine, to whom it is paid, whether its magnitude is determined by regulatory considerations rather than principles of criminal sentencing, and whether stigma is associated with the penalty ...

[My emphasis.]

[70] An *ex post* approach is not necessarily required to assess the purpose of a monetary penalty but it may be required to assess the effect on the person subject to it. Although the court in *Guindon* held that the penal consequences test “focuses on the potential impact on the person subject to the proceeding” (at para. 50) it rejected an approach requiring an arbitrary upper limit on administrative penalties (at para. 79):

The analysis must ask whether the amount of the penalty, considered with the other relevant factors, is in keeping with the nature of the misconduct and the penalty necessary to serve regulatory purposes, such as promoting compliance and deterring non-compliance, not focus on an arbitrary threshold which may bear no relation to the particular administrative regime and policy goals ...

[My emphasis in both.]

[71] In both of these passages, the court referred to *Canada (Attorney General) v. United States Steel Corp.*, 2011 FCA 176 [*US Steel*], a decision also relied on in *Rowan*. In *US Steel*, the Federal Court of Appeal held (at para. 80) that a “statutory power to impose fines that comes along with little statutory guidance will not be subject to s. 11 as long as it is exercised in a way so as to achieve proper administrative aims” (my emphasis).

[72] In my view, these authorities establish that a court exercising direct appellate review of an administrative penalty may properly consider the actual penalty imposed in assessing whether it constitutes a true penal consequence. If the court determines that the penalty does constitute a true penal consequence, it has the power, *inter alia*, to set such a penalty aside. In this case, however, the court is not exercising direct appellate review of the AMP and the only remedy sought is a stay of subsequent criminal proceedings. In this rather unique context, I share the concerns expressed by Justice Hunter about the implications of considering the actual penalty imposed.

[73] However, as these concerns were not canvassed during the appeal, I am prepared to address the issue the appellant has placed before this court: whether the \$33M AMP imposed on her constitutes a true penal consequence. Later, I will

further explore why it is very difficult to meet the true penal consequences test where a proceeding is not criminal by nature, a concern expressed by Wilson J. in *Wigglesworth* and raised by the appellant here.

Does the \$33M AMP constitute a true penal consequence?

[74] There is no question that the \$33M AMP imposed against the appellant and her companies is a very substantial sanction, higher than any of the sanctions imposed in the cases cited before us. Its magnitude, however, is but one factor to consider in determining whether an AMP has true penal consequences. As the court said in *Guindon* at para. 77:

The magnitude of the sanction on its own is not determinative. However, if the amount at issue is out of proportion to the amount required to achieve regulatory purposes, this consideration suggests that it will constitute a true penal consequence and that the provision will attract the protection of s. 11 of the *Charter*. This is not to say that very large penalties cannot be imposed under administrative monetary penalty regimes. Sometimes significant penalties are necessary in order to deter non-compliance with an administrative scheme: see *Rowan v. Ontario Securities Commission*, 2012 ONCA 208, 110 O.R. (3d) 492, at para. 49. The amount of the penalty should reflect the objective of deterring non-compliance with the administrative or regulatory scheme.

[75] The essence of the appellant's submission is fourfold: (1) the magnitude of the AMP is out of proportion to the amount required to achieve regulatory purposes, especially when considered in the context of the disgorgement order that was designed to strip away any profit; (2) the AMP was determined by the application of traditional criminal sentencing principles and was designed not only to deter non-compliance but also to denounce her conduct and seek retribution; (3) the stigma associated with the AMP in the circumstances here is comparable to that attached to a criminal conviction; and (4) the AMP is punitive in its effect on her.

[76] I am unable to accept this submission for the following reasons.

Magnitude

[77] Given the magnitude of the fraud perpetrated by the appellant – \$100M obtained from over 200 investors over a nine-year period – I cannot conclude that a

\$33M AMP is out of proportion to the amount required to deter non-compliance with the Act. Section 162, authorizing AMPs of up to \$1M for each contravention, provides the Commission with substantial tools to effect meaningful deterrence. As the Court recognized in *Guindon*, sizable penalties are necessary so that they are not simply considered a cost of doing business. The Commission found that the appellant contravened s. 57(b) hundreds of times, thus presenting the possibility of an extremely significant sanction (Sanctions Decision at para. 51).

[78] Similar provisions in Alberta and Ontario securities legislation authorizing AMPs of up to \$1M per contravention were held not to attract true penal consequences in *Lavallee* and *Rowan*. In *Rowan*, Sharpe J.A. stated at para. 49:

Penalties of up to \$1 million per infraction are, in my view, entirely in keeping with the Commission's mandate to regulate the capital markets where enormous sums of money are involved and where substantial penalties are necessary to remove economic incentives for non-compliance with market rules.

[79] I recognize that the sanctions imposed in *Rowan*, *Guindon* and other cases cited by the appellant were of a different level of magnitude than the AMP imposed in this case. However, the circumstances in those cases were very different. For example, *Rowan* involved failing to report trades and failing to ensure compliance with regulatory requirements; AMPs totaling \$1.2M were imposed against an investment dealer, its president and chairman. In *Guindon*, a lawyer was assessed penalties under the *Income Tax Act* totaling \$546,747 for making false statements in donation receipts issued on behalf of a charity.

[80] A case that bears a closer comparison to the penalty imposed here is *Michaels v. British Columbia (Securities Commission)*, 2016 BCCA 144. There, the Commission imposed an AMP of \$17.5M against an individual for contraventions of the Act that included fraud under s. 57(b). Michaels had advised 484 clients to purchase over \$65M worth of exempt market securities, almost all of which became worthless. In doing so, he was paid \$5.8M in commissions and marketing fees.

[81] Michaels appealed the Commission's findings of liability and the AMP to this court. While the court was not considering whether the AMP was a true penal consequence for the purpose of s. 11 of the *Charter*, it accepted as "clear, principled and intelligible" the Commission's reasons for imposing an AMP of \$17.5M (at para. 128).

[82] In assessing the quantum in *Michaels*, the Commission had considered submissions from the executive director for a penalty of \$65M and from Michaels for a penalty in the \$3.8M range. It did not agree that either amount was appropriate for the following reasons:

[51] ... The seriousness of Michaels' misconduct and the catastrophic losses that have been suffered by the investors through his misconduct justify a significant administrative penalty. A significant administrative penalty is warranted both as a specific deterrent to Michaels who has not been deterred by the previous sanctions imposed on him, and as a general deterrent to others who would commit fraud, make serious misrepresentations or provide investment advice without being registered to do so and callously recommend unsuitable investments to others for personal gain.

[52] The appropriate starting place in this case is to look at the \$5.8 million benefit that Michaels received personally from his misconduct. A two to three times multiplier of this amount, consistent with the cases reviewed in *IAC [Re Independent Academies Canada Inc. 2014 BCSECCOM 260]*, is appropriate in the circumstances. This will place the administrative penalty in excess of those levied in fraud cases (as described in *IAC*) where the amounts derived from the misconduct are smaller, without making the amount so large as to exceed the purposes of specific and general deterrence.

[83] While the fraud in *Michaels* was serious, the fraud in this case was even more so; no actual securities ever existed, significantly more money was obtained from investors, and almost \$11M was never repaid. The Commission did not accept the submissions on quantum from the executive director (\$100M) or the appellant (no more than \$1M) for the following reasons:

[54] We do not agree with the executive director's submissions regarding the quantum of the appropriate administrative penalty. While the number of contraventions under the Act could support an administrative penalty in the amount proposed by the executive director, we do not think it is in the public interest to do so. Even though the amount suggested by the executive director does not exceed the amount raised by the respondents, an administrative penalty of \$100 million goes beyond any meaningful bounds of deterrence for the respondents or others.

[55] We do not agree with the respondents' submission that an administrative penalty of \$1 million is appropriate in the circumstances. The magnitude and duration of the fraudulent investment scheme and the number of investors affected justify a significant penalty. A significant penalty also is warranted both as a specific deterrent to the respondents and as a general deterrent to others who would engage in similar fraudulent schemes.

[56] In the circumstances, an administrative penalty of \$33 million is appropriate. It reflects the seriousness of the respondents' misconduct and the other factors relevant to sanctions, making it appropriate for the respondents personally. It also serves as a meaningful and substantial general deterrent to others who would engage in similar misconduct.

[84] This reasoning was accepted by the trial judge without comment.

[85] It is unfortunate that the Commission did not more fully explain how it arrived at the amount of \$33M. The respondent submitted that it appears to have been determined by way of the formula used in previous orders, such as *Michaels*, where the amount of the "ill-gotten" gain is multiplied by a factor of two or three. It does appear to conform to this formula using a factor of three, as the ill-gotten gain in this case, reflected in the disgorgement order, is almost \$11M.

[86] The appellant submitted that a monetary penalty that is fixed or determined by a mathematical calculation, without regard to other criminal sentencing principles, is more likely to be non-punitive. This was the circumstance in *Martineau*. However, applying a mathematical calculation may not show that a penalty was imposed for proper purposes, and a penalty may be non-punitive in the absence of a mathematical calculation. *US Steel* shows that a statutory power to impose monetary penalties with little statutory guidance "will not be subject to section 11 as long as it is exercised in a way so as to achieve proper administrative aims". In this case, whether or not the Commission applied the formula used in *Michaels*, it is clear that the amount was considered to serve as a meaningful general deterrent by reflecting the seriousness of the appellant's conduct.

[87] I do not agree with the appellant's submission that the AMP, combined with the disgorgement order, exceeded her profit by so much (\$33M) that it goes beyond mere deterrence and becomes punitive. As this court held in *Poonian*, the purpose of a disgorgement order under s. 161(1)(g) of the *Act* is neither punitive nor

compensatory; rather it is to compel a wrongdoer to give up any ill-gotten amounts. In this respect, the existence of a disgorgement order is not a relevant consideration in assessing whether an AMP under s. 162 is a true penal consequence, especially in relation to its purpose.

[88] Finally, the magnitude of the penalty cannot be considered in isolation. Other factors are important, such as whether the proceeds are used for the benefit of third parties, whether the amount is determined by regulatory considerations distinct from the principles of criminal liability and sentencing, and whether the effect of the sanction on the appellant creates a stigma that is comparable to a criminal conviction: *Guindon* at paras. 76–77; *US Steel* at paras. 74–77.

[89] The appellant acknowledges that the proceeds of an AMP are not paid into the Consolidated Revenue Fund, but are used to educate securities market participants and members of the public. With respect to the effect of the sanction, it is my view that this is to be considered in relation to whether there is a stigma associated with the penalty. I interpret this from para. 76 of *Guindon*, which I repeat here for convenience:

... A monetary penalty may or may not be a true penal consequence. It will be so when it is, in purpose or effect, punitive. Whether this is the case is assessed by looking at considerations such as the magnitude of the fine, to whom it is paid, whether its magnitude is determined by regulatory considerations rather than principles of criminal sentencing, and whether stigma is associated with the penalty ...

[Emphasis added.]

[90] Therefore, I will consider the other two factors: regulatory or criminal sentencing principles, and stigma and effect.

Criminal sentencing principles

[91] There is no dispute that general deterrence is an appropriate consideration in making orders that are protective and preventative, and more specifically, for administrative penalties under s. 162 of the *Act*: *Cartaway* at paras. 60–61; *Guindon* at para. 83; *Rowan* at para. 51; *Lavallee* at para. 25.

[92] However, the appellant asserts that in this case the Commission fixed the amount in a purely discretionary way, with regard to traditional sentencing principles that are not tied to the objective of deterring non-compliance with the *Act*, exemplified by its consideration of the seriousness of the conduct, the harm suffered by investors, the damage done to the integrity of the capital markets, aggravating and mitigating factors, past conduct and orders made in similar cases. She also asserts that the factors applied by the Commission stemming from *Eron Mortgage* are flawed in that they parallel the principles in s. 718 of the *Criminal Code* and the common law.

[93] In my view, the appellant's characterization of what factors are relevant to a consideration of deterrence is far too narrow and not supported by the authorities. A consideration of factors such as the seriousness of the appellant's conduct and the damage done to the capital markets are matters that the Commission is entitled to weigh in determining a penalty that will be a meaningful deterrent to others.

[94] In *Cartaway*, LeBel J. held that a penalty imposed under s. 162 of the *Act* should take into account the entire context as well as the preservation of the public interest. At paras. 65–66, he considered that an increased fine sent a “clear message to other actors in the British Columbia securities market” that a breach of the prospectus requirements would be dealt with severely, noting that

[t]he Commission stressed the seriousness of the respondents' conduct and the damage done to the integrity of the capital markets, and found that when making an order that is in the public interest, “[w]e are obliged to take whatever remedial steps we determine are appropriate to maintain the public's confidence in the fairness of our markets”...

[95] He considered the penalty to be reasonable globally, noting as well that the Commission “weighed the aggravating and mitigating factors” in determining the appropriate penalty.

[96] It is also my view that the factors set out in *Eron Mortgage* are in accordance with the principles in *Cartaway*. They are reproduced in the trial judge's decision at para. 114:

In making orders under section 161 and 162 of the Act, the Commission must consider what is in the public interest in the context of its mandate to regulate trading in securities. [Relevant factors include]:

- the seriousness of respondent's conduct,
- the harm suffered by investors as a result of the respondent's conduct,
- the damage done to the integrity of the capital markets in British Columbia by the respondent's conduct,
- the extent to which the respondent was enriched,
- factors that mitigate the respondent's conduct,
- the respondent's past conduct,
- the risk to investors and the capital markets posed by the respondent's continued participation in the capital markets of British Columbia,
- the respondent's fitness to be a registrant or to bear the responsibilities associated with being a director, officer or advisor to issuers,
- the need to demonstrate the consequences of inappropriate conduct to those who enjoy the benefits of access to the capital markets,
- the need to deter those who participate in the capital markets from engaging in inappropriate conduct, and
- orders made by the Commission in similar circumstances in the past.

[97] The trial judge made no error in accepting that sentencing principles such as deterrence and proportionality are not unique to criminal proceedings, or that the Commission's application of these factors is relevant to the determination of an AMP under s. 162 of the Act. The jurisprudence is clear that such considerations are relevant to crafting an effective sanction in the context of regulating the capital markets. While some factors may also be relevant to the principles in s. 718 of the *Criminal Code*, the entire purpose for their consideration is to inform what is needed to effectively deter, specifically and generally, the particular misconduct in issue in the context of securities regulation.

[98] I do not accept the appellant's submission that the description of her conduct in the Sanctions Decision as "egregious" and "at the highest end of the scale of seriousness" implies that the Commission was concerned with the moral blameworthiness of her conduct and the need for a large penalty to denounce it.

Relating an AMP to the magnitude of the misconduct and the harm done to investors are particularly important factors when considering general deterrence. In *Alberta (Securities Commission) v. Brost*, 2008 ABCA 326 the court concluded that an amendment increasing the potential magnitude of an AMP to \$1M per contravention reflected a legislative intent “that the Commission should fit the sanction to the circumstances, including the magnitude of the illegality and the need to encourage lawful conduct by those involved with securities” (at para. 54). I agree with this, as well as the respondent’s submission that consideration of the harm to investors reflects the protective purposes of the AMP.

[99] It cannot be the case that simply because the Commission has discretion and tries to achieve proportionality in its sanction decisions that an AMP therefore imposes true penal consequences. To say that would provide an incentive to reduce proportionality in sanction decisions to save them from *Charter* scrutiny. It may also lead to greater injustice if the Commission is forced to follow a rigid mathematical formula instead of tailoring the sanction to better protect markets and deter future fraud.

[100] As recognized in *Brost*, any penalty may be regarded by the person on whom it is imposed as “punitive”. However, this does not answer the question of whether its effect is punitive in the sense of redressing harm done to society. A penalty may be punitive “in the broad sense of the word” for some purposes, but not “in the narrow sense of the word” if it is not imposed as punishment for the wrongdoer’s past transgressions or moral failings: see *Thow v. British Columbia (Securities Commission)*, 2009 BCCA 46 at para. 49.

[101] In my view, the amount of the AMP in this case was determined by regulatory factors distinct from criminal sentencing principles. I do not agree with the appellant that some of the language in the Sanctions Decision suggested that the Commission took into account principles other than deterrence. When considered in its overall context, the Sanctions Decision was focused on an AMP that would address both specific and general deterrence, as summarized at para. 56:

In the circumstances, an administrative penalty of \$33 million is appropriate. It reflects the seriousness of the respondents' misconduct and the other factors relevant to sanctions, making it appropriate for the respondents personally. It also serves as a meaningful and substantial general deterrent to others who would engage in similar misconduct.

[Emphasis added.]

[102] All of the factors referred to by the Commission, and accepted by the trial judge, were assessed in the context of a protective and preventative order designed to deter similar conduct, not to denounce the appellant's conduct and reflect the extent of her moral blameworthiness.

Stigma and effect

[103] There is no dispute that the appellant has been stigmatized. Fraud is a serious allegation that carries a stigma. However, the trial judge considered that the stigma arose largely from the Commission's findings and reflected only the social repugnance of the appellant's misconduct. He also considered that the significant media attention to this case was not exceptional given the scrutiny one should expect would be given to those who commit securities fraud. I find no error in the judge's conclusion that the stigma suffered by the appellant did not reflect the degree of fault for her perpetration of the scheme and was not comparable to that attached to a criminal conviction.

[104] The appellant submitted that the effect of the \$33M AMP is a "virtual life sentence in debtor's prison with no hope of escape". I appreciate that \$33M is a crushing debt, but so is half that amount. I also appreciate that the appellant will likely never be able to pay it, but it does not necessarily follow from this that the AMP is punitive in effect.

[105] First of all, the appellant cannot be imprisoned for failing to pay an AMP. It can only be enforced pursuant to s. 163 of the Act as if it were a judgment of the Supreme Court. Second, the Commission's ability to enforce the AMP is very limited. Because the appellant declared bankruptcy before the penalty was imposed, the

Commission will not be able to seize any assets, and any attempt to garnish her wages will be limited.

[106] Given the timing of the appellant's bankruptcy, it is true that she will likely remain obligated to pay the AMP after a discharge. However, the Commission has not yet taken any enforcement measures and it is unlikely to do so here, where the appellant has extremely limited assets and little prospect in the foreseeable future of acquiring any. In any event, I agree with the respondent that the stress associated with long-term indebtedness does not in itself render the effect of the AMP to be punitive. As the judge noted, one may question why, in these circumstances, the appellant chose not to challenge the AMP by way of an appeal to this Court under s. 167 of the *Act*.

Conclusion

[107] For all of these reasons, it is my view that the trial judge was correct in concluding that the AMP imposed by the Commission does not amount to a true penal consequence. Its quantum was determined by regulatory considerations that focused on general deterrence, distinct from the criminal law sentencing principles of denunciation and retribution. Any proceeds realized on an AMP are allocated by the Commission for the benefit of third parties. The stigma resulting from the Commission's findings of fraud against the appellant is not equivalent to a criminal conviction, and the effect of the AMP on her, while significant, cannot be said to be truly punitive.

Is the true penal consequence test impossible to achieve?

[108] As noted above, the appellant suggested that if a penalty of the magnitude here does not meet the second part of the *Wigglesworth* test, no case involving a fine ever can. In other words, the test is a chimera; it is illusory and impossible to achieve.

[109] There is no question that it is indeed difficult to meet the second part of the *Wigglesworth* test where a proceeding fails the first part. In my view, this flows from

the fact that in such circumstances, the inquiry is directed to a penalty issued pursuant to valid administrative proceedings operating within a defined statutory mandate.

Wilson J. recognized this in *Wigglesworth*, as she found the possibility of a particular proceeding failing the by nature test but passing the true penal consequence test “difficult to conceive”, and the court in *Guindon* acknowledged the same.

Nevertheless, Wilson J. found *Wigglesworth* to be the unusual case where the true penal consequence test applied to proceedings that were not criminal in nature. We were referred to no case since *Wigglesworth* (other than the minority judgment in *R. v. Shubley*, [1990] 1 S.C.R. 3) which has come to the same conclusion.

[110] The appellant characterized this case as involving the confluence of administrative and criminal law. I agree with that, but the appellant’s submission focused on criminal law without properly addressing administrative law principles. She relied on the AMP imposed on her to engage the application of s. 11(h) of the *Charter* but at the same time asserted that the AMP was beyond the Commission’s legislative mandate. This is inconsistent.

[111] If the AMP was beyond the Commission’s mandate (and this was not disputed), such a sanction is vulnerable to be set aside on appeal as invalid. However, rather than challenging the sanction by way of an appeal, the appellant chose to seek a stay of proceedings on the assumption that the AMP is a valid and enforceable order.

[112] *Wigglesworth* did not directly address the validity of a penalty with true penal consequences imposed by an administrative tribunal, as this was not before the court. However, the reasons of Wilson J. indicate that she was concerned about this. In the unusual circumstances there, where the RCMP Service Court had the power to imprison, she expressed “grave doubts” whether any administrative body or official could ever imprison an individual. This was stated in the context of her “second caveat” to the proposition that punitive forms of disciplinary measures such as fines or imprisonment are indistinguishable from criminal punishment (at 561–561):

... I have grave doubts whether any body or official which exists in order to achieve some administrative or private disciplinary purpose can ever imprison an individual. Such a deprivation of liberty seems justified as being in accordance with fundamental justice under s. 7 of the *Charter* only when a public wrong or transgression against society, as opposed to an internal wrong, is committed. However, as this was not argued before us in this appeal I shall assume that it is possible that the “by nature” test can be failed but the “true penal consequence” test passed...

[Emphasis added.]

[113] What I read from this “caveat” is that the assumption that the “by nature” test can be failed but the “true penal consequence” test passed is predicated upon a valid and enforceable punitive order having been imposed by the administrative body. Otherwise, there would be no basis to consider a stay of subsequent criminal proceedings as contrary to s. 11(h). In other words, the *Wigglesworth* test assumes, without deciding, that an administrative body could issue a valid sanction that imposes “true penal consequences” upon an individual.

[114] The trial judge was alive to this issue, having raised the question of whether the appellant’s application for a stay was a collateral attack on the Commission’s order. He concluded that it was not, since the appellant was not seeking to avoid the consequences of the sanction.

[115] In *Wigglesworth*, Wilson J. made it clear that the power of an administrative body to fine without attracting the application of s. 11 is restricted to the power to do so “in order to achieve the particular private purpose”. Similarly, in *Rowan*, Sharpe J.A. held, at para. 41, that the appropriate remedy to protect the rights guaranteed by s. 11 where there is unlimited power to impose a fine is

... to limit the tribunal’s discretion so that it may only impose penalties that are consistent with the purpose of maintaining discipline and order within a particular sphere of activity.

[116] In my view, an AMP cannot be a true penal consequence for the purpose of s. 11 of the *Charter* and remain a valid exercise of administrative power, or at least an enforceable sanction. The Commission’s jurisdiction under ss. 161 and 162 of the *Act* is clearly limited to sanctions that are not penal in nature. Therefore, an AMP

imposed under s. 162 by its very nature is limited to the objectives under the *Act*, and unless directly challenged on appeal, it is presumptively valid and not a true penal consequence.

[117] As Justice Hunter points out, if the Commission imposes a sanction that oversteps this jurisdiction, the appropriate remedy is by way of an appeal under s. 167. To seek a stay of validly constituted criminal proceedings under s. 11(h) of the *Charter* on the basis of a sanction imposed that, if truly punitive, ought to be overturned on appeal, illustrates why the two parts of the *Wigglesworth* test will rarely, if ever, lead to different conclusions, and why my colleague's approach provides a sensible basis for analysis in the context in which this appeal was brought.

3. Does s. 11(h) of the *Charter* preclude a criminal prosecution for the "same offence"?

[118] In the absence of a finding that the AMP constitutes a true penal consequence, the appellant is not a person "charged with an offence" within the meaning of s. 11 of the *Charter*. Thus s. 11(h) of the *Charter* does not preclude a criminal prosecution against her for fraud under s. 380 of the *Criminal Code*.

4. Is the criminal proceeding an abuse of process contrary to s. 7 of the *Charter*?

[119] The appellant contends, in the alternative, that the criminal prosecution against her is an abuse of process, contrary to s. 7 of the *Charter*. Section 7 provides:

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

[120] The appellant relied on the following *obiter* comment by the majority in *Guindon*, at para. 69, to support her argument:

Should an individual be assessed an administrative monetary penalty and subsequently face criminal prosecution for the same conduct (or vice versa), that individual may argue that bringing the second proceedings in the particular circumstances is an abuse of process. [2]

[121] In the referenced footnote, the court noted that ss. 238(3) and 239(3) of the *Income Tax Act* “prevent an individual from being liable for any penalty assessed under the administrative monetary penalty provisions after the individual is convicted of an offence under the Act for the same conduct”. In other words, the *Income Tax Act* itself precludes such a course of action.

[122] The appellant referred to other statutes that expressly preclude a prosecution for an offence after an administrative penalty has been imposed: see, for example, ss. 164(3) and (4) of the *Business Practices and Consumer Protection Act*, S.B.C. 2004, c. 2. She also referred to the options under the Act to pursue either an administrative penalty under s. 162 or to prosecute an offence under either s. 57(b) of the Act or s. 380 of the *Criminal Code*, arguing that it “would offend society’s fundamental notions of decency and fair play for the state to pursue both a significant AMP and a criminal prosecution for the exact same misconduct”.

[123] The trial judge considered these arguments and concluded, rightly in my view, that the prosecutorial conduct in advancing the criminal proceeding did not amount to an abuse of process contrary to s. 7 of the *Charter*.

[124] A stay of proceedings for an abuse of process is the most drastic remedy a criminal court can order and will be warranted only in “the clearest of cases”: *R. v. Babos*, 2014 SCC 16 at paras. 30–31. As set out in *R. v. O’Connor*, [1995] 4 S.C.R. 411, such cases generally fall into two categories: (1) the main category, where state conduct compromises the fairness of an accused’s trial; and (2) a residual category, where state conduct does not compromise trial fairness but risks undermining the integrity of the judicial process. The appellant’s argument relies on the residual category.

[125] As discussed in *Babos* at para. 35, when the residual category is invoked,

... the question is whether the state has engaged in conduct that is offensive to societal notions of fair play and decency and whether proceeding with a trial in the face of that conduct would be harmful to the integrity of the justice system.

[126] I do not agree with the appellant that the state conduct in proceeding with a criminal prosecution after the conclusion of the Commission's administrative proceedings offends society's fundamental notions of decency and fair play. The criminal proceedings have been pending for a long time. The investigation commenced in January 2012, around the same time as the Commission investigation, and the information was sworn in November 2013, before almost all of the proceedings before the Commission. There is nothing in the *Act* – in contrast to the legislation referred to by the appellant – which precludes a *Criminal Code* prosecution following the imposition of an AMP. In my opinion, the *obiter* comments in *Guindon* do not support a finding of abuse of process in the circumstances here.

[127] I agree with the trial judge that the appellant's conduct has not been redressed to society at large and that a stay of proceedings in this case would likely cause the public to lose confidence in the integrity of the justice system.

Conclusion

[128] For all of these reasons, I would dismiss the appeal.

“The Honourable Madam Justice Fisher”

I AGREE:

“The Honourable Chief Justice Bauman”

Reasons for Judgment of the Honourable Mr. Justice Hunter:

[129] I have had the privilege of reading in draft the judgment of Justice Fisher and I agree with her that this appeal must be dismissed. I write separately to express my opinion that the proper approach to resolving the issues in this case is not to assess the legal character of the \$33 million penalty that was imposed by the tribunal, but rather to analyze the nature of the statutory jurisdiction being exercised by the tribunal. This exercise is prospective, not retrospective.

[130] The central question in this appeal is whether Ms. Samji was “charged with an offence” within the meaning of s. 11 of the *Charter of Rights and Freedoms* when the British Columbia Securities Commission instituted proceedings against her under ss. 161 and 162 of the *Securities Act*, R.S.B.C. 1996, c. 418. For ease of reference, I will refer to an offence within the meaning of s. 11 of the *Charter* as a s. 11 offence.

[131] If Ms. Samji was charged with a s. 11 offence and “found guilty and punished for the offence” in the words of s. 11(h), the next question is whether the *Criminal Code* offence with which she was subsequently charged was the same offence, in which case the protection against double jeopardy would require a stay of the criminal charge. But if she was not charged with a s.11 offence before the Securities Commission, s. 11 has no application to her *Criminal Code* charge and the appeal based on s. 11(h) must fail, without regard for the sanction actually imposed by the Commission.

Analysis of the s. 11 Issue

[132] The appellant has approached this appeal on the footing that the central question I have described is to be resolved by examining the \$33 million penalty imposed by the Securities Commission and determining whether it was a “true penal consequence”.

[133] In my respectful view, whether the penalty actually imposed was a true penal consequence is not relevant to the determination as to whether Ms. Samji was charged with a s. 11 offence. The appellant’s approach conflates two separate

questions. The first is whether any person subject to an enforcement proceeding under s. 161 of the *Securities Act* is charged with a s. 11 offence. The second is whether the sanction issued in this particular case by the Commission is *intra vires* the Commission or invalid because it is a true penal consequence.

[134] Whether Ms. Samji was charged with a s. 11 offence must in my view be determined by analyzing the statute under which the proceedings took place, not by assessing the ultimate outcome. If s. 161 is criminal in nature or provides for true penal consequences, s. 11 applies to all s. 161 proceedings. If not, s. 11 applies to none of them. In neither case is the penalty actually imposed a factor in the analysis.

[135] There has been no suggestion that s. 161 establishes a process that is “criminal by nature” within the meaning of the *Wigglesworth* test. The sole issue is whether the “true penal consequences” test has been met.

[136] Whether the sanction actually imposed by the Commission is *intra vires* must be determined after the sanction has been imposed. The appropriate forum for such a determination is an appeal of an administrative monetary penalty pursuant to s. 167 of the *Act*.

[137] If the penalty is a true penal consequence and if the Commission does not have the authority to impose true penal consequences, it is *ultra vires* and must be set aside if challenged. If it is not a true penal consequence, it stands, subject to any other considerations that might apply to appellate review of the exercise of statutory authority. In neither case can it provide the basis for a stay of proceedings of an otherwise valid criminal charge. An *ultra vires* sanction by an administrative tribunal cannot bar an otherwise valid criminal charge.

[138] Ms. Samji did not appeal the \$33 million administrative monetary penalty. The consequence of her failure to appeal is in my view that the monetary penalty stands, whether or not it is *ultra vires* as a true penal consequence. To analyze the penalty as if this were an appeal or judicial review of the Commission’s decision would be tantamount to a collateral attack on the sanction without the benefit of submissions

by the Commission. The proper forum for such an analysis is an appeal of the Commission's decision.

[139] For these reasons, as will be developed further in this judgment, I do not consider it necessary or appropriate to decide whether the \$33 million administrative monetary penalty is a true penal consequence. The question that arises in a s. 11(h) challenge is whether Ms. Samji was charged with an offence when the Commission instituted s. 161 proceedings against her. I conclude she was not, by analyzing ss. 161 and 162 by reference to the *Wigglesworth* test but without regard to the sanction eventually imposed by the Commission.

[140] Before explaining why I believe this issue must be decided without regard to the sanction imposed, I should explain why I regard the analytical structure in which to resolve this issue as sufficiently important to prepare separate reasons, given that I am in agreement with my colleague as to the disposition of this appeal.

[141] If s. 11 applies to an administrative proceeding, a panoply of constitutional protections accrues to the person charged including the presumption of innocence, the right not to testify, the right to be tried by an independent tribunal and other rights typically associated with criminal as opposed to regulatory proceedings. If a statutory process to which s. 11 applies cannot be read as providing for these protections, it would be constitutionally invalid: *Guindon v. Canada*, 2015 SCC 41 at para. 41.

[142] Under the approach that permits consideration of the penalty actually imposed in determining whether a s. 11 offence has been created, no one would know whether a proceeding was subject to the protections of s. 11 until the proceeding was over, the sanction had been imposed, and a reviewing court had determined whether or not the sanction was a true penal consequence. That in my view is not a workable theory of constitutional analysis and is not required by the *Charter* or the jurisprudence of the Supreme Court of Canada.

[143] As I read Justice Wilson's judgment in *Wigglesworth*, the test she proposed and the Court adopted resolves this problem. For every statutory regime that

provides an administrative tribunal with the authority to impose penalties, an analysis of the statute will determine whether or not a person subject to the jurisdiction of the tribunal has been charged with a s. 11 offence and is therefore entitled to s. 11 protection. In no circumstance is it necessary to await the ultimate decision of the tribunal to make that determination.

[144] Before turning to the test developed in *Wigglesworth*, I propose setting out the statutory framework at issue and how this Court has interpreted these remedial provisions.

Statutory Framework

[145] The *Securities Act* of British Columbia contains two very different mechanisms for enforcement of the statutory requirements.

[146] Section 155 is an explicit offence provision. It reads in part as follows:

155 (1) A person who does any of the following commits an offence:

(a) fails to file, provide, deliver or send a record that

(i) is required to be filed, provided, delivered or sent under this Act, or

(ii) is required to be filed, provided, delivered or sent under this Act within the time required under this Act;

(b) contravenes any of section 34, 49 to 57, 57.2, 57.3, 57.5, 57.6, 58, 59, 61, 85 (b), 87, 121, 122, 124, 125, 148 or 168.1 (1) of this Act;

(c) fails to comply with a decision made under this Act;

(d) contravenes any of the provisions of the regulations that are specified by regulation for the purpose of this paragraph;

(e) contravenes any of the provisions of the commission rules that are specified by regulation for the purpose of this paragraph.

(2) A person that commits an offence under this Act is liable to a fine of not more than \$3 million, or to imprisonment for not more than 3 years, or both.

...

[147] This provision is clearly a s. 11 offence provision. Imprisonment is a possible penalty. If a person was charged under this section, s. 11 protections would apply. Ms. Samji was not charged with an offence under s. 155.

[148] By contrast, ss. 161 and 162, the sections at issue in this appeal, are regulatory provisions designed to protect the integrity of capital markets.

[149] The provisions at issue fall under the heading “Enforcement Orders” and read in part as follows:

161 (1) If the commission or the executive director considers it to be in the public interest, the commission or the executive director, after a hearing, may order one or more of the following:

(a) that a person comply with or cease contravening, and that the directors and officers of the person cause the person to comply with or cease contravening,

(i) a provision of this Act or the regulations,

(ii) a decision, whether or not the decision has been filed under section 163, or

(iii) a bylaw, rule, or other regulatory instrument or policy or a direction, decision, order or ruling made under a bylaw, rule or other regulatory instrument or policy of a self regulatory body, exchange or quotation and trade reporting system, as the case may be, that has been recognized by the commission under section 24;

(b) that

(i) all persons,

(ii) the person or persons named in the order, or

(iii) one or more classes of persons

cease trading in, or be prohibited from purchasing, any securities or exchange contracts, a specified security or exchange contract or a specified class of securities or class of exchange contracts;

...

(d) that a person

(i) resign any position that the person holds as a director or officer of an issuer or registrant,

(ii) is prohibited from becoming or acting as a director or officer of any issuer or registrant,

(iii) is prohibited from becoming or acting as a registrant or promoter,

(iv) is prohibited from acting in a management or consultative capacity in connection with activities in the securities market, or

(v) is prohibited from engaging in investor relations activities;

...

(g) if a person has not complied with this Act, the regulations or a decision of the commission or the executive director, that the person pay to the commission any amount obtained, or payment or loss avoided, directly or indirectly, as a result of the failure to comply or the contravention;

...

Administrative penalty

162 If the commission, after a hearing,

(a) determines that a person has contravened

(i) a provision of this Act or of the regulations, or

(ii) a decision, whether or not the decision has been filed under section 163, and

(b) considers it to be in the public interest to make the order,

the commission may order the person to pay the commission an administrative penalty of not more than \$1 million for each contravention.

Prior Consideration of ss. 161 and 162

[150] Public interest jurisdiction similar to s. 161 has been described as “neither remedial nor punitive: it is protective and preventive, intended to be exercised to prevent likely future harm” to the capital markets: *Committee for the Equal Treatment of Asbestos Minority Shareholders v. Ontario (Securities Commission)*, 2001 SCC 37 at para. 42.

[151] In considering similar legislation in Ontario in the *Asbestos* judgment, the Supreme Court of Canada has described the array of sanctions available to Securities Commissions:

[43] The enforcement techniques in the Act span a broad spectrum from purely regulatory or administrative sanctions to serious criminal penalties. The administrative sanctions are the most frequently used sanctions and are grouped together in s. 127 as “Orders in the public interest”. Such orders are not punitive: *Re Albino* (1991), 14 O.S.C.B. 365. Rather, the purpose of an order under s. 127 is to restrain future conduct that is likely to be prejudicial to the public interest in fair and efficient capital markets. The role of the OSC under s. 127 is to protect the public interest by removing from the capital markets those whose past conduct is so abusive as to warrant apprehension of future conduct detrimental to the integrity of the capital markets.

[152] In *Thow v. British Columbia (Securities Commission)*, 2009 BCCA 46, this Court held at para. 30 that the comments of the Supreme Court of Canada in *Asbestos* applied to the broadened powers under s. 161 of the *Securities Act*. The principles arising from *Asbestos*, as well as a subsequent decision referred to by my colleague, *Re Cartaway Resources Corp.*, 2004 SCC 26, were summarized in this way:

[38] *Asbestos* and *Cartaway* establish that securities commissions, not being criminal courts, may not impose penalties that are "punitive" in the sense of being designed to punish an offender for past transgressions. They may, however, impose penalties that place burdens (even very heavy burdens) on offenders, as long as the penalties are designed to encourage compliance with regulations in the future. In essence, penalties may be directed at general or specific deterrence and at protection of the public; penalties that are purely retributive or denunciatory, however, are not appropriately imposed by administrative tribunals.

[39] *Asbestos* and *Cartaway*, then, are cases about the proper role of administrative tribunals in administering regulatory regimes. They concern the limits of proper administrative sanctions. In defining those limits, the Supreme Court of Canada distinguished between penal orders that function to punish an offender and those that attempt to protect society. The former are the exclusive purview of the courts administering in punishing offences; the latter may be imposed, as well, by administrative bodies.

[153] In *Walker v. British Columbia (Securities Commission)*, 2011 BCCA 415 at para. 74, this Court referred to these comments and applied them to ss. 161 and 162, the penalty provisions relevant to this appeal:

... As discussed above, the Commission, in its powers under ss. 161 and 162 of the *Act*, is not imposing penal sanctions, but is acting under its mandate to protect the public by providing specific and general deterrence. This deterrence, as it is not penal, is not necessarily related to the other ways Walker has been affected by other aspects of his act.

[154] The other monetary penalty that is available to the Commission is the disgorgement provision in s. 161(1)(g). This Court has recently confirmed that the purpose of this provision is "to deter persons from contravening the *Act* by removing the incentive to contravene" and specifically "not to punish the contravener": *Poonian v. British Columbia Securities Commission*, 2017 BCCA 207 at para. 143.

[155] With that summary of the legislative provisions at issue in this appeal, I turn to the test in *Wigglesworth*.

The Wigglesworth Test

[156] In *Wigglesworth*, the appellant had been charged with what was described as a “major service offence” under the *Royal Canadian Mounted Police Act*, R.S.C. 1970, c. R-9. The offence was punishable by a fine or imprisonment for up to one year.

[157] Mr. Wigglesworth had been assessed a fine of \$300. Section 11(h) of the *Charter* reads in relevant part that, “Any person charged with an offence has the right ... if found guilty and punished for the offence, not to be tried or punished for it again ...” Relying on s. 11(h) of the *Charter*, he sought a stay of a subsequent *Criminal Code* charge that was based on the same conduct. This is the same argument that is advanced in this appeal.

[158] Thus, the first question before the Court was whether Mr. Wigglesworth had been charged with a s. 11 offence when he was charged with the major service offence under the *Royal Canadian Mounted Police Act*.

[159] Consideration of this issue led to the *Wigglesworth* test referred to by my colleague which I regard as dispositive of the present appeal. The test was described as follows (at 559):

While it is easy to state that those involved in a criminal or penal matter are to enjoy the rights guaranteed by s. 11, it is difficult to formulate a precise test to be applied in determining whether specific proceedings are proceedings in respect of a criminal or penal matter so as to fall within the ambit of the section. The phrase “criminal and penal matters” which appears in the marginal note would seem to suggest that a matter could fall within s. 11 either because by its very nature it is a criminal proceeding or because a conviction in respect of the offence may lead to a true penal consequence. I believe that a matter could fall within s. 11 under either branch.

[Emphasis added.]

[160] The Court held that the major service offence of which Mr. Wigglesworth had been convicted was not criminal by nature, but nevertheless fell within s. 11 for the following reason (at 563–564):

... But it is apparent that an officer charged under the Code of Discipline faces a true penal consequence. He or she may be imprisoned for one year pursuant to s. 36(1) of the *Royal Canadian Mounted Police Act* if he or she is found guilty of a major service offence. As was stated by Joyal J. in *Van Rassel v. Canada*, [1987] 1 F.C. 473, a case which also dealt with a s. 11(h) claim with respect to proceedings for a major service offence under the *Royal Canadian Mounted Police Act*, “The statute as a consequence [of the provision for imprisonment] is as much a penal statute as is the *Criminal Code*” (at p. 484). This would seem, therefore, to be that unusual case where proceedings have failed the “by nature” test but have passed the “true penal consequence” test.

[161] Mr. Wigglesworth faced a true penal consequence not because of the penalty imposed (which was minor), but because he was in jeopardy of a sentence of imprisonment. The analysis depended on the statutory authority of the tribunal viewed at the outset, not on the penalty actually imposed.

[162] I can find no indication in *Wigglesworth* that the answer to the question whether Mr. Wigglesworth had been charged with a s. 11 offence was in any way affected by the penalty actually imposed. The analysis in the judgment seems to be entirely a prospective one, based on what penalty he could have incurred, having in mind the statutory authority of the tribunal.

[163] Justice Wilson elaborated on the concept of true penal consequences in this way (at 561):

In my opinion, a true penal consequence which would attract the application of s. 11 is imprisonment or a fine which by its magnitude would appear to be imposed for the purpose of redressing the wrong done to society at large rather than to the maintenance of internal discipline within the limited sphere of activity.

[164] It is this language that seems to have led to what I consider to be an erroneous approach – an assessment of a fine actually imposed to determine whether it “would appear to be imposed for the purpose of redressing the wrong done to society”. The appellant has interpreted this as a requirement to determine

whether a particular penalty “would appear to have been imposed for the purpose of redressing the wrong done to society”, but in my view the analysis should properly be on the legislative intent, not the tribunal’s intention. The tribunal’s intention or purpose in imposing the penalty will be relevant to assessing on appeal or judicial review whether the exercise of statutory authority was lawful or appropriate, but it is the legislative intent that determines whether the proceeding “may lead to a true penal consequence.”

[165] When the relevant sanction is a substantial fine rather than imprisonment, it may be difficult to determine by a statutory analysis whether the legislative intent was to provide the tribunal with the authority to impose a true penal consequence. However, Justice Wilson in *Wigglesworth* has provided the operative principle to assist in making that determination (at 561):

... It is my view that if a body or an official has an unlimited power to fine, and if it does not afford the rights enumerated under s. 11, it cannot impose fines designed to redress the harm done to society at large. Instead, it is restricted to the power to impose fines in order to achieve the particular private purpose.

[166] Thus, if an administrative tribunal exercising regulatory authority in a particular area has the power to impose monetary penalties that could theoretically amount to true penal consequences, that power must be restricted to monetary penalties that are intended to achieve the purposes of the empowering legislation. A penalty that was a true penal consequence would be *ultra vires*.

[167] The *Wigglesworth* test provides a workable standard to determine at the outset of proceedings whether a person subject to administrative penalties has been charged with a s. 11 offence and is entitled to the protection of s. 11 rights. If the statute creates a process that is criminal by nature, s. 11 applies. If the statute authorizes the tribunal to impose a penalty that has a true penal consequence, s. 11 applies, regardless of what penalty the tribunal ultimately imposes.

[168] If the statute is unclear as to whether it authorizes the tribunal to impose a penalty that has a true penal consequence but permits the tribunal to impose a fine

of indeterminate amount, the dictum of Wilson J. applies. The statutory authority will be interpreted so as to exclude the authority to impose true penal consequences and s. 11 will not apply to the administrative proceedings, regardless of the ultimate sanction imposed.

Subsequent Considerations of the Wigglesworth Test

[169] My colleague has expressed the view that there is authority to support the approach of considering the actual penalty imposed in order to determine whether s. 11 is engaged, and I acknowledge that there are passages in some of the decisions she cites that may seem inconsistent with what I consider to be the clear direction of *Wigglesworth*. In my view, however, these apparent inconsistencies arise from the appellate context in which these cases have been decided and not from any change in the prospective nature of the *Wigglesworth* test.

[170] To assess this proposition, I propose to review three cases that are binding on this Court, *Martineau v. M.N.R.*, 2004 SCC 81, *Guindon v. Canada*, 2015 SCC 41, and *Goodwin v. British Columbia (Superintendent of Motor Vehicles)*, 2015 SCC 46, as well as two judgments of appellate courts that are not binding but require respectful consideration, *Lavallee v. Alberta (Securities Commission)*, 2010 ABCA 48 and *Rowan v. Ontario (Securities Commission)*, 2012 ONCA 208.

1. *Martineau v. M.N.R.*

[171] The issue in *Martineau* was described by the Supreme Court of Canada as whether the appellant may, in the course of an action under s. 135 of the *Customs Act*, R.S.C. 1985, c.1 (2nd Supp.), avail himself of the right against self-incrimination guaranteed by s. 11 of the *Charter*. The appellant had received a written notice from a customs officer demanding that the appellant pay \$315,458 which was the deemed value of goods he allegedly attempted to export by making false statements.

[172] The procedure for appealing such an order was an action under s. 135 of the *Customs Act*. Mr. Martineau availed himself of that opportunity and commenced the

s. 135 action. In that unusual context, the Court was called upon to determine whether the demand for payment amounted to a s. 11 offence that entitled him to invoke the protection against self-incrimination and thereby avoid testifying at an examination for discovery. The Court held that it did not.

[173] While the Court did respond to (and reject) an argument that the magnitude of the amount claimed demonstrated that it was a true penal consequence as explained in *Wigglesworth*, the ratio of the decision in my view can be found in the conclusion of the judgment, which I reproduce in full:

[87] To characterize the appellant as a “person charged with an offence” would have a significant impact on the entire body of legislation whose purpose is taxation and economic regulation. To recognize an alleged offender in these spheres as a “person charged with an offence”, even where he or she is not in fact charged, would undermine the effectiveness of the system and substantially increase the cost of administering it.

[88] In this context, an analysis of s. 124 of the CA [Customs Act] and its related provisions shows that the process they establish is not penal in nature and that the sanction provided for does not have true penal consequences within the meaning of *Wigglesworth*.

[89] Therefore, Rule 236(2) of the *FCR* does not violate s. 11(c) of the *Charter* by requiring the appellant, as plaintiff in an action under s. 135 of the *CA*, to submit to an examination for discovery.

[Emphasis added.]

[174] Since this was an appeal of the sanction imposed, some consideration of the appropriateness of the sanction was a necessary part of the appellate process. However, it was the analysis of the statutory scheme, not a consideration of the specific demand made, that determined whether Mr. Martineau was charged with an offence within the meaning of s. 11. This seems to me consistent with the *Wigglesworth* prospective test.

2. *Guindon v. Canada*

[175] In *Guindon*, the question was whether s. 163.2 of the *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.), which imposes monetary penalties on every person who makes a false statement that could be used by another person for purposes of the

Income Tax Act creates an offence within the meaning of s. 11. This question also arose in the context of an appeal from the decision of a statutory decision-maker.

[176] The Court summarized its conclusions at the outset of its judgment:

[4] ... The substantive issue is whether s. 163.2(4) creates a true criminal offence and therefore engages the protections provided for under s. 11.

[5] ... In our view, proceedings under s. 163.2 are of an administrative nature. Ms. Guindon therefore is not a person “charged with an offence” and accordingly the protections under s. 11 of the *Charter* do not apply. In the result, we would dismiss the appeal.

[177] After reviewing the facts, the Court reiterated the question to be addressed in this way:

[41] ... The basic question is whether, as Ms. Guindon submits, s. 163.2 creates “an offence” for the purposes of s. 11 and the answer depends, as we shall explain, on whether s. 163.2 is criminal in nature or provides for true penal consequences. In our view, neither is the case and s. 11 does not apply to these proceedings.

[Emphasis added.]

[178] This is the basic question in the case at bar – whether ss. 161 and 162 of the *Securities Act* create an offence for the purposes of s. 11.

[179] Justice Fisher has referenced the key paragraphs in *Guindon* in her judgment, but I would like to set these paragraphs out again in order to emphasize what in my view are the prospective elements of the test as reiterated in *Guindon*:

[49] When the criminal in nature test is understood as considering only the nature of the proceedings, the independent value of each test becomes clear. The criminal in nature test identifies provisions that are criminal because Parliament or the legislature has provided for proceedings whose attributes and purpose show that the penalty is to be imposed via criminal proceedings. The true penal consequence test, on the other hand, looks at whether an ostensibly administrative or regulatory provision nonetheless engages s. 11 of the *Charter* because it may result in punitive consequences. While there is inevitably some overlap in the analysis, the important thing is to consider all relevant factors, acknowledging that only rarely, as in *Wigglesworth*, will the two branches of the test lead to different conclusions.

[50] Moreover, the analysis is not circular: both tests ask distinct questions that evaluate the two different ways in which a provision could be a criminal offence for the purpose of s. 11. The criminal in nature test focuses on the

process while the penal consequences test focuses on its potential impact on the person subject to the proceeding.

[Emphasis added.]

[180] I acknowledge that in paras. 75 to 81 the Court did discuss the principles applicable to true penal consequence with reference to cases in which sanctions had already been imposed, but in my view the more salient passage is the one that immediately follows this discussion and applies it to the case before the Court:

[82] Section 163.2 of the *ITA* does not impose any “true penal consequence”.

[181] In addition, the Court considered whether the penalty imposed was a true penal consequence, a consideration that is likely the source of the after-the-fact analysis asserted by the appellant in this appeal. However, I do not discern a nexus between the comments of the Court on this point and the answer to the question whether Ms. Guindon was charged with an offence when monetary penalties were assessed against her.

[182] Since the Court was exercising appellate jurisdiction over the decision imposing the penalties, it was necessary for the penalty to be reviewed. In the case at bar, Ms. Samji has not appealed the sanction imposed on her, and it is unnecessary for us to review that sanction.

[183] The final conclusion of the Court on the s. 11 issue focuses on the statutory scheme, not the specific penalty imposed:

[89] We conclude that the proceeding under s. 163.2 is not criminal in nature and does not lead to the imposition of true penal consequences. We agree with Stratas J.A., writing for the Federal Court of Appeal, that “the assessment of a penalty under section 163.2 is not the equivalent of being ‘charged with a [criminal] offence.’ Accordingly, none of the section 11 rights apply in section 163.2 proceedings”: para. 37.

[184] I conclude from the manner in which the Court stated the question and the emphasis on potential impact, that the Court did not intend to alter the s. 11 test from a test based on the statutory scheme to include an after-the-fact assessment of the penalty imposed.

3. *Goodwin v. British Columbia (Superintendent of Motor Vehicles)*

[185] Shortly after *Guindon*, the Supreme Court of Canada again commented on the s. 11 analysis, this time in the context of a challenge to British Columbia's immediate roadside prohibition regime referred to as ARP.

[186] The issue had arisen as a challenge to the constitutional validity of the ARP provisions based on several grounds, including the argument that the ARP regime created a s. 11 offence. The trial judge, in a judgment indexed as *Sivia v. British Columbia (Superintendent of Motor Vehicles)*, 2011 BCSC 1639, had approached the issue in this way:

[166] The impugned provisions of the MVA that create the ARP regime provide for the suspension of an individual's license, and for the imposition of monetary penalties and other costs. ...

[167] In order to determine if these penalties and costs amount to "true penal consequences" I must look at the consequences of the ARP regime as a whole ...

[187] After examining the penalties available under the statutory provisions, Sigurdson J. concluded that "the ARP regime does not impose true penal consequences" (at para. 181). This approach of considering the s. 11 issue by examining the sanctions available under the statutory regime rather than the penalties imposed on the appellants is in keeping with the *Wigglesworth* test as explained earlier in this judgment.

[188] The judgment of Sigurdson J. was affirmed by this Court in *Sivia v. British Columbia (Superintendent of Motor Vehicles)*, 2014 BCCA 79 and by the Supreme Court of Canada *sub. nom. Goodwin v. British Columbia*. The Supreme Court of Canada summarized its decision by stating that "s. 11 of the *Charter* is not engaged as the provincial regime does not create an 'offence'" (para. 4).

[189] The Supreme Court in *Goodwin* also confirmed the *Wigglesworth* analytical framework, characterizing *Guindon* as a reaffirmation of the *Wigglesworth* test:

[40] This Court recently reviewed and reaffirmed the s. 11 analytical framework developed in *Wigglesworth* and *Martineau*: see *Guindon v. Canada*, 2015 SCC 41, [2015] 3 S.C.R. 3. In *Wigglesworth*, this Court

concluded that s. 11 protections only apply to persons “prosecuted by the State for public offences involving punitive sanctions, i.e., criminal, quasi-criminal and regulatory offences, either federally or provincially enacted”: p. 554. Writing for the majority, Wilson J. stated that a matter falls within s. 11 where “by its very nature it is a criminal proceeding” or where a conviction “may lead to a true penal consequence”: p. 559. By contrast, administrative matters “instituted for the protection of the public in accordance with the policy of a statute” do not attract s. 11 protections: p. 560.

[190] After rejecting the argument that the roadside prohibitions met the criminal by nature test, the Court went on to assess the penal consequences test by reference to the possible sanctions in the statute:

[46] Whether such penalties amount to penal consequences must of course be assessed relative to the conduct in question and the regulatory objective. The driving prohibition relates directly to the regulatory terms and conditions under which a person may be licensed to drive. Vehicle impoundment is directly related to the removal of drivers from the road, and drivers may apply to the Superintendent for review, including on compassionate and economic hardship grounds: *MVA*, ss. 262 and 263. The fine is capped at \$500: *Motor Vehicle Act Regulations*, B.C. Reg. 26/58, s. 43.09. The remaining costs are tied to the various remedial programs, including installation of an ignition interlock device, and are incidental to the scheme’s objective of getting drivers and vehicles off the road. Such costs can hardly be considered to be penal, particularly when viewed in light of the public interest in removing a drunk driver from a roadway once detected.

[191] This appears to me to be consistent with the prospective approach in *Wigglesworth*.

4. *Lavallee v. Alberta (Securities Commission)*, 2010 ABCA 48

[192] The judgment of the Alberta Court of Appeal in *Lavallee* arose in a statutory setting more similar to the case at bar.

[193] The Alberta Securities Commission had issued two notices of hearing, each alleging fraudulent and illegal activity under provisions of the *Alberta Securities Act*, R.S.A. 2000, c. S-4 (the “*Alberta Act*”), analogous to s. 161 of the BC Act that is engaged in this appeal. The *Alberta Act* contained a provision similar to s. 162 of the BC Act that exposed the subject of such a notice to the possibility of administrative penalties of up to \$1 million for each contravention.

[194] Mr. Lavallee took the position that the potential penalties were penal consequences, triggering the application of s. 11. The hearing had not yet taken place when the case reached the courts, so no issue could arise in respect of the penalty actually imposed.

[195] The specific issue raised by Mr. Lavallee was a constitutional challenge to provisions not relevant to the case at bar, but in order to resolve the issue it was necessary for the Court to decide whether Mr. Lavallee was facing penal consequences such that s. 11 was engaged. The trial court had held that the potential administrative penalty of \$1 million per contravention was not a true penal consequence in light of the “legislative intent to ensure that the penalties are not simply considered another cost of doing business” (at para. 23). The Alberta Court of Appeal agreed.

[196] This analysis was conducted on an examination of the statutory scheme, not on a review of penalties which had not yet been imposed. It is consistent with the *Wigglesworth* test.

5. *Rowan v. Ontario (Securities Commission)*

[197] *Rowan* was a case similar to *Lavallee*, except that *Rowan* was an appeal of the decision of the Ontario Securities Commission, including the penalties that had been imposed by the Commission on the appellants. The appellants brought their appeal initially to the Ontario Divisional Court and then with leave to the Ontario Court of Appeal.

[198] It is this appellate context that in my view explains what at first blush appears to be some inconsistency in the Ontario Court of Appeal’s analysis of the issues before it.

[199] The appellants had been the subject of enforcement proceedings under the Ontario *Securities Act*, R.S.O. 1990, c. S-5, similar in nature to the provisions at issue in *Lavallee* and to s. 161 of the *BC Act*. The Ontario Securities Commission found that the appellants had breached Ontario securities law and had engaged in

conduct contrary to the public interest (as is the case with the appellant at bar). The Commission went on to impose administrative monetary penalties against the three appellants totalling approximately \$1.2 million.

[200] The central ground of appeal in *Rowan* was whether the section of the Ontario *Securities Act* that provided remedial authority to the Ontario Securities Commission to impose administrative penalties of up to \$1 million per contravention, as s. 162 does for the British Columbia Securities Commission, was constitutionally invalid as constituting a true penal consequence. Citing *Lavallee* with approval, the Ontario Court of Appeal rejected this argument and held that the provision permitting administrative penalties of up to \$1 million “is not *prima facie* penal” (at para. 52).

[201] Much of the Court’s analysis is entirely consistent with the *Wigglesworth* test, but portions of the judgment appear to be influenced by the fact that the Court was hearing an appeal of the Commission’s decision, including its sanctions.

[202] For example, the Court summarized its decision in para. 5 as follows;

In my view, the Commission and the Divisional Court correctly concluded that the only remedy available to the appellants under s. 11(d) of the Charter is to limit the authority of the Commission to impose AMPs [administrative monetary penalties] to levels that qualify as administrative, rather than penal, sanctions. The AMPs at issue here do not transgress that limit. Accordingly, I would dismiss the constitutional challenge to s. 127(1)(9). I would also dismiss the other grounds of appeal on the basis that [the] Divisional Court properly concluded that the Commission’s reasons are to be reviewed on a standard of reasonableness, and that they met that standard. The Commission provided careful and detailed reasons for its decision, making all the necessary findings to support the sanctions it imposed. I agree with the Divisional Court that the appellants have failed to show any basis for appellate intervention.

[203] The first sentence is consistent with the principle expressed by Wilson J. in *Wigglesworth* that I reproduced earlier in these reasons, and is consistent with the proposition that the Ontario Securities Commission did not have the jurisdiction to impose true penal consequences, which answers the s. 11 question. The balance of the paragraph considers the decision as made, but in the context of an appellate court reviewing the validity of sanctions imposed by an administrative tribunal.

[204] In a similar vein, the Ontario Court of Appeal relied on Wilson J.'s statement of principle to reject an argument that a statutory provision analogous to s. 162 of the *BC Act* should be struck down on the basis that it could authorize the imposition of a penalty of unlimited magnitude:

[41] ... the appropriate remedy to protect the rights guaranteed by s. 11 in the case of an unlimited power to impose a fine is not to nullify the power altogether, but rather to limit the tribunal's discretion so that it may only impose penalties that are consistent with the purpose of maintaining discipline and order within a particular sphere of activity.

[205] I recognize that in *Rowan* the Court appeared to reject what it characterized as an “*ex ante*” approach, but the analysis the Court followed to consider the s. 11 offence question appears to be largely based on such an approach. To the extent that the Court found it necessary to examine the actual penalty imposed, such an examination is consistent with the exercise of appellate jurisdiction in relation to the Commission's decision. It was necessary to examine the sanctions actually imposed as part of the appellate function of the Court, independent of the issue whether the Ontario *Securities Act* created a s. 11 offence.

[206] In the case at bar, while this Court is exercising an appellate jurisdiction, it is not the jurisdiction exercised by the Ontario Court of Appeal in *Rowan*. The validity and legality of the Commission's decision is not before us, as it was before the Ontario Court of Appeal. What we must decide is whether Ms. Samji was charged with a s. 11 offence in the proceeding initiated by the Commission. In my view, the answer to this question depends solely on the jurisdiction invoked by the Commission. It is to that issue that I now turn.

Application of the *Wigglesworth* test to the *Securities Act*

[207] In contradistinction to s. 155, there is nothing in the *Securities Act* that indicates that the Legislature intended to confer upon the Commission authority when conducting proceedings under s. 161 of the *Act* to impose penalties that have true penal consequences. Both the structure of the *Act* and this Court's jurisprudence are inconsistent with such a conclusion.

[208] Earlier in this judgment, I referred to judgments of this Court culminating in *Walker* that explained that ss. 161 and 162 are not penal in nature.

[209] The Court in *Walker* was dealing with a version of s. 162 that specified lower maximum administrative monetary penalties than the statute at issue in this appeal. The current s. 162 authorizes penalties to a maximum of \$1 million per contravention. While the allowable penalty has increased, the principle in *Walker* remains sound.

[210] As previously noted, both the Alberta Court of Appeal in *Lavallee* and the Ontario Court of Appeal in *Rowan* have held that the comparable sections of their Securities Acts that include the same \$1 million per contravention provision do not amount to true penal consequences.

[211] I agree, and would apply the same reasoning to s. 162. As the Supreme Court of Canada stated in *Guindon* at para. 80: “In some cases, sizable penalties are necessary so that the penalty is not simply considered a cost of doing business.”

[212] As well, unlike fines arising from s. 155 proceedings, administrative monetary penalties are paid to the Commission to be used for costs involved in the administration and enforcement of the *Act* and for any costs involved in operating the Commission: *Securities Act*, s. 15. In *Wigglesworth*, Wilson J. held that “One *indicium* of the purpose of a particular fine is how the body is to dispose of the fines that it collects”: at 561. The fact that the monetary penalties are to be used for the benefit of the Commission is a further indication of legislative intent that the monetary penalties are not penal in nature.

[213] Accordingly, in my opinion, neither s. 161 nor s. 162 authorize the Securities Commission to impose penalties that have true penal consequences. That being so, when Ms. Samji became the subject of proceedings under s. 161, she was not charged with an offence within the meaning of s. 11. As a result, there is no foundation for a stay pursuant to s. 11(h) and the appeal on that basis must be dismissed.

[214] Whether the administrative penalty actually imposed on Ms. Samji was a true penal consequence is not relevant to the analysis in my view. I express no opinion on the subject. If Ms. Samji wished to challenge the penalty, the appropriate forum to do so would have been an appeal under s. 167, at which the Commission would have been a respondent pursuant to s. 167(5).

[215] An appeal of the Commission's decision was the mechanism by which the administrative monetary penalty came before this Court in *Michaels v. British Columbia (Securities Commission)*, 2016 BCCA 144. Ms. Samji has chosen not to challenge the Commission's penalty by seeking leave to appeal it. That decision precludes our examination of the validity of the penalty in this proceeding. Under the *Wigglesworth* test, such an examination is unnecessary in any event.

The s. 7 Ground of Appeal

[216] I agree that Ms. Samji's ground of appeal based on s. 7 of the *Charter* must be dismissed for the reasons given by Justice Fisher.

Disposition

[217] For these reasons I agree with my colleague that the appeal must be dismissed.

"The Honourable Mr. Justice Hunter"

Her Majesty The Queen *Appellant*

v.

Harjit Singh Shoker *Respondent*

and

**Attorney General of Canada and Criminal
Lawyers' Association (Ontario)** *Interveners*

INDEXED AS: **R. v. SHOKER**

Neutral citation: **2006 SCC 44.**

File No.: 30779.

2006: February 14; 2006: October 13.

Present: McLachlin C.J. and Bastarache, Binnie, LeBel,
Fish, Abella and **Charron** JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR
BRITISH COLUMBIA

Criminal law — Sentencing — Probation — Accused convicted of entering a dwelling house with intent to commit sexual assault and sentenced to incarceration followed by two years of probation subject to conditions — Probation order requires accused to abstain from consumption and possession of alcohol and non-prescription narcotics and to provide bodily substances on demand by probation officer or peace officer to monitor compliance with abstention condition — Whether sentencing judge had jurisdiction under Criminal Code to authorize search and seizure of bodily substances as part of probation order — Criminal Code, R.S.C. 1985, c. C-46, ss. 732.1(3)(c), 732.1(3)(h).

The accused was convicted of breaking and entering a dwelling house with intent to commit sexual assault. A psychological pre-sentencing report revealed that accused blamed his drug use for his behaviour and recommended requiring the accused to submit to random urinalysis to manage his risk in the community. The accused was sentenced to imprisonment followed by probation. The probation order required that he abstain

Sa Majesté la Reine *Appelante*

c.

Harjit Singh Shoker *Intimé*

et

**Procureur général du Canada et Criminal
Lawyers' Association (Ontario)** *Intervenants*

RÉPERTORIÉ : **R. c. SHOKER**

Référence neutre : **2006 CSC 44.**

N° du greffe : 30779.

2006 : 14 février; 2006 : 13 octobre.

Présents : La juge en chef McLachlin et les juges
Bastarache, Binnie, LeBel, Fish, Abella et Charron.

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

Droit criminel — Détermination de la peine — Probation — Accusé déclaré coupable d'introduction dans une maison d'habitation avec l'intention d'y commettre une agression sexuelle et condamné à une peine d'emprisonnement suivie d'une période de probation de deux ans assortie de certaines conditions — Ordonnance de probation intimant à l'accusé de s'abstenir de consommer et de posséder de l'alcool et des narcotiques non vendus sur ordonnance et de fournir, à la demande d'un agent de probation ou d'un agent de la paix, des échantillons de substances corporelles permettant de vérifier si la condition interdisant la consommation et la possession de ces substances est respectée — Le Code criminel habilite-t-il un juge chargé de la détermination de la peine à autoriser le prélèvement de substances corporelles dans le cadre d'une ordonnance de probation? — Code criminel, L.R.C. 1985, ch. C-46, art. 732.1(3)c, 732.1(3)h.

L'accusé est déclaré coupable d'introduction par effraction dans une maison d'habitation avec l'intention d'y commettre une agression sexuelle. Un rapport psychologique prédécisionnel révèle que l'accusé attribue son comportement à sa consommation de drogue, et recommande de l'obliger à se soumettre à des analyses d'urine au hasard afin de gérer le risque qu'il présente pour la société. L'accusé est condamné à une

absolutely from the consumption and possession of alcohol and non-prescription narcotics and, to determine compliance with the abstention condition, that he submit to urinalysis, blood tests or breathalyzer tests upon the demand of a peace officer or probation officer. The order also stated that any positive reading would be a breach of the abstention condition. A majority of the Court of Appeal held that ss. 732.1(3)(c) and 732.1(3)(h) of the *Criminal Code* grant a sentencing judge statutory authority to include a monitoring condition in a probation order but that compelling the accused to provide bodily samples, in the absence of a governing regulatory or statutory framework, is contrary to s. 8 of the *Canadian Charter of Rights and Freedoms*. The Court of Appeal also held that the sentencing judge had no jurisdiction to predetermine that a positive reading was a breach of probation.

Held: The appeal should be dismissed.

Per McLachlin C.J. and Binnie, Fish, Abella and Charron JJ.: The majority of the Court of Appeal was correct to delete that part of the probation order compelling the accused to provide bodily samples and stating that any positive reading will be a breach of probation. Although a condition requiring abstention from consumption and possession of alcohol and non-prescription narcotics is authorized under the *Criminal Code*, and was reasonable in the accused's circumstances, the sentencing judge had no authority under ss. 732.1(3)(c) and 732.1(3)(h) of the *Code* to authorize a search and seizure of bodily substances as part of a probation order. Nor did he have jurisdiction to predetermine that any positive reading would constitute a breach of probation. [3] [17] [26]

Section 732.1(3)(c), which allows an abstention condition, defines a criminal offence, but enforcement powers are not implicit from the simple creation of an offence. While the power to demand bodily samples and the resulting analyses would undoubtedly assist in the enforcement of a s. 732.1(3)(c) abstention condition, it cannot be implied on that basis. Under s. 732.1(3)(h), a court is given a broad power to craft other reasonable conditions for the purpose of protecting society and for facilitating the accused's reintegration into the

peine d'emprisonnement suivie d'une période de probation. L'ordonnance de probation lui intime de s'abstenir totalement de consommer et de posséder de l'alcool et des narcotiques non vendus sur ordonnance et de se soumettre, à la demande d'un agent de la paix ou d'un agent de probation, à des analyses de sang, d'urine et d'haleine permettant de vérifier si la condition interdisant la consommation et la possession de ces substances est respectée. L'ordonnance précise également que tout résultat d'analyse positif constituera une violation de cette condition. Les juges majoritaires de la Cour d'appel concluent que les al. 732.1(3)(c) et h) du *Code criminel* habilient le juge chargé de la détermination de la peine à inclure une condition en matière de surveillance dans une ordonnance de probation, mais que, en l'absence de cadre réglementaire ou législatif, obliger l'accusé à fournir des échantillons de substances corporelles va à l'encontre de l'art. 8 de la *Charte canadienne des droits et libertés*. La Cour d'appel statue également que le juge chargé de la détermination de la peine n'avait pas compétence pour décider d'avance qu'un résultat d'analyse positif constituerait une violation de l'ordonnance de probation.

Arrêt : Le pourvoi est rejeté.

La juge en chef McLachlin et les juges Binnie, Fish, Abella et Charron : Les juges majoritaires de la Cour d'appel ont eu raison de supprimer la partie de l'ordonnance de probation obligeant l'accusé à fournir des échantillons de substances corporelles et précisant que tout résultat d'analyse positif constituera une violation de l'ordonnance de probation. Bien qu'une condition intimant de s'abstenir de consommer et de posséder de l'alcool et des narcotiques non vendus sur ordonnance soit autorisée par le *Code criminel* et qu'elle fût raisonnable compte tenu de la situation de l'accusé, les al. 732.1(3)(c) et h) du *Code* n'habilitaient pas le juge chargé de la détermination de la peine à autoriser le prélèvement de substances corporelles dans le cadre d'une ordonnance de probation. Ce juge n'avait pas non plus compétence pour décider d'avance que tout résultat d'analyse positif constituerait une violation de l'ordonnance de probation. [3] [17] [26]

L'alinéa 732.1(3)(c), qui permet d'imposer une condition interdisant la consommation de certaines substances, définit une infraction criminelle, mais les pouvoirs d'exécution ne découlent pas de la simple création d'une infraction. Même s'il ne fait aucun doute que le pouvoir de demander des échantillons de substances corporelles et les analyses qui en découleraient aideraient à exécuter une condition interdisant la consommation de certaines substances, imposée en vertu de l'al. 732.1(3)(c), cela n'est pas suffisant pour conclure que ce pouvoir

community. However, s. 732.1(3)(h) is not unlimited and must be read in context. The conditions set out in s. 732.1(3) can assist in delineating the scope of this residual provision. These listed conditions relate to conduct, or abstention from conduct, the fulfilment of which has no incriminating consequence for the probationer. When a condition may pose a risk, such as participating in a treatment program, the consent of the probationer is required. Conditions compelling bodily samples to facilitate the gathering of evidence for enforcement purposes do not simply monitor the probationer's behaviour and, as such, are of a different kind and, because of their potential effect, absent the probationer's consent to such conditions, raise constitutional concerns. The seizure of bodily samples must be subject to stringent standards and safeguards to meet constitutional requirements. Where Parliament authorizes the collection of bodily samples, it uses clear language and sets out standards and safeguards for collecting these samples. Parliament has not provided a scheme under s. 732.1(3) for collecting bodily samples and such a scheme cannot be judicially enacted. [20-25]

Per Bastarache and LeBel JJ.: Under well-established rules of statutory interpretation, s. 732.1(3)(h) of the *Criminal Code* grants authority to include monitoring procedures in probation orders, including the condition imposed on the accused that he provide bodily samples. Section 732.1(3)(h) must be read in the context of probation and sentencing. A probation order addresses the imperatives of the protection of society and the rehabilitation of the accused. Sentencing judges are required to devise terms that are reasonable in the sense that they complement these objectives and the terms set out in s. 732.1(3). The residual clause allows judges to frame conditions to fit the distinct situation of each accused. So long as a reasonable condition can be connected with the categories of terms contemplated by the *Code*, it is grounded in an implied, but solid, statutory authority. Although the *Code* provides for conditions concerning alcohol and drug use, it is silent about monitoring these conditions. This Court has acknowledged implied statutory powers when the need for them flows from the substantive provisions of a law, and the need for a monitoring mechanism may arise from the

existe implicitement. L'alinéa 732.1(3)(h) confère au tribunal un vaste pouvoir de concevoir d'autres conditions raisonnables destinées à protéger la société et à faciliter la réinsertion sociale de l'accusé. Cependant, l'al. 732.1(3)(h) n'a pas une portée illimitée et doit être interprété dans son contexte. Les conditions énumérées au par. 732.1(3) peuvent aider à circonscrire la portée de cette disposition résiduelle. Le respect de ces conditions, qui ont trait à un comportement ou à une abstention d'adopter un comportement, n'a aucune conséquence incriminante pour le probationnaire. Une condition susceptible de présenter un risque, comme celle intimant de participer à un programme de traitement, ne peut être imposée qu'avec le consentement du probationnaire. Du fait qu'elles ne permettent pas simplement de surveiller le comportement du probationnaire, les conditions obligeant à fournir des échantillons de substances corporelles dans le but de faciliter l'obtention d'éléments de preuve aux fins d'exécution sont différentes et soulèvent, à cause de leur effet potentiel, des questions d'ordre constitutionnel dans le cas où le probationnaire n'y a pas consenti. Le prélèvement d'échantillons de substances corporelles doit être assujéti à des normes et à des garanties rigoureuses qui permettent de satisfaire aux exigences de la Constitution. Dans les cas où le législateur autorise le prélèvement d'échantillons de substances corporelles, il le dit clairement et il établit des normes et des garanties applicables au prélèvement de ces échantillons. Le législateur n'a prescrit aucun régime de prélèvement d'échantillons de substances corporelles au par. 732.1(3) et il n'appartient pas à un tribunal d'édicter un tel régime. [20-25]

Les juges Bastarache et LeBel : Des règles d'interprétation législative bien établies veulent que l'al. 732.1(3)(h) du *Code criminel* permette d'inclure des modes de surveillance dans une ordonnance de probation, y compris la condition obligeant l'accusé à fournir des échantillons de substances corporelles. L'alinéa 732.1(3)(h) doit être interprété dans le contexte de la probation et de la détermination de la peine. Une ordonnance de probation donne suite aux impératifs de protection de la société et de réhabilitation de l'accusé. Le juge chargé de la détermination de la peine doit concevoir des conditions raisonnables en ce sens qu'elles doivent compléter ces objectifs et les conditions énoncées au par. 732.1(3). La clause résiduelle permet aux juges de formuler des conditions adaptées à la situation particulière de chaque accusé. Dans la mesure où une condition raisonnable peut être reliée aux catégories prévues par le *Code*, elle doit être considérée comme étant implicitement, mais indéniablement, autorisée par la loi. Bien qu'il prescrive des conditions relatives à la consommation d'alcool et de drogues, le *Code* est muet en ce qui concerne la surveillance de l'exécution de ces conditions. Notre

nature of the obligations imposed on an accused in a probation order. To hold otherwise would cast doubt on a number of useful monitoring methods used to ensure that the goals of probation are met. However, any condition of a probation order requiring monitoring of an accused is open to review under s. 8 of the *Charter*. In this case, the monitoring condition does not meet the requirements of s. 8. Compelling blood tests absent a statutory framework governing such tests is not consistent with the *Charter* and random drug testing at a probation officer's discretion could become highly arbitrary. [30-37] [42-43]

The part of the order stating that a positive test will be a breach of probation is contrary to criminal law principles that require guilt to be proved in the usual manner. [41]

Cases Cited

By Charron J.

Referred to: *R. v. Proulx*, [2000] 1 S.C.R. 61, 2000 SCC 5; *R. v. Kootenay* (2000), 150 C.C.C. (3d) 311; *R. v. Traverse* (2006), 205 C.C.C. (3d) 33; *R. v. Ziatas* (1973), 13 C.C.C. (2d) 287; *R. v. Caja* (1977), 36 C.C.C. (2d) 401; *R. v. Lavender* (1981), 59 C.C.C. (2d) 551; *R. v. L.* (1986), 50 C.R. (3d) 398; *R. v. McLeod* (1993), 81 C.C.C. (3d) 83; *R. v. Borden*, [1994] 3 S.C.R. 145; *R. v. Stillman*, [1997] 1 S.C.R. 607; *R. v. Golden*, [2001] 3 S.C.R. 679, 2001 SCC 83; *Hunter v. Southam Inc.*, [1984] 2 S.C.R. 145.

By LeBel J.

Referred to: *R. v. M. (M.R.)*, [1998] 3 S.C.R. 393; *R. v. Carlson* (1996), 141 Sask. R. 168; *R. v. Curtis* (1996), 144 Sask. R. 156; *R. v. McLeod* (1992), 109 Sask. R. 8; *Little Sisters Book and Art Emporium v. Canada (Minister of Justice)*, [2000] 2 S.C.R. 1120, 2000 SCC 69.

Statutes and Regulations Cited

Canadian Charter of Rights and Freedoms, ss. 1, 8.
Correctional Institution Regulation, Alta. Reg. 205/2001, ss. 48.1, 48.2.
Correctional Institutions Regulation, Man. Reg. 227/92, ss. 28, 29, 29.1, 31(1).

Cour a reconnu l'existence de pouvoirs légaux implicites dans les cas où leur nécessité découle des dispositions substantielles d'une loi, et la nécessité d'un mécanisme de surveillance peut découler de la nature des obligations que l'ordonnance de probation impose à l'accusé. Conclure autrement jetterait le doute sur un certain nombre de modes de surveillance utiles pour assurer la réalisation des objectifs de la probation. Toutefois, toute condition d'une ordonnance de probation prescrivant la surveillance d'un accusé peut faire l'objet d'une révision fondée sur l'art. 8 de la *Charte*. En l'espèce, la condition en matière de surveillance ne respecte pas les exigences de l'art. 8. Obliger à se soumettre à des analyses sanguines en l'absence de cadre législatif régissant le prélèvement des échantillons de sang n'est pas conforme à la *Charte*, et les tests de dépistage de drogue faits au hasard, à la discrétion de l'agent de probation, risqueraient de devenir très arbitraires. [30-37] [42-43]

La partie de l'ordonnance prévoyant qu'un test positif constituera une violation de l'ordonnance de probation contrevient aux principes du droit criminel qui exigent que la culpabilité soit établie de la manière habituelle. [41]

Jurisprudence

Citée par la juge Charron

Arrêts mentionnés : *R. c. Proulx*, [2000] 1 R.C.S. 61, 2000 CSC 5; *R. c. Kootenay* (2000), 150 C.C.C. (3d) 311; *R. c. Traverse* (2006), 205 C.C.C. (3d) 33; *R. c. Ziatas* (1973), 13 C.C.C. (2d) 287; *R. c. Caja* (1977), 36 C.C.C. (2d) 401; *R. c. Lavender* (1981), 59 C.C.C. (2d) 551; *R. c. L.* (1986), 50 C.R. (3d) 398; *R. c. McLeod* (1993), 81 C.C.C. (3d) 83; *R. c. Borden*, [1994] 3 R.C.S. 145; *R. c. Stillman*, [1997] 1 R.C.S. 607; *R. c. Golden*, [2001] 3 R.C.S. 679, 2001 CSC 83; *Hunter c. Southam Inc.*, [1984] 2 R.C.S. 145.

Citée par le juge LeBel

Arrêts mentionnés : *R. c. M. (M.R.)*, [1998] 3 R.C.S. 393; *R. c. Carlson* (1996), 141 Sask. R. 168; *R. c. Curtis* (1996), 144 Sask. R. 156; *R. c. McLeod* (1992), 109 Sask. R. 8; *Little Sisters Book and Art Emporium c. Canada (Ministre de la Justice)*, [2000] 2 R.C.S. 1120, 2000 CSC 69.

Lois et règlements cités

Charte canadienne des droits et libertés, art. 1, 8.
Code criminel, L.R.C. 1985, ch. C-46, art. 253 à 261, 487.04 à 487.091, 718 à 718.2, 731, 732.1(2), (3), 733.1, 742.3(2)f).

Correctional Services Act, R.S.P.E.I. 1988, c. C-26.1, s. 17(g).
Correctional Services Act, S.M. 1998, c. 47, C.C.S.M. c. C230, s. 16.
Correctional Services Act, S.S. 1993, c. C-39.1, s. 56(1).
Correctional Services Administration, Discipline and Security Regulations, 2003, R.R.S., c. C-39.1, Reg. 3, s. 40(1).
Correctional Services Regulation, Man. Reg. 128/99, ss. 41 to 45.
Corrections Accountability Act, 2000, S.O. 2000, c. 40, s. 57.9(1) to (3).
Corrections Act, R.S.A. 2000, c. C-29, ss. 14.1, 14.2.
Corrections and Conditional Release Act, S.C. 1992, c. 20, ss. 54 to 57.
Corrections and Conditional Release Regulations, SOR/92-620, ss. 60 to 72.
Criminal Code, R.S.C. 1985, c. C-46, ss. 253 to 261, 487.04 to 487.091, 718 to 718.2, 731, 732.1(2), (3), 733.1, 742.3(2)(f).
P.E.I. Reg. EC616/92, ss. 10, 11.

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APPEAL from a judgment of the British Columbia Court of Appeal (Finch C.J.B.C. and Hall and Levine J.J.A.) (2004), 206 B.C.A.C. 266, 338 W.A.C. 266, 192 C.C.C. (3d) 176, 26 C.R. (6th) 97, 126 C.R.R. (2d) 149, [2004] B.C.J. No. 2626 (QL), 2004 BCCA 643, deleting part of a probation order. Appeal dismissed.

Wendy L. Rubin and Susan J. Brown, for the appellant.

Garth Barriere and Dana Kripp, for the respondent.

Correctional Institution Regulation, Alta. Reg. 205/2001, art. 48.1, 48.2.
Correctional Services Act, R.S.P.E.I. 1988, ch. C-26.1, art. 17g).
Correctional Services Act, S.S. 1993, ch. C-39.1, art. 56(1).
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Loi sur les services correctionnels, L.M. 1998, ch. 47, C.P.L.M. ch. C230, art. 16.
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POURVOI contre un arrêt de la Cour d’appel de la Colombie-Britannique (le juge en chef Finch et les juges Hall et Levine) (2004), 206 B.C.A.C. 266, 338 W.A.C. 266, 192 C.C.C. (3d) 176, 26 C.R. (6th) 97, 126 C.R.R. (2d) 149, [2004] B.C.J. No. 2626 (QL), 2004 BCCA 643, qui a supprimé une partie d’une ordonnance de probation. Pourvoi rejeté.

Wendy L. Rubin et Susan J. Brown, pour l’appelante.

Garth Barriere et Dana Kripp, pour l’intimé.

Kenneth J. Yule, Q.C., and David Schermbrucker, for the intervener the Attorney General of Canada.

James Stribopoulos and Sarah Loosemore, for the intervener the Criminal Lawyers' Association (Ontario).

The judgment of McLachlin C.J. and Binnie, Fish, Abella and Charron JJ. was delivered by

CHARRON J. —

1. Overview

This appeal raises the question whether a sentencing judge may require a probationer to provide, on demand by the probation officer, samples of breath, urine or blood for analysis to determine compliance with an abstention term of the probation order. In allowing the appeal against sentence, the British Columbia Court of Appeal held that the enforcement term violates s. 8 of the *Canadian Charter of Rights and Freedoms* due to the absence of legislative or regulatory standards or safeguards that would adequately protect the probationer's privacy interest. Levine J.A., in writing for the majority, deleted the enforcement term, holding that it was up to Parliament and not the courts to fill this "gap in . . . legislation" (2004), 206 B.C.A.C. 266, 2004 BCCA 643, at para. 60). Hall J.A., in partial dissent, would have deleted the requirement to provide blood samples but would have read in adequate safeguards to ensure the constitutionality of the rest of the condition.

The Crown appeals to this Court and seeks to reinstate the enforcement condition. At issue is whether ss. 732.1(3)(c) and 732.1(3)(h) of the *Criminal Code*, R.S.C. 1985, c. C-46, authorize the enforcement condition and, if permissible, whether the condition must be predicated by reasonable and probable grounds to suspect a violation of an abstention condition.

Kenneth J. Yule, c.r., et David Schermbrucker, pour l'intervenant le procureur général du Canada.

James Stribopoulos et Sarah Loosemore, pour l'intervenante Criminal Lawyers' Association (Ontario).

Version française du jugement de la juge en chef McLachlin et des juges Binnie, Fish, Abella et Charron rendu par

LA JUGE CHARRON —

1. Aperçu

Le présent pourvoi soulève la question de savoir si le juge chargé de la détermination de la peine peut exiger qu'un probationnaire fournisse, à la demande de l'agent de probation, des échantillons d'haleine, d'urine ou de sang qui seront analysés pour déterminer s'il respecte une condition de l'ordonnance de probation qui lui interdit de consommer certaines substances. En accueillant l'appel interjeté contre la peine, la Cour d'appel de la Colombie-Britannique a conclu que la modalité d'exécution en cause enfreint l'art. 8 de la *Charte canadienne des droits et libertés* en raison de l'absence de normes ou garanties législatives ou réglementaires qui protégeraient adéquatement le droit à la vie privée du probationnaire. S'exprimant au nom des juges majoritaires, la juge Levine a supprimé cette modalité d'exécution, concluant qu'il appartenait au législateur, et non aux tribunaux, de combler ce [TRADUCTION] « vide législatif » (2004), 206 B.C.A.C. 266, 2004 BCCA 643, par. 60). Le juge Hall, dissident en partie, aurait supprimé l'obligation de fournir des échantillons de sang, mais il aurait ajouté des garanties suffisantes pour assurer la constitutionnalité des autres éléments de la condition.

Le ministère public se pourvoit devant notre Cour et sollicite le rétablissement de la modalité d'exécution. La question est de savoir si les al. 732.1(3)(c) et h) du *Code criminel*, L.R.C. 1985, ch. C-46, permettent d'établir cette modalité d'exécution et, dans l'affirmative, si celle-ci doit être fondée sur des motifs raisonnables et probables de soupçonner qu'il y a eu violation d'une condition interdisant la consommation et la possession de certaines substances.

For the reasons that follow, I would dismiss the appeal. A sentencing judge has a broad jurisdiction in determining appropriate conditions of probation. However, there is no authority under the *Criminal Code* to authorize a search and seizure of bodily substances as part of a probation order. In light of the fact that the impugned condition must be quashed for lack of jurisdiction, it is neither necessary nor advisable for this Court to answer the constitutional question. It is Parliament's role to determine appropriate standards and safeguards governing the collection of bodily samples for enforcement purposes.

2. The Facts and Proceedings Below

Shortly after midnight on September 7, 2003, the complainant was awakened when a naked stranger was getting in her bed. The intruder, Harjit Singh Shoker, followed her when she fled to the kitchen to phone the police but he did not attempt to leave. On arrest, he told the police that he had been using a narcotic the previous day. Mr. Shoker did not testify at trial. He was convicted of breaking and entering a dwelling-house with intent to commit sexual assault.

A psychological assessment report prepared by Dr. Whittemore for sentencing revealed that Mr. Shoker blamed his drug use for his behaviour, stating that he had been on speed at the time of the offence. The report described a history of substance abuse, starting with alcohol as a teenager and later drugs including heroin, speed, cocaine and marijuana. The report also referred to a similar incident that had occurred a few months earlier in respect of which Mr. Shoker had been charged and awaiting trial at the time of this offence. Mr. Shoker told Dr. Whittemore that he was under the influence of alcohol at the time of this previous incident and thought he was at a friend's apartment. He was acquitted on that charge. Mr. Shoker did not feel that he needed treatment as he had not used drugs for the three months he had been in custody since his arrest. Describing Mr. Shoker's behaviour

Pour les motifs qui suivent, je suis d'avis de rejeter le pourvoi. Le juge chargé de la détermination de la peine est investi d'une vaste compétence pour imposer des conditions de probation appropriées. Cependant, le *Code criminel* ne confère aucun pouvoir d'autoriser le prélèvement de substances corporelles dans le cadre d'une ordonnance de probation. Comme la condition contestée doit être annulée pour cause d'absence de compétence, il n'est ni nécessaire ni souhaitable que notre Cour réponde à la question constitutionnelle. Il appartient au législateur d'établir les normes et garanties qui doivent régir le prélèvement d'échantillons de substances corporelles effectué aux fins d'exécution.

2. Les faits et les décisions des juridictions inférieures

Peu après minuit le 7 septembre 2003, la plaignante s'est réveillée au moment où un inconnu nu se glissait dans son lit. L'intrus, Harjit Singh Shoker, l'a suivie lorsqu'elle s'est enfuie vers la cuisine pour appeler la police, mais il n'a pas tenté de partir. Lors de son arrestation, il a dit à la police avoir consommé un narcotique la veille. M. Shoker n'a pas témoigné lors de son procès. Il a été déclaré coupable d'introduction par effraction dans une maison d'habitation avec l'intention d'y commettre une agression sexuelle.

Selon le rapport d'évaluation psychologique que le Dr Whittemore a rédigé aux fins de détermination de la peine, M. Shoker attribuait son comportement à sa consommation de drogue, affirmant avoir été sous l'effet de l'amphétamine au moment de l'infraction. Le rapport faisait état d'antécédents de consommation abusives de substances psychoactives, à commencer par l'alcool, durant son adolescence, jusqu'aux drogues telles l'héroïne, l'amphétamine, la cocaïne et la marijuana. Il mentionnait également un épisode similaire survenu quelques mois plus tôt, pour lequel M. Shoker avait été inculpé et attendait de subir son procès au moment où l'infraction reprochée en l'espèce a été commise. M. Shoker a déclaré au Dr Whittemore qu'il était en état d'ébriété lors de l'épisode antérieur et qu'il se croyait alors dans l'appartement d'une amie. Il a été acquitté relativement à cette accusation. Il estimait

as disturbing, Dr. Whittemore suggested that the court might consider imposing a condition requiring him to submit to random urinalysis to assist in managing his risk in the community.

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The trial judge sentenced Mr. Shoker to 20 months' incarceration to be followed by a two-year period of probation subject to a number of conditions. The Crown did not ask that the order of probation include any condition for treatment or testing of bodily substances and the offender did not consent to those conditions. The following two conditions were later challenged by Mr. Shoker on his appeal before the British Columbia Court of Appeal:

CONDITION 7: You shall attend for such treatment and counselling as directed by the Probation Officer and successfully complete any such programs to which you are referred.

. . .

CONDITION 9: Abstain absolutely from the consumption and possession of alcohol and non prescription narcotics and to submit to a urinalysis, blood test or breathalyzer test upon the demand/request of a Peace Officer or Probation Officer to determine compliance with this condition. Any positive reading will be a breach of this condition.

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The Court of Appeal deleted the reference to "treatment" in Condition 7 because a treatment condition can only be imposed under s. 732.1(3)(g) of the *Criminal Code* with the consent of the offender. In addition, as the majority of the court noted, there is no program in British Columbia for curative treatment in relation to the consumption of alcohol or drugs as described in para. (g.1). Condition 7 was amended accordingly and it is no longer in issue before this Court. The court also

qu'il n'avait pas à suivre un traitement étant donné qu'il n'avait consommé aucune drogue pendant les trois mois passés en détention depuis son arrestation. Qualifiant de troublant le comportement de M. Shoker, le D^r Whittemore a indiqué que la cour pourrait songer à lui imposer une condition qui l'obligerait à se soumettre à des analyses d'urine au hasard afin d'aider à gérer le risque qu'il présente pour la société.

Le juge du procès a condamné M. Shoker à une peine d'emprisonnement de 20 mois, suivie d'une période de probation de deux ans assortie d'un certain nombre de conditions. Le ministère public n'a pas demandé que l'ordonnance de probation comporte une condition prescrivant un traitement ou des analyses de substances corporelles et le délinquant n'a pas consenti à ces conditions. M. Shoker a, par la suite, contesté les deux conditions suivantes lors de son appel devant la Cour d'appel de la Colombie-Britannique :

[TRADUCTION]

CONDITION n° 7 : Vous devrez suivre le traitement et participer aux séances de counseling prescrits par l'agent de probation et réussir tous les programmes qui vous seront recommandés.

. . .

CONDITION n° 9 : Vous devrez vous abstenir totalement de consommer et de posséder de l'alcool et des narcotiques non vendus sur ordonnance et vous soumettre, à la demande d'un agent de la paix ou d'un agent de probation, à des analyses de sang, d'urine et d'haleine permettant de vérifier si la présente condition est respectée. Tout résultat positif constituera une violation de la présente condition.

La Cour d'appel a supprimé la mention de « traitement » dans la condition n° 7 parce qu'une condition prescrivant un traitement ne peut être imposée qu'en vertu de l'al. 732.1(3)(g) du *Code criminel* et avec le consentement du délinquant. De plus, comme les juges majoritaires l'ont souligné, il n'existe en Colombie-Britannique aucun programme de traitement curatif pour abus d'alcool ou de drogue, comme celui décrit à l'al. g.1). La condition n° 7 a été modifiée en conséquence et n'est

deleted the last sentence of Condition 9 for lack of jurisdiction — the sentencing judge could not pre-determine that any positive reading would constitute a breach of probation as he had purported to do. The question of any breach would have to form the basis of a new charge against Mr. Shoker and be determined by a court in the usual way.

Fresh evidence admitted before the Court of Appeal revealed that funding for urinalysis testing had been discontinued as of March 31, 2003, and the service was no longer available in British Columbia. Hence the question of urinalysis testing for this offender was effectively moot. However, the court considered whether at law an offender can be required under the terms of a probation order to submit to a demand for a sample of bodily substances, including breath, urine and blood. Levine J.A., Finch C.J.B.C. concurring, was of the view that the authority for imposing such a condition could be found in s. 732.1(3)(c) of the *Criminal Code* with s. 732.1(3)(h) supporting this interpretation. Despite this finding, Levine J.A., in writing for the majority, held that the requirement to provide bodily samples, in the absence of a regulatory or statutory framework governing how the samples will be taken and tested, violates s. 8 of the *Charter* and that the defect cannot be cured by judicial fiat. Hence, that part of Condition 9 following the words “non prescription narcotics” was deleted. I read the majority’s reasons as effectively holding that there is no statutory authority to require a probationer to provide bodily samples on demand.

Hall J.A., in partial dissent, was of the view that the authority to impose the condition could not be found under s. 732.1(3)(h) because “Parliament has spoken in a specific manner about alcohol and drugs in s. 732.1(3)(c)” (para. 70). In his view, the power flowed rather from s. 732.1(3)(c) itself as “a reasonable methodology to ensure that such an

plus en cause devant notre Cour. La cour a également supprimé la dernière phrase de la condition n° 9 pour cause d’absence de compétence — le juge chargé de la détermination de la peine ne pouvait pas, comme il avait voulu le faire, décider d’avance que tout résultat d’analyse positif constituerait une violation de l’ordonnance de probation. La question de la violation devrait constituer le fondement d’une nouvelle accusation contre M. Shoker et être tranchée par un tribunal de la manière habituelle.

De nouveaux éléments de preuve admis en Cour d’appel ont révélé que le financement des analyses d’urine avait été interrompu dès le 31 mars 2003 et que ce service n’était plus offert en Colombie-Britannique. Partant, la question des analyses d’urine relativement au délinquant en cause était, en fait, théorique. La cour s’est toutefois demandé si, sur le plan juridique, une ordonnance de probation peut obliger un délinquant à se conformer à une demande d’échantillons de substances corporelles, notamment d’haleine, d’urine et de sang. La juge Levine, avec l’appui du juge en chef Finch, estimait que le pouvoir d’imposer une telle condition se dégageait de l’al. 732.1(3)(c) du *Code criminel* et que l’al. 732.1(3)(h) appuyait cette interprétation. Malgré cette conclusion, la juge Levine, s’exprimant au nom des juges majoritaires, a décidé que, en l’absence de cadre réglementaire ou législatif régissant la façon de prélever et d’analyser des échantillons de substances corporelles, l’obligation de fournir ces échantillons viole l’art. 8 de la *Charte* et qu’il ne peut être remédié à cette lacune au moyen d’une décision judiciaire. Ainsi, la partie de la condition n° 9 qui suit les termes [TRADUCTION] « narcotiques non vendus sur ordonnance » a été supprimée. Je considère que les motifs majoritaires précisent, en fait, qu’il n’existe aucun pouvoir légal d’obliger un probationnaire à fournir des échantillons de substances corporelles sur demande.

Le juge Hall, dissident en partie, était d’avis que l’al. 732.1(3)(h) ne pouvait pas conférer le pouvoir d’imposer la condition puisque [TRADUCTION] « le législateur a traité expressément de l’alcool et des drogues à l’al. 732.1(3)(c) » (par. 70). À son avis, ce pouvoir découlait plutôt de l’al. 732.1(3)(c) lui-même en tant que « moyen raisonnable d’assurer

order is effective” (para. 70). Hall J.A. departed from the majority on the question whether the condition could be amended to conform with the *Charter*. He would have deleted the requirement to provide blood samples and would have amended Condition 9 to require that urine or breath samples be provided upon demand based on reasonable and probable grounds to suspect a violation of the abstention condition.

3. Analysis

3.1 *Relevant Statutory Provisions*

10 Probation is a form of sentence that can be imposed only in circumstances described in s. 731 of the *Criminal Code*:

731. (1) Where a person is convicted of an offence, a court may, having regard to the age and character of the offender, the nature of the offence and the circumstances surrounding its commission,

(a) if no minimum punishment is prescribed by law, suspend the passing of sentence and direct that the offender be released on the conditions prescribed in a probation order; or

(b) in addition to fining or sentencing the offender to imprisonment for a term not exceeding two years, direct that the offender comply with the conditions prescribed in a probation order.

(2) A court may also make a probation order where it discharges an accused under subsection 730(1).

Probation has traditionally been viewed as a rehabilitative sentencing tool: *R. v. Proulx*, [2000] 1 S.C.R. 61, 2000 SCC 5, at paras. 31-33. The probationer remains free to live in the community but certain restraints on his freedom are imposed for the purpose of facilitating his rehabilitation and protecting society. An offender who is bound by a probation order and who, without reasonable excuse, fails or refuses to comply with that order is guilty of an offence under s. 733.1 punishable by up to two years’ imprisonment.

l’efficacité d’une telle ordonnance » (par. 70). Le juge Hall ne partageait pas l’opinion des juges majoritaires quant à la possibilité de modifier la condition pour la rendre conforme à la *Charte*. Il aurait supprimé l’obligation de fournir des échantillons de sang et aurait modifié la condition n° 9 de manière à exiger que des échantillons d’urine ou d’haleine soient fournis sur demande, lorsqu’il y a des motifs raisonnables et probables de soupçonner qu’il y a eu violation de la condition interdisant la consommation et la possession de certaines substances.

3. Analyse

3.1 *Dispositions législatives pertinentes*

La probation est une forme de peine qui ne peut être infligée que dans les cas prévus à l’art. 731 du *Code criminel* :

731. (1) Lorsqu’une personne est déclarée coupable d’une infraction, le tribunal peut, vu l’âge et la réputation du délinquant, la nature de l’infraction et les circonstances dans lesquelles elle a été commise :

a) dans le cas d’une infraction autre qu’une infraction pour laquelle une peine minimale est prévue par la loi, surseoir au prononcé de la peine et ordonner que le délinquant soit libéré selon les conditions prévues dans une ordonnance de probation;

b) en plus d’infliger une amende au délinquant ou de le condamner à un emprisonnement maximal de deux ans, ordonner que le délinquant se conforme aux conditions prévues dans une ordonnance de probation.

(2) Le tribunal peut aussi rendre une ordonnance de probation qui s’applique à l’accusé absous aux termes du paragraphe 730(1).

La probation a traditionnellement été considérée comme une mesure de réinsertion sociale du délinquant : *R. c. Proulx*, [2000] 1 R.C.S. 61, 2000 CSC 5, par. 31-33. Le probationnaire reste libre de vivre au sein de la collectivité, mais sa liberté est assujettie à certaines restrictions destinées à faciliter sa réadaptation et à assurer la protection de la société. Le délinquant visé par une ordonnance de probation qui, sans excuse raisonnable, omet ou refuse de s’y conformer est, aux termes de l’art. 733.1, coupable d’une infraction punissable d’un emprisonnement maximal de deux ans.

All probation orders must contain at a minimum three conditions as prescribed under s. 732.1(2):

- (a) keep the peace and be of good behaviour;
- (b) appear before the court when required to do so by the court; and
- (c) notify the court or the probation officer in advance of any change of name or address, and promptly notify the court or the probation officer of any change of employment or occupation.

Additional optional conditions may be imposed pursuant to s. 732.1(3). Only ss. 732.1(3)(c) and 732.1(3)(h) are at issue on this appeal. However, it is important that they be read in the context of the entire provision. Section 732.1(3) reads as follows:

732.1 . . .

(3) The court may prescribe, as additional conditions of a probation order, that the offender do one or more of the following:

- (a) report to a probation officer
 - (i) within two working days, or such longer period as the court directs, after the making of the probation order, and
 - (ii) thereafter, when required by the probation officer and in the manner directed by the probation officer;
- (b) remain within the jurisdiction of the court unless written permission to go outside that jurisdiction is obtained from the court or the probation officer;
- (c) abstain from
 - (i) the consumption of alcohol or other intoxicating substances, or
 - (ii) the consumption of drugs except in accordance with a medical prescription;
- (d) abstain from owning, possessing or carrying a weapon;
- (e) provide for the support or care of dependants;
- (f) perform up to 240 hours of community service over a period not exceeding eighteen months;

Toutes les ordonnances de probation doivent comporter au moins trois conditions prévues au par. 732.1(2), soit celles intimant

- a) de ne pas troubler l'ordre public et d'avoir une bonne conduite;
- b) de répondre aux convocations du tribunal;
- c) de prévenir le tribunal ou l'agent de probation de ses changements d'adresse ou de nom et de les aviser rapidement de ses changements d'emploi ou d'occupation.

Des conditions facultatives supplémentaires peuvent être imposées conformément au par. 732.1(3). Seuls les al. 732.1(3)(c) et h) sont en cause dans le présent pourvoi. Il importe toutefois de les interpréter en fonction de l'ensemble de la disposition. Le paragraphe 732.1(3) est ainsi libellé :

732.1 . . .

(3) Le tribunal peut assortir l'ordonnance de probation de l'une ou de plusieurs des conditions suivantes, intimant au délinquant :

- a) de se présenter à l'agent de probation :
 - (i) dans les deux jours ouvrables suivant l'ordonnance, ou dans le délai plus long fixé par le tribunal,
 - (ii) par la suite, selon les modalités de temps et de forme fixées par l'agent de probation;
- b) de rester dans le ressort du tribunal, sauf permission écrite d'en sortir donnée par le tribunal ou par l'agent de probation;
- c) de s'abstenir de consommer :
 - (i) de l'alcool ou d'autres substances toxiques,
 - (ii) des drogues, sauf sur ordonnance médicale;
- d) de s'abstenir d'être propriétaire, possesseur ou porteur d'une arme;
- e) de prendre soin des personnes à sa charge et de subvenir à leurs besoins;
- f) d'accomplir au plus deux cent quarante heures de service communautaire au cours d'une période maximale de dix-huit mois;

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(g) if the offender agrees, and subject to the program director's acceptance of the offender, participate actively in a treatment program approved by the province;

(g.1) where the lieutenant governor in council of the province in which the probation order is made has established a program for curative treatment in relation to the consumption of alcohol or drugs, attend at a treatment facility, designated by the lieutenant governor in council of the province, for assessment and curative treatment in relation to the consumption by the offender of alcohol or drugs that is recommended pursuant to the program;

(g.2) where the lieutenant governor in council of the province in which the probation order is made has established a program governing the use of an alcohol ignition interlock device by an offender and if the offender agrees to participate in the program, comply with the program; and

(h) comply with such other reasonable conditions as the court considers desirable, subject to any regulations made under subsection 738(2) [s. 738(2) relates to restitution orders], for protecting society and for facilitating the offender's successful reintegration into the community.

g) si le délinquant y consent et le directeur du programme l'accepte, de participer activement à un programme de traitement approuvé par la province;

g.1) si le lieutenant-gouverneur en conseil de la province où doit être rendue l'ordonnance de probation a institué un programme de traitement curatif pour abus d'alcool ou de drogue, de subir, à l'établissement de traitement désigné par celui-ci, l'évaluation et la cure de désintoxication pour abus d'alcool ou de drogue qui sont recommandées dans le cadre de ce programme;

g.2) si le lieutenant-gouverneur en conseil de la province où est rendue l'ordonnance de probation a institué un programme visant l'utilisation par le délinquant d'un antidémarrreur avec éthylomètre et s'il accepte de participer au programme, de se conformer aux modalités du programme;

h) d'observer telles autres conditions raisonnables que le tribunal considère souhaitables, sous réserve des règlements d'application du paragraphe 738(2), pour assurer la protection de la société et faciliter la réinsertion sociale du délinquant.

13

Before discussing the issue that arises in this case, I wish to make a few general comments about the power to impose optional conditions under s. 732.1(3). The residual power under s. 732.1(3)(h) speaks of "other reasonable conditions" imposed "for protecting society and for facilitating the offender's successful reintegration into the community". Such language is instructive, not only in respect of conditions crafted under this residual power, but in respect of the optional conditions listed under s. 732.1(3): before a condition can be imposed, it must be "reasonable" in the circumstances and must be ordered for the purpose of protecting society and facilitating the particular offender's successful reintegration into the community. Reasonable conditions will generally be linked to the particular offence but need not be. What is required is a nexus between the offender, the protection of the community and his reintegration into the community. See, for example, *R. v. Kootenay* (2000), 150 C.C.C. (3d) 311 (Alta. C.A.), and *R. v. Traverse* (2006), 205 C.C.C. (3d) 33 (Man. C.A.), where appellate courts have upheld conditions

Avant d'aborder la question qui se pose en l'espèce, je tiens à formuler quelques observations générales au sujet du pouvoir d'imposer des conditions facultatives en vertu du par. 732.1(3). Le pouvoir résiduel prévu à l'al. 732.1(3)(h) fait état d'« autres conditions raisonnables » destinées à « assurer la protection de la société et [à] faciliter la réinsertion sociale du délinquant ». Un tel libellé est intéressant non seulement en ce qui concerne les conditions conçues en vertu de ce pouvoir résiduel, mais également en ce qui a trait aux conditions facultatives énumérées au par. 732.1(3) : la condition imposée doit être « raisonnable » dans les circonstances et viser à assurer la protection de la société et à faciliter la réinsertion sociale du délinquant en question. Les conditions raisonnables sont généralement, mais pas nécessairement, liées à l'infraction en cause. Il doit y avoir un lien entre le délinquant, la protection de la société et la réinsertion sociale de ce délinquant. Voir, par exemple, les arrêts *R. c. Kootenay* (2000), 150 C.C.C. (3d) 311 (C.A. Alb.), et *R. c. Traverse* (2006), 205 C.C.C. (3d) 33 (C.A. Man.), où des cours d'appel ont confirmé la validité

requiring abstinence from alcohol or drugs even though these played no part in the commission of the offence for which the offender was sentenced. On the other hand, conditions of probation imposed to punish rather than rehabilitate the offender have been struck out: *R. v. Ziatas* (1973), 13 C.C.C. (2d) 287 (Ont. C.A.); *R. v. Caja* (1977), 36 C.C.C. (2d) 401 (Ont. C.A.); *R. v. Lavender* (1981), 59 C.C.C. (2d) 551 (B.C.C.A.); *R. v. L.* (1986), 50 C.R. (3d) 398 (Alta. C.A.). In contrast, punitive conditions may be imposed pursuant to s. 742.3(2)(f) as part of a conditional sentence: *Proulx*, at para. 34.

The residual power to craft individualized conditions of probation is very broad. It constitutes an important sentencing tool. The purpose and principles of sentencing set out in ss. 718 to 718.2 of the *Criminal Code* make it clear that sentencing is an individualized process that must take into account both the circumstances of the offence and of the offender. It would be impossible for Parliament to spell out every possible condition of probation that can meet these sentence objectives. The sentencing judge is well placed to craft conditions that are tailored to the particular offender to assist in his rehabilitation and protect society. However, the residual power to impose individualized conditions is not unlimited. The sentencing judge cannot impose conditions that would contravene federal or provincial legislation or the *Charter*. Further, inasmuch as the wording of the residual provision can inform the sentencing judge's exercise of discretion in imposing one of the listed optional conditions as I have described, the listed conditions in turn can assist in interpreting the scope of "other reasonable conditions" that can be crafted under s. 732.1(3)(h). As we shall see, none of the listed conditions is aimed at facilitating the investigation of suspected breaches of probation. I will come back to this point later.

de conditions prescrivant l'abstention de consommer de l'alcool ou des drogues, même si ces substances n'avaient joué aucun rôle dans la perpétration de l'infraction pour laquelle le délinquant avait été condamné. Par ailleurs, des conditions de probation imposées pour punir le délinquant, plutôt que pour le réadapter, ont été annulées : *R. c. Ziatas* (1973), 13 C.C.C. (2d) 287 (C.A. Ont.); *R. c. Caja* (1977), 36 C.C.C. (2d) 401 (C.A. Ont.); *R. c. Lavender* (1981), 59 C.C.C. (2d) 551 (C.A.C.-B.); *R. c. L.* (1986), 50 C.R. (3d) 398 (C.A. Alb.). Par contre, une ordonnance de sursis à l'emprisonnement peut être assortie de conditions à caractère punitif, selon l'al. 742.3(2)f) : *Proulx*, par. 34.

Le pouvoir résiduel de concevoir des conditions de probation individualisées est très large. Il constitue un important outil de détermination de la peine. L'objectif et les principes de la détermination de la peine, énoncés aux art. 718 à 718.2 du *Code criminel*, indiquent clairement qu'il s'agit d'un processus individualisé qui doit tenir compte à la fois des circonstances de l'infraction et de la situation du délinquant. Il serait impossible au législateur d'énoncer toutes les conditions de probation qui peuvent satisfaire à ces objectifs de la peine. Le juge chargé de la détermination de la peine est bien placé pour concevoir des conditions adaptées au délinquant particulier, qui l'aideront dans sa réadaptation et contribueront à protéger la société. Cependant, le pouvoir résiduel d'imposer des conditions individualisées n'est pas illimité. Le juge chargé de la détermination de la peine ne peut pas imposer des conditions qui contreviendraient à une loi provinciale ou fédérale ou encore à la *Charte*. En outre, dans la mesure où le libellé de la disposition résiduelle peut guider le juge chargé de la détermination de la peine dans l'exercice de son pouvoir discrétionnaire d'imposer l'une des conditions facultatives énumérées que j'ai décrites, les conditions énumérées peuvent à leur tour aider à interpréter la portée des « autres conditions raisonnables » qui peuvent être conçues en vertu de l'al. 732.1(3)h). Comme nous le verrons, aucune des conditions énumérées ne vise à faciliter les enquêtes sur de présumées violations d'une ordonnance de probation. Je reviendrai sur cette question plus loin.

15 The underlying purpose for imposing conditions of probation also serves to define the role of the probation officer. The intervenor the Attorney General of Canada aptly describes the probation officer's functions in its factum (at para. 21):

It is in the nature of a probation officer's duties to act as an officer of the court, to assist the probationer in his rehabilitation, and to monitor compliance with the conditions of probation imposed by the sentencing court. The supervising probation officer simultaneously performs two distinct functions, rehabilitation and enforcement. The twin goals of probation — rehabilitation of the offender and protection of society — require and justify supervision in order to ensure that the probationer in fact observes his conditions. This supervised control is a restraint on the probationer's freedom.

The supervisory function of the probation officer in ensuring compliance with the conditions and the manner in which this function must be performed becomes of central importance in this case when we consider the full implications of enforcing an abstention order by requiring bodily samples. The determinative question is whether the supervisory power to demand samples of bodily substances for enforcement purposes may be conferred upon the probation officer by the court as a discretionary exercise of discretion or whether it must be authorized by statute.

3.2 *The Impugned Condition*

16 For ease of reference, I repeat the terms of Condition 9:

CONDITION 9: Abstain absolutely from the consumption and possession of alcohol and non prescription narcotics and to submit to a urinalysis, blood test or breathalyzer test upon the demand/request of a Peace Officer or Probation Officer to determine compliance with this condition. Any positive reading will be a breach of this condition. [Emphasis added.]

17 As indicated earlier, the sentencing judge did not have the jurisdiction to predetermine that any positive reading would constitute a breach of

L'objectif fondamental de l'imposition de conditions de probation sert aussi à définir le rôle de l'agent de probation. L'intervenant le procureur général du Canada a décrit avec justesse les fonctions de l'agent de probation dans son mémoire (par. 21) :

[TRADUCTION] Il est du ressort de l'agent de probation d'agir à titre d'auxiliaire de justice, d'aider le probationnaire dans sa réadaptation et de veiller à ce que les conditions de probation imposées par le tribunal qui a déterminé la peine soient respectées. L'agent de probation qui agit comme superviseur cumule deux fonctions distinctes, celles de réadaptation et d'exécution. Le double objectif de la probation — la réadaptation du délinquant et la protection de la société — commande et justifie une supervision destinée à assurer que le probationnaire respecte effectivement les conditions qui lui ont été imposées. Ce contrôle supervisé restreint la liberté du probationnaire.

En l'espèce, la fonction de supervision que l'agent de probation exerce pour assurer le respect des conditions et la façon dont il doit exercer cette fonction revêtent une importance cruciale lorsqu'on examine toutes les répercussions de l'exécution d'une ordonnance d'abstention au moyen d'une demande d'échantillons de substances corporelles. La question déterminante est celle de savoir si la cour peut, à sa discrétion, investir l'agent de probation d'un pouvoir de supervision lui permettant de demander des échantillons de substances corporelles aux fins d'exécution, ou si cela doit être autorisé par la loi.

3.2 *La condition contestée*

Pour en faciliter la consultation, je reproduis de nouveau la condition n° 9 :

[TRADUCTION]

CONDITION n° 9 : Vous devrez vous abstenir totalement de consommer et de posséder de l'alcool et des narcotiques non vendus sur ordonnance et vous soumettre, à la demande d'un agent de la paix ou d'un agent de probation, à des analyses de sang, d'urine et d'haleine permettant de vérifier si la présente condition est respectée. Tout résultat positif constituera une violation de la présente condition. [Je souligne.]

Comme nous l'avons vu, le juge chargé de la détermination de la peine n'avait pas compétence pour décider d'avance que tout résultat d'analyse

probation. Therefore, the last sentence of Condition 9 was properly deleted by the Court of Appeal. The first part of the condition is also not in issue. The abstention condition is expressly authorized under s. 732.1(3)(c) and, given Mr. Shoker's particular circumstances, it is entirely reasonable to impose this condition to facilitate his rehabilitation and to protect society. The prohibition against the possession of alcohol and non-prescription drugs, imposed pursuant to the s. 732.1(3)(h) residual power, is also not in dispute. What remains at issue is the requirement that bodily samples be provided on demand.

The impugned condition is challenged essentially on *Charter* grounds. In reviewing a sentencing judge's exercise of discretion on *Charter* grounds, an appellate court should first consider whether the sentencing judge acted within his statutory jurisdiction. If a sentence is illegal on the basis that it is unauthorized under the governing legislation, it must be struck down and the constitutional issue does not arise. I will therefore consider whether the requirement to provide bodily samples as a condition of probation falls within the scope of s. 732.1.

3.3 *Requiring Bodily Samples and Section 732.1 of the Criminal Code*

The Crown submits that s. 732.1(3)(c) abstention conditions are highly desirable for the rehabilitation of the offender and the protection of the public and that the sentencing objectives of such abstention terms can only be achieved if there is also an effective mechanism to enforce them. Therefore, the Crown argues that ss. 732.1(3)(c) and 732.1(3)(h), read together, authorize the imposition of random sampling of an offender's bodily substances to ensure compliance with the

positif constituerait une violation de l'ordonnance de probation. Par conséquent, la dernière phrase de la condition n° 9 a été supprimée à juste titre par la Cour d'appel. La première partie de la condition n'est pas non plus en cause. La condition interdisant la consommation de certaines substances est expressément autorisée par l'al. 732.1(3)(c) et, compte tenu de la situation particulière de M. Shoker, il est parfaitement raisonnable d'imposer cette condition pour faciliter sa réadaptation et protéger la société. L'interdiction de la possession d'alcool et de drogues non vendues sur ordonnance, imposée conformément au pouvoir résiduel prévu à l'al. 732.1(3)(h), n'est pas contestée non plus. Ce qui reste en cause est la question de l'obligation de fournir des échantillons de substances corporelles sur demande.

La contestation de la condition litigieuse repose essentiellement sur la *Charte*. En examinant, pour des motifs liés à la *Charte*, l'exercice d'un pouvoir discrétionnaire du juge chargé de la détermination de la peine, une cour d'appel doit d'abord se demander si le juge a agi conformément à la compétence que lui confère la loi. Si une peine est illégale du fait qu'elle n'est pas autorisée par la loi applicable, elle doit être annulée et la question constitutionnelle ne se pose pas. Je vais donc examiner la question de savoir si l'obligation de fournir des échantillons de substances corporelles, comme condition de probation, est visée par l'art. 732.1.

3.3 *La demande d'échantillons de substances corporelles et l'art. 732.1 du Code criminel*

Le ministère public soutient que les conditions interdisant de consommer certaines substances, prévues à l'al. 732.1(3)(c), sont très souhaitables aux fins de réadaptation du délinquant et de protection du public. Il ajoute que seule l'existence d'un moyen efficace d'assurer le respect de ces conditions peut permettre d'atteindre les objectifs qu'elles visent en matière de détermination de la peine. Par conséquent, le ministère public fait valoir que les al. 732.1(3)(c) et (h),

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abstention condition. Mr. Shoker argues that the power to impose enforcement terms to the abstention condition neither flows implicitly from s. 732.1(3)(c) nor does it fall within the scope of s. 732.1(3)(h) “reasonable conditions”. If Parliament had intended to authorize the seizure of bodily samples, he argues, it would have expressly so stated as it has done in other existing legislative schemes.

interprétés conjointement, permettent d’imposer le prélèvement au hasard d’échantillons de substances corporelles d’un délinquant afin d’assurer le respect de la condition lui interdisant de consommer certaines substances. M. Shoker prétend que le pouvoir d’assortir cette condition de modalités d’exécution ne découle pas implicitement de l’al. 732.1(3)(c) et n’est pas visé non plus par les « conditions raisonnables » mentionnées à l’al. 732.1(3)(h). Si, affirme-t-il, le législateur avait voulu autoriser le prélèvement de substances corporelles, il l’aurait précisé, comme il l’a fait dans d’autres régimes législatifs existants.

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I will deal firstly with s. 732.1(3)(c). With respect to Hall J.A.’s opinion to the contrary, the jurisdiction to impose enforcement terms cannot simply flow from the power to impose an abstention condition. The effect of including a s. 732.1(3)(c) abstention condition in a probation order is to define a criminal offence, the commission of which is punishable under s. 733.1. Enforcement powers are not implicit from the simple creation of an offence. For example, it cannot reasonably be contended that the prohibition against impaired driving under s. 253 implicitly includes the enforcement scheme for demanding bodily samples contained in ss. 254 to 258. Yet, in essence, that is the argument here. The Crown submits that the enforcement scheme should be implied as necessary to give effect to a s. 732.1(3)(c) abstention condition. I do not accept this argument. Breach of probation is a criminal offence under the *Criminal Code* and, as such, it is subject to the usual investigatory techniques and manner of proof as any other offence. Hence, the probationer who is found consuming alcohol with his friends in a drinking establishment can be prosecuted based on the evidence of witnesses to the event. Likewise, the probationer who exhibits signs of alcohol or drug impairment can be prosecuted and the offence can be proven by testimonial evidence much in the same way as an offence for impaired driving. The power to demand bodily samples and the resulting analyses would undoubtedly assist in the enforcement

Je vais commencer par examiner l’al. 732.1(3)(c). Avec respect pour l’opinion contraire exprimée par le juge Hall, la compétence pour imposer des modalités d’exécution ne peut pas simplement découler du pouvoir d’imposer une condition interdisant la consommation de certaines substances. L’inclusion, dans une ordonnance de probation, d’une condition interdisant la consommation de certaines substances, prévue à l’al. 732.1(3)(c), a pour effet de définir une infraction criminelle punissable en vertu de l’art. 733.1. Les pouvoirs d’exécution ne découlent pas de la simple création d’une infraction. Par exemple, on ne peut pas raisonnablement prétendre que l’interdiction de la conduite avec facultés affaiblies prévue à l’art. 253 inclut implicitement le régime d’exécution consistant à demander des échantillons de substances corporelles prévu aux art. 254 à 258. Pourtant, tel est essentiellement l’argument avancé en l’espèce. Le ministère public fait valoir que le régime d’exécution devrait être implicite dans la mesure où il est nécessaire pour donner effet à une condition interdisant la consommation de certaines substances, prévue à l’al. 732.1(3)(c). Je ne retiens pas cet argument. La violation d’une ordonnance de probation est une infraction criminelle prévue par le *Code criminel* et, à ce titre, elle est sujette aux techniques d’enquête et au mode de preuve qui sont habituellement utilisés pour n’importe quelle autre infraction. Partant, le probationnaire surpris en train de consommer de l’alcool avec ses amis dans un débit de boissons peut être poursuivi sur la foi du témoignage de ceux qui l’ont vu faire. De

of a s. 732.1(3)(c) condition, but it cannot on that basis simply be implied.

The authority to impose enforcement terms, if any, must be found rather in the residual clause. As indicated earlier, s. 732.1(3)(h) gives the sentencing judge a broad power to craft other reasonable conditions designed to protect society and facilitate the offender's successful reintegration into the community. Hall J.A. was of the view that the authority could not be found under s. 732.1(3)(h) because Parliament has specifically addressed alcohol and drugs in s. 732.1(3)(c). The fact that Parliament has specifically addressed alcohol and drugs under s. 732.1(3)(c) — and also in ss. 732.1(3)(g.1) and 732.1(3)(g.2) — is certainly a relevant factor but, in my respectful view, it does not preclude the imposition of “other” alcohol and drug-related “reasonable conditions” under the residual clause. Any number of additional conditions aimed at ensuring that the probationer comply with the abstention condition can be imposed. Indeed, the prescription against the possession of alcohol and drug found in Condition 9 is one example. Similarly, a sentencing judge could prescribe that the offender not enter any premises where alcohol is sold or served; that he not associate with his favourite drinking buddies; or that he obey a curfew. All these conditions could be imposed to ensure better compliance with the abstention condition and thereby facilitate the offender's rehabilitation and protect society. Absent peculiar circumstances, it could not seriously be contended that any such condition would be unreasonable. LeBel J., in his concurring reasons, expressed concerns that a narrow interpretation of the residual clause would cast doubt on a number of useful monitoring methods,

même, le probationnaire qui montre des signes de facultés affaiblies en raison de la consommation d'alcool ou de drogue peut être poursuivi et l'infraction peut être prouvée au moyen d'une preuve testimoniale à peu près de la même façon qu'une infraction de conduite avec facultés affaiblies. Il ne fait aucun doute que le pouvoir de demander des échantillons de substances corporelles et les analyses qui en découleraient aideraient à exécuter une condition imposée en vertu de l'al. 732.1(3)(c), mais cela n'est pas suffisant pour tout simplement conclure que ce pouvoir existe implicitement.

Le pouvoir d'imposer des modalités d'exécution, s'il existe, doit plutôt se dégager de la clause résiduelle. Comme nous l'avons vu, l'al. 732.1(3)(h) attribue au juge chargé de la détermination de la peine un vaste pouvoir de concevoir d'autres conditions raisonnables destinées à protéger la société et à faciliter la réinsertion sociale du délinquant. Le juge Hall estimait que ce pouvoir ne pouvait pas se dégager de l'al. 732.1(3)(h) étant donné que le législateur a abordé expressément la question de l'alcool et des drogues à l'al. 732.1(3)(c). Le fait que le législateur a traité expressément de ces substances à l'al. 732.1(3)(c) — ainsi qu'aux al. 732.1(3)(g.1) et (g.2) — est certainement pertinent, mais j'estime, en toute déférence, que cela n'empêche pas d'imposer, en application de la clause résiduelle, d'« autres conditions raisonnables » liées à l'alcool et aux drogues. Il est possible d'imposer toute une série de conditions supplémentaires destinées à assurer le respect, par le probationnaire, de la condition interdisant la consommation et la possession de certaines substances. En fait, l'interdiction d'être en possession d'alcool et de drogues énoncée à la condition n° 9 en est un exemple. De même, un juge chargé de la détermination de la peine pourrait interdire au délinquant de fréquenter les copains avec qui il aime prendre un verre ou tout endroit où de l'alcool est vendu ou servi, ou encore lui imposer un couvre-feu. Toutes ces conditions pourraient être imposées pour assurer un meilleur respect de la condition interdisant la consommation et la possession d'alcool et ainsi faciliter la réadaptation du délinquant et protéger la société. En l'absence de circonstances particulières, on ne saurait sérieusement prétendre

more particularly the use of electronic monitoring. The legality of electronic monitoring under s. 732.1(3)(h) is not before us and, hence, this Court is not deciding this issue. We are concerned here only with the compelled seizure of bodily samples as an enforcement mechanism. It is also noteworthy that in each case referred to by LeBel J., the probationer's consent was required for participation in the Saskatchewan electronic monitoring program. Further, the Saskatchewan Court of Appeal in *R. v. McLeod* (1993), 81 C.C.C. (3d) 83, at p. 99, also made it clear that "the constitutionality of this form of sanction was not argued or considered during argument".

qu'une telle condition serait déraisonnable. Dans ses motifs concordants, le juge LeBel, a dit craindre qu'une interprétation restrictive de la clause résiduelle jette le doute sur un certain nombre de modes de surveillance utiles, plus particulièrement la surveillance électronique. Nous ne sommes pas saisis de la question de la légalité de la surveillance électronique au regard de l'al. 732.1(3)(h) et, partant, notre Cour ne se prononce pas sur ce point. En l'espèce, nous nous intéressons uniquement au prélèvement forcé d'échantillons de substances corporelles en tant que mécanisme d'exécution. Il vaut également la peine de noter que, dans chacun des cas mentionnés par le juge LeBel, il fallait que le probationnaire consente à participer au programme de surveillance électronique de la Saskatchewan. De plus, dans l'arrêt *R. c. McLeod* (1993), 81 C.C.C. (3d) 83, p. 99, la Cour d'appel de la Saskatchewan a aussi indiqué clairement que [TRADUCTION] « la constitutionnalité de cette forme de sanction n'a pas été débattue ou examinée au cours des plaidoiries ».

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On the face of it, s. 732.1(3)(h) therefore appears wide enough to permit enforcement terms such as the one imposed in this case since, it is argued, submitting to testing would also ensure better compliance with the abstention condition. However, the residual provision must be read in context. Since it provides for "other" reasonable conditions, the listed conditions under ss. 732.1(3)(a) to 732.1(3)(g.2) can assist in delineating the scope of the residual provision. It is noteworthy that the fulfilment of any of the listed conditions can have no incriminating consequence for the probationer. In addition, when the condition may pose a risk, such as participating in a treatment program, the consent of the offender is required before the condition can be imposed. Section 732.1(3)(h) speaks of "other reasonable conditions". It is reasonable to infer that additional conditions imposed under the residual power would be of the same kind as the listed conditions. However, conditions intended to facilitate the gathering of evidence for enforcement purposes do not simply monitor the probationer's behaviour and, as such, are of a different kind and, because of their potential effect, absent the probationer's consent to such conditions, raise

À première vue, l'al. 732.1(3)(h) semble donc avoir une portée assez large pour permettre des conditions d'exécution comme celle imposée en l'espèce étant donné, soutient-on, que les tests de dépistage assureraient également un meilleur respect de la condition interdisant la consommation de certaines substances. Toutefois, la disposition résiduelle doit être interprétée dans son contexte. Comme cette disposition prévoit la possibilité d'imposer d'« autres » conditions raisonnables, les conditions énumérées aux al. 732.1(3)(a) à g.2) peuvent aider à en circonscrire la portée. Il vaut la peine de noter que le respect de l'une ou l'autre des conditions énumérées ne peut avoir aucune conséquence incriminante pour le probationnaire. En outre, une condition susceptible de présenter un risque, comme celle intimant de participer à un programme de traitement, ne peut être imposée qu'avec le consentement du délinquant. L'alinéa 732.1(3)(h) parle d'« autres conditions raisonnables ». On peut raisonnablement inférer que des conditions supplémentaires imposées en vertu du pouvoir résiduel seraient du même genre que celles qui sont énumérées. Toutefois, du fait qu'elles ne permettent pas simplement de surveiller le comportement du probationnaire, les conditions

constitutional concerns. For example, could Mr. Shoker be compelled, as a condition of his probation, to make his home available for inspection on demand to better monitor the prescription against the possession of alcohol or drugs? Such a condition in effect would subject him to a different standard than that provided by Parliament for the issuance of a search warrant. In my view, it could not reasonably be argued that the sentencing judge would have the jurisdiction to override this scheme under the authority of the open-ended language of s. 732.1(3)(h). It would be up to Parliament, if it saw fit, to enact any such scheme.

The sentencing judge's jurisdiction can be no greater in respect of the seizure of bodily samples. The seizure of bodily samples is highly intrusive and, as this Court has often reaffirmed, it is subject to stringent standards and safeguards to meet constitutional requirements. Significantly, in *R. v. Borden*, [1994] 3 S.C.R. 145, this Court held that where there is no statutory authorization for the seizure of bodily samples, consent must be obtained if the seizure is to be lawful. In *R. v. Stillman*, [1997] 1 S.C.R. 607, Cory J., speaking for the majority, held that the seizure of bodily samples such as hair, buccal swabs and dental impressions, was not authorized by the common law power to search incident to arrest. The principle was again reaffirmed in *R. v. Golden*, [2001] 3 S.C.R. 679, 2001 SCC 83. Again here, it is my view that such statutory authorization cannot be read in the general language of s. 732.1(3)(h). In the various circumstances where Parliament has chosen to authorize the collection of bodily samples, it has not only used clear language; it has also included in the legislation, or through regulations, a number of standards and safeguards: see for example, the collection of DNA samples for investigative purposes or, on conviction, for inclusion in the DNA databank (ss. 487.04 to 487.091 of the *Criminal Code*); the collection of breath and blood samples during the

destinées à faciliter l'obtention d'éléments de preuve aux fins d'exécution sont différentes et soulèvent, à cause de leur effet potentiel, des questions d'ordre constitutionnel dans le cas où le probationnaire n'y a pas consenti. Par exemple, M. Shoker pourrait-il se voir imposer, comme condition de sa probation, l'obligation de donner accès sur demande à sa résidence pour qu'on puisse y effectuer des inspections permettant de mieux veiller à ce que l'interdiction d'être en possession d'alcool ou de drogues soit respectée? Une telle condition aurait pour effet de l'assujettir à une norme différente de celle que le législateur prescrit pour la délivrance d'un mandat de perquisition. À mon avis, on ne saurait raisonnablement soutenir que le libellé non limitatif de l'al. 732.1(3)(h) habiliterait le juge chargé de la détermination de la peine à passer outre à ce régime. Il appartiendrait au législateur d'édicter un tel régime s'il jugeait à propos de le faire.

La compétence du juge chargé de la détermination de la peine ne peut pas être plus grande en matière de prélèvement d'échantillons de substances corporelles. Le prélèvement d'échantillons de substances corporelles est une mesure très envahissante et, comme notre Cour l'a souvent confirmé, il est assujéti à des normes et à des garanties rigoureuses qui permettent de satisfaire aux exigences de la Constitution. Fait révélateur, dans l'arrêt *R. c. Borden*, [1994] 3 R.C.S. 145, la Cour a conclu que, en l'absence d'autorisation légale de prélever des échantillons de substances corporelles, la légalité du prélèvement est subordonnée au consentement de la personne visée. Dans l'arrêt *R. c. Stillman*, [1997] 1 R.C.S. 607, le juge Cory a conclu, au nom des juges majoritaires, que le pouvoir de common law de procéder à une fouille accessoire à une arrestation ne permettait pas de prélever des échantillons de substances corporelles, comme des cheveux et des poils, d'effectuer des prélèvements dans la bouche et de prendre des empreintes dentaires. Ce principe a été confirmé de nouveau dans l'arrêt *R. c. Golden*, [2001] 3 R.C.S. 679, 2001 CSC 83. Là encore, j'estime qu'on ne peut pas considérer que le libellé général de l'al. 732.1(3)(h) accorde une telle autorisation. Dans les différents cas où le législateur a choisi d'autoriser le prélèvement d'échantillons de

investigation of impaired driving offences (ss. 253 to 261 of the *Criminal Code*); and the collection of urine samples from federal inmates and parolees (ss. 54 to 57 of the *Corrections and Conditional Release Act*, S.C. 1992, c. 20, and ss. 60 to 72 of the *Corrections and Conditional Release Regulations*, SOR/92-620).

substances corporelles, il ne l'a pas seulement dit clairement, mais il a également établi, dans la loi ou par voie de règlement, un certain nombre de normes et de garanties : voir, par exemple, le prélèvement d'échantillons d'ADN pour les besoins d'une enquête ou, à la suite d'une déclaration de culpabilité, aux fins d'inclusion dans la banque de données génétiques (art. 487.04 à 487.091 du *Code criminel*), le prélèvement d'échantillons d'haleine et de sang au cours d'une enquête relative à une infraction de conduite avec facultés affaiblies (art. 253 à 261 du *Code criminel*), ainsi que le prélèvement d'échantillons d'urine d'un détenu qui se trouve dans un pénitencier fédéral ou à l'extérieur d'un tel pénitencier à la suite d'une libération conditionnelle (art. 54 à 57 de la *Loi sur le système correctionnel et la mise en liberté sous condition*, L.C. 1992, ch. 20, et art. 60 à 72 du *Règlement sur le système correctionnel et la mise en liberté sous condition*, DORS/92-620).

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A number of provincial legislatures have also enacted legislation and regulations governing the seizure of bodily samples from inmates of provincial institutions: see, for example, Alberta, *Corrections Act*, R.S.A. 2000, c. C-29, ss. 14.1 and 14.2, and *Correctional Institution Regulation*, Alta. Reg. 205/2001, ss. 48.1 and 48.2; Saskatchewan, *The Correctional Services Act*, S.S. 1993, c. C-39.1, s. 56(1), and *The Correctional Services Administration, Discipline and Security Regulations*, 2003, R.R.S., c. C-39.1, Reg. 3, s. 40(1); Manitoba, *Correctional Services Act*, S.M. 1998, c. 47, C.C.S.M. c. C230, s. 16, *Correctional Institutions Regulation*, Man. Reg. 227/92, ss. 28, 29, 29.1 and 31(1), and *Correctional Services Regulation*, Man. Reg. 128/99, ss. 41 to 45; Prince Edward Island, *Correctional Services Act*, R.S.P.E.I. 1988, c. C-26.1, s. 17(g), and P.E.I. Reg. EC616/92, ss. 10 and 11; Ontario, *Corrections Accountability Act*, 2000, S.O. 2000, c. 40, s. 57.9(1) to (3). The Ontario legislation, unlike other provinces, applies to probationers as well as to provincial inmates.

Un certain nombre de législatures provinciales ont également édicté des lois et des règlements régissant le prélèvement d'échantillons de substances corporelles de détenus incarcérés dans un établissement provincial : voir, par exemple, Alberta, *Corrections Act*, R.S.A. 2000, ch. C-29, art. 14.1 et 14.2, et *Correctional Institution Regulation*, Alta. Reg. 205/2001, art. 48.1 et 48.2; Saskatchewan, *The Correctional Services Act*, S.S. 1993, ch. C-39.1, par. 56(1), et *The Correctional Services Administration, Discipline and Security Regulations*, 2003, R.R.S., ch. C-39.1, Reg. 3, par. 40(1); Manitoba, *Loi sur les services correctionnels*, L.M. 1998, ch. 47, C.P.L.M. ch. C230, art. 16, *Règlement sur les établissements de correction*, Règl. du Man. 227/92, art. 28, 29, 29.1 et par. 31(1), et *Règlement sur les services correctionnels*, Règl. du Man. 128/99, art. 41 à 45; Île-du-Prince-Édouard, *Correctional Services Act*, R.S.P.E.I. 1988, ch. C-26.1, al. 17g), et P.E.I. Reg. EC616/92, art. 10 et 11; Ontario, *Loi de 2000 sur la responsabilisation en matière de services correctionnels*, L.O. 2000, ch. 40, par. 57.9(1) à (3). La loi ontarienne, contrairement à celles des autres provinces, s'applique tant aux probationnaires qu'aux détenus incarcérés dans un établissement provincial.

The establishment of these standards and safeguards cannot be left to the discretion of the sentencing judge in individual cases. There is no question that a probationer has a lowered expectation of privacy. However, it is up to Parliament, not the courts, to balance the probationers' *Charter* rights as against society's interest in effectively monitoring their conduct. Since the purpose of s. 8 is preventative, the following principle in *Hunter v. Southam Inc.*, [1984] 2 S.C.R. 145, at p. 169, is particularly apposite here:

While the courts are guardians of the Constitution and of individuals' rights under it, it is the legislature's responsibility to enact legislation that embodies appropriate safeguards to comply with the Constitution's requirements. It should not fall to the courts to fill in the details that will render legislative lacunae constitutional.

In this case, the Crown argues that reasonable and probable grounds are not required for the search and seizure of bodily substances from probationers and that the seizure of blood samples is also reasonable. Hall J.A. disagreed. He would have deleted the requirement to provide blood samples as too intrusive and conditioned the requirement to provide urine and breath samples upon the establishment of reasonable and probable grounds. Those are precisely the kinds of policy decisions for Parliament to make having regard to the limitations contained in the *Charter*. Parliament has specifically addressed the issue of alcohol and intoxicating substances in ss. 732.1(3)(c), 732.1(3)(g.1) and 732.1(3)(g.2) but it has not provided for a scheme for the collection of bodily samples as it has done in respect of parolees. Such a scheme cannot be judicially enacted on the ground that the court may find it desirable in an individual case. In addition to the constitutional concerns raised by the collection of bodily samples, the establishment of such a scheme requires the expenditure of resources and usually the cooperation of the provinces. This reality is exemplified in this case where the funding for urinalysis has been discontinued in British Columbia rendering the

L'établissement de ces normes et garanties ne saurait être laissé, dans chaque cas, au choix du juge chargé de la détermination de la peine. Il est indubitable qu'un probationnaire a des attentes moins grandes en matière de vie privée. Cependant, il appartient au législateur, et non aux tribunaux, d'établir un équilibre entre les droits que la *Charte* garantit aux probationnaires et l'intérêt qu'a la société à assurer une surveillance efficace de leur conduite. Comme l'art. 8 remplit une fonction préventive, le principe suivant énoncé dans l'arrêt *Hunter c. Southam Inc.*, [1984] 2 R.C.S. 145, p. 169, est particulièrement pertinent en l'espèce :

Même si les tribunaux sont les gardiens de la Constitution et des droits qu'elle confère aux particuliers, il incombe à la législature d'adopter des lois qui contiennent les garanties appropriées permettant de satisfaire aux exigences de la Constitution. Il n'appartient pas aux tribunaux d'ajouter les détails qui rendent constitutionnelles les lacunes législatives.

Dans la présente affaire, le ministère public fait valoir que l'existence de motifs raisonnables et probables n'est pas requise pour prélever des échantillons de substances corporelles de probationnaires et que le prélèvement d'échantillons de sang est également raisonnable. Le juge Hall de la Cour d'appel n'était pas de cet avis. Il aurait supprimé l'exigence de fournir des échantillons de sang pour le motif qu'elle constitue une mesure trop envahissante et il aurait assujéti l'exigence de fournir des échantillons d'urine et d'haleine à la preuve de l'existence de motifs raisonnables et probables. C'est précisément le genre de décision de politique générale que le législateur doit prendre tenu des restrictions prévues dans la *Charte*. Le législateur a abordé expressément la question de l'alcool et des substances toxiques aux al. 732.1(3)(c), g.1) et g.2), mais il n'a prescrit aucun régime de prélèvement d'échantillons de substances corporelles comme il l'a fait pour les personnes en liberté conditionnelle. Il n'appartient pas à un tribunal d'édicter un tel régime parce qu'il peut juger souhaitable de le faire dans un cas particulier. Outre les questions d'ordre constitutionnel soulevées par le prélèvement d'échantillons de substances corporelles, l'établissement d'un tel régime commande l'utilisation de ressources et habituellement, la collaboration des

probation condition moot. This is yet another reason why the matter is one for Parliament.

26 For these reasons, I would conclude that there is no statutory authority for requiring Mr. Shoker to submit bodily samples. In the absence of a legislative scheme authorizing the seizure of bodily samples, the enforcement of abstention conditions must be done in accordance with existing investigatory tools. The majority of the Court of Appeal was therefore correct in deleting that part of Condition 9 following the words “non prescription narcotics”. I would dismiss the appeal.

The reasons of Bastarache and LeBel JJ. were delivered by

LEBEL J. —

I. Introduction

27 I have read the reasons of my colleague Charron J. Although I agree with her that the appeal should be dismissed, I reach this result on a different basis. In my opinion, there is statutory authority for the kind of order made by the sentencing judge. But the terms of the order were open to review under s. 8 of the *Canadian Charter of Rights and Freedoms*. As they did not meet the requirements of s. 8, the appeal should fail.

28 I need not return to the facts of this appeal, which were fully reviewed by Charron J. I will focus on the two legal issues raised by the case at bar. I will begin by considering whether statutory authority for the order can be found in the *Criminal Code*, R.S.C. 1985, c. C-46. Then, I will turn to the issue of whether the discretion delegated to the sentencing judge was exercised in conformity with the *Charter*.

provinces. Cela se reflète dans la présente affaire où la Colombie-Britannique a cessé de financer les analyses d’urine, de sorte que la condition de probation est désormais théorique. Voilà une raison de plus pour laquelle cette question doit relever du législateur.

Pour ces motifs, je suis d’avis de conclure qu’il n’existe aucun pouvoir légal de contraindre M. Shoker à fournir des échantillons de substances corporelles. En l’absence d’un régime législatif autorisant le prélèvement d’échantillons de substances corporelles, l’exécution des conditions interdisant la consommation de certaines substances doit se faire d’une manière conforme aux outils d’enquête existants. Par conséquent, les juges majoritaires de la Cour d’appel ont eu raison de supprimer la partie de la condition n° 9 qui suivait les termes « narcotiques non vendus sur ordonnance ». Je suis d’avis de rejeter le pourvoi.

Version française des motifs des juges Bastarache et LeBel rendus par

LE JUGE LeBEL —

I. Introduction

J’ai pris connaissance des motifs de ma collègue la juge Charron. Je partage son opinion selon laquelle il y a lieu de rejeter le pourvoi, mais à l’issue d’un raisonnement différent. Selon moi, la loi permet de prononcer une ordonnance comme celle rendue par le juge chargé de la détermination de la peine. Cependant, les conditions de l’ordonnance pouvaient faire l’objet d’une révision fondée sur l’art. 8 de la *Charte canadienne des droits et libertés*. Puisqu’elles ne respectaient pas les exigences de l’art. 8, le pourvoi doit être rejeté.

Je n’entends pas revenir sur les faits, que la juge Charron a examinés en détail. Je me concentrerai sur les deux questions de droit que soulève la présente affaire. J’examinerai d’abord si le *Code criminel*, L.R.C. 1985, ch. C-46, permet de rendre l’ordonnance en cause. Ensuite, je verrai si le pouvoir discrétionnaire délégué au juge chargé de la détermination de la peine a été exercé d’une manière conforme à la *Charte*.

II. Statutory Basis for the Order

This case is, first and foremost, one raising a problem of statutory interpretation. Once more, the courts are trying to ascertain the intention of Parliament using, I assume, the modern approach of purposive interpretation (see S. Beaulac and P.-A. Côté, “Driedger’s ‘Modern Principle’ at the Supreme Court of Canada: Interpretation, Justification, Legitimization” (2006), 40 *R.J.T.* 131). In this context, I readily concede that a purely textual reading of the relevant provisions of the *Criminal Code* (ss. 732.1(3)(c) and 732.1(3)(h)) would not resolve the issue. Nowhere do these provisions grant the sentencing judge, in so many words, the discretion to impose on the accused, in a probation order, an obligation to give samples of bodily substances. The *Criminal Code* expressly lists a number of mandatory and optional conditions, which are reviewed by my colleague in her reasons. Section 732.1(3)(c) authorizes the prohibition of the consumption of drugs or alcohol, but says nothing about monitoring the interdiction. Then, s. 732.1(3)(h), which plays the role of a basket or residual clause, refers merely to “such other reasonable conditions as the court considers desirable . . . for protecting society and for facilitating the offender’s successful reintegration into the community”. These words do not by themselves clearly grant a discretion. Read in context, however, they do.

To determine whether statutory authority for the order exists, the court must consider the context, namely probation and sentencing. A probation order is framed in a situation in which the court must address, in an individualized manner, the imperatives of the protection of society and rehabilitation of the accused. The sentencing judge is required to address the circumstances of the case and to devise terms that are reasonable in their context. The focus of the analysis remains the reasonableness of the conditions themselves. They are reasonable, and thus authorized by the statute, if they complement terms provided for in the *Code*

II. Fondement législatif de l’ordonnance

La présente affaire soulève d’abord et avant tout un problème d’interprétation législative. Une fois de plus, les tribunaux essaient de déterminer l’intention du législateur à l’aide, je suppose, de la méthode moderne d’interprétation téléologique (voir S. Beaulac et P.-A. Côté, « Driedger’s “Modern Principle” at the Supreme Court of Canada : Interpretation, Justification, Legitimization » (2006), 40 *R.J.T.* 131). Dans ce contexte, je reconnais volontiers qu’une interprétation purement textuelle des dispositions pertinentes du *Code criminel* (al. 732.1(3)c) et 732.1(3)h)) ne permettrait pas de régler la question en litige. Nulle part ces dispositions ne confèrent-elles explicitement au juge chargé de la détermination de la peine le pouvoir discrétionnaire d’imposer à l’accusé, dans une ordonnance de probation, l’obligation de fournir des échantillons de substances corporelles. Le *Code criminel* énumère expressément un certain nombre de conditions obligatoires et facultatives que ma collègue examine dans ses motifs. L’alinéa 732.1(3)c) permet d’interdire la consommation de drogues ou d’alcool, mais il demeure silencieux au sujet de la surveillance de l’interdiction. Ensuite, l’al. 732.1(3)h), qui sert de clause « fourre-tout » ou résiduelle, mentionne simplement « telles autres conditions raisonnables que le tribunal considère souhaitables [. . .] pour assurer la protection de la société et faciliter la réinsertion sociale du délinquant ». Pris isolément, ces mots ne confèrent pas clairement un pouvoir discrétionnaire. Cependant, ils le font si on les interprète dans leur contexte.

Pour déterminer si la loi permet de rendre l’ordonnance en cause, le tribunal doit examiner le contexte, qui est celui de la probation et de la détermination de la peine. Une ordonnance de probation est rédigée dans des circonstances où le tribunal doit donner suite, d’une manière individualisée, aux impératifs de protection de la société et de réhabilitation de l’accusé. Le juge chargé de la détermination de la peine doit examiner les circonstances de l’affaire et concevoir des conditions raisonnables dans leur contexte. L’analyse doit être axée sur le caractère raisonnable des conditions elles-mêmes. Des conditions sont raisonnables, et donc autorisées

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and address the objectives of the protection of society and the reintegration of the accused into the community.

31 In a legal and factual environment such as this, the *Code* cannot provide for everything. Parliament has wisely delegated to sentencing judges a reasonable discretion to frame terms that will allow them to address the particular situation of each accused. A reasonable condition that can be connected with the categories of terms contemplated by the *Code* is grounded in an implied, but solid, statutory authority. The condition may then face a second level of scrutiny under the *Charter*, but it would not lie outside the jurisdiction of the sentencing judge.

32 The *Criminal Code* provides for conditions concerning alcohol and drug use. Prohibitions or restrictions on their use appear to have become almost standard terms of many probation orders. Nevertheless, the *Code* remains vague, even silent, about the monitoring of these conditions, although, according to well-known textbooks on sentencing, probation orders often incorporate monitoring procedures (C. C. Ruby, *Sentencing* (6th ed. 2004), at para. 10.57; A. Manson, P. Healy and G. Trotter, *Sentencing and Penal Policy in Canada* (2000), at p. 280).

33 The residual clause in s. 732.1(3)(h) appears to have been designed to address the difficulties faced by trial judges in framing orders that fit the distinct situations of individual accused and that must be made effective. It is there to fill in gaps, allowing the sentencing judge to flesh out the terms of the probation order by adding reasonable conditions. Conditions will be reasonable if they address the situation of the accused and meet the standards of s. 8 of the *Charter*.

34 The residual clause was not adopted for the purpose of collecting evidence for future prosecution.

par la loi, si elles complètent celles prévues dans le *Code* et répondent aux objectifs de protection de la société et de réinsertion sociale de l'accusé.

Dans un contexte juridique et factuel comme celui qui nous occupe, le *Code* ne saurait tout prévoir. Le législateur a eu la sagesse de déléguer aux juges chargés de la détermination de la peine un pouvoir discrétionnaire raisonnable de concevoir des conditions adaptées à la situation particulière de chaque accusé. Une condition raisonnable qui peut être reliée aux catégories prévues par le *Code* doit être considérée comme étant implicitement, mais indéniablement, autorisée par la loi. Cette condition peut ensuite faire l'objet d'un deuxième examen cette fois fondé sur la *Charte*, mais elle n'excéderait pas la compétence du juge chargé de la détermination de la peine.

Le *Code criminel* prescrit des conditions relatives à la consommation d'alcool et de drogues. Les interdictions ou les restrictions concernant la consommation de ces substances semblent presque devenues la norme dans maintes ordonnances de probation. Néanmoins, le *Code* reste vague, voire muet, à l'égard de la surveillance de l'exécution de ces conditions, quoique, selon des ouvrages de doctrine bien connus en matière de détermination de la peine, les ordonnances de probation sont souvent assorties de modes de surveillance (C. C. Ruby, *Sentencing* (6^e éd. 2004), par. 10.57; A. Manson, P. Healy et G. Trotter, *Sentencing and Penal Policy in Canada* (2000), p. 280).

La clause résiduelle qui figure à l'al. 732.1(3)(h) semble avoir pour objet d'aplanir les difficultés auxquelles se heurtent les juges du procès lorsqu'ils sont appelés à formuler des ordonnances à la fois efficaces et adaptées à la situation particulière de chaque accusé. Elle vise à combler des lacunes en permettant au juge chargé de la détermination de la peine d'étoffer l'ordonnance de probation par l'ajout de conditions raisonnables. Des conditions seront alors raisonnables si elles tiennent compte de la situation de l'accusé et si elles respectent les normes de l'art. 8 de la *Charte*.

La clause résiduelle ne vise pas à permettre l'obtention d'éléments de preuve destinés à être utilisés

It exists to make sure that the terms of probation orders are effective and can be implemented in a practical way. The fact that the *Criminal Code* contains no specific monitoring provisions simply reflects the generally individualized nature of the sentencing process and of probation orders.

The need for a monitoring mechanism may result from the nature of the obligations imposed on the accused by the probation order. Absent a monitoring procedure in such circumstances, it might rightly be said that Parliament spoke for nothing. To deny the existence of implied statutory powers in the present case does not comport with the approach of this Court, which has not hesitated to acknowledge the existence of such powers when the need for them flows from the nature of the substantive provisions of a law. For example, in one *Charter* case, which concerned public schools and their students, the Court found implied authority for conducting reasonable searches of students in the statutory obligations of schools and teachers to maintain order and discipline (*R. v. M. (M.R.)*, [1998] 3 S.C.R. 393, at para. 51, *per* Cory J.):

If it is to be reasonable the search must be conducted reasonably and must be authorized by a statutory provision which is itself reasonable. There is no specific authorization to search provided in the *Education Act*, R.S.N.S. 1989, [c. 136,] or its regulations. Nonetheless, the responsibility placed upon teachers, and principals to maintain proper order and discipline in the school and to attend to the health and comfort of students by necessary implication authorizes searches of students. See s. 54(b) and Regulation 3(7) and (9). Teachers must be able to search students if they are to fulfil the statutory duties imposed upon them. It is reasonable, if not essential to provide teachers and principals with this authorization to search. It is now necessary to consider the circumstances in which the search itself may be considered to be reasonable.

With respect for those who hold other views, under very well-established rules of statutory interpretation, the *Criminal Code* grants the sentencing

dans des poursuites ultérieures. Elle a pour objet d'assurer que les conditions des ordonnances de probation soient efficaces et puissent être exécutées concrètement. L'absence dans le *Code criminel* de dispositions précises en matière de surveillance reflète simplement la nature généralement individualisée du processus de détermination de la peine et des ordonnances de probation.

La nécessité d'un mécanisme de surveillance peut découler de la nature des obligations que l'ordonnance de probation impose à l'accusé. Si aucun mode de surveillance n'était prévu dans ces cas, on pourrait affirmer à juste titre que le législateur a parlé pour ne rien dire. Nier l'existence de pouvoirs légaux implicites ne respecte pas l'opinion de notre Cour, qui n'a pas hésité à reconnaître l'existence de tels pouvoirs dans les cas où leur nécessité tient à la nature des dispositions substantielles d'une loi. Par exemple, dans une affaire liée à la *Charte*, à propos des rapports entre les écoles publiques et leurs élèves, la Cour a conclu que les obligations légales des écoles et des enseignants de maintenir l'ordre et la discipline permettaient implicitement de soumettre les élèves à des fouilles raisonnables (*R. c. M. (M.R.)*, [1998] 3 R.C.S. 393, par. 51, le juge Cory) :

Pour être raisonnable, la fouille doit être effectuée de manière raisonnable et être autorisée par une disposition législative qui est elle-même raisonnable. On ne trouve aucune autorisation particulière de procéder à des fouilles dans l'*Education Act*, R.S.N.S. 1989, [ch. 136,] ou dans son règlement d'application. Cependant, la responsabilité qui incombe aux enseignants et aux directeurs de maintenir l'ordre et la discipline dans l'école et de veiller à la santé et au bien-être des élèves autorise, par déduction nécessaire, les fouilles d'élèves. Voir l'al. 54b) de la Loi et les par. 3(7) et (9) du Règlement. Les enseignants doivent pouvoir fouiller les élèves pour être en mesure de s'acquitter des responsabilités que leur impose la loi. Il est raisonnable, voire essentiel, de donner cette autorisation de fouiller aux enseignants et aux directeurs. Il faut maintenant examiner les circonstances dans lesquelles la fouille elle-même peut être jugée raisonnable.

En toute déférence pour les tenants d'autres points de vue, des règles d'interprétation législative très bien établies veulent que le *Code criminel*

judge the authority to include monitoring procedures in probation orders. To hold otherwise might well cause unforeseen and undesirable effects, as the inflexibility of such an interpretative approach would likely require Parliament to attempt to foresee a wide range of individual situations and to address them in minute detail. A drafting technique such as this would hardly be consistent with the canons of sound legal drafting, even if it were feasible.

habilite le juge chargé de la détermination de la peine à inclure des modes de surveillance dans une ordonnance de probation. Conclure différemment pourrait bien entraîner des effets inattendus et peu souhaitables, parce que la rigidité d'une telle méthode d'interprétation forcerait vraisemblablement le législateur à tenter de prévoir une vaste gamme de situations particulières et à en traiter de manière très détaillée. Même s'il était possible de l'utiliser, cette technique de rédaction ne serait guère compatible avec les règles fondamentales d'une bonne rédaction législative.

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Moreover, a narrow interpretation of the residual clause would cast doubt on a number of useful monitoring methods, which sentencing judges appear to be resorting to with increasing frequency. For example, it might prevent the use of electronic monitoring, which allows probation officers or public authorities to make sure that conditions relating to house arrest or curfews are complied with. I note that a number of judges have found such conditions to be valid:

De plus, une interprétation restrictive de la clause résiduelle jetterait le doute sur un certain nombre de modes de surveillance utiles auxquels semblent recourir de plus en plus les juges chargés de la détermination de la peine. Elle pourrait notamment empêcher le recours à la surveillance électronique qui permet aux agents de probation ou aux autorités publiques de s'assurer que les conditions prescrivant la détention à domicile ou un couvre-feu sont respectées. D'ailleurs, je constate qu'un certain nombre de juges ont conclu à la validité de ces conditions :

The conclusion is that section 732.1(3)(h) allows orders which restrict a defendant's lifestyle, such as curfews, orders that he or she not frequent specified places, or associate with specified persons, or orders that a defendant be confined on electronic monitoring.

[TRADUCTION] Il faut conclure que l'al. 732.1(3)h) permet de rendre des ordonnances qui restreignent le mode de vie d'un défendeur par l'imposition d'un couvre-feu notamment, qui lui intiment de ne pas fréquenter certains endroits ou certaines personnes ou qui le placent sous surveillance électronique.

. . .

. . .

The terms of probation can control the defendant's lifestyle. For example, a defendant might be . . . ordered to wear an electronic monitoring device . . .

Les conditions de probation peuvent régir le mode de vie du défendeur. Par exemple, un défendeur pourrait se voir [. . .] ordonner de porter un dispositif de surveillance électronique . . .

. . .

. . .

Thus, curfews, house arrest (with or without electronic monitoring), bed checks . . . etc., can all be appropriate "other conditions". It does not matter whether one sees them as rehabilitative measures, control measures, or punishment. What counts is not the label but an intent that the condition should further public protection or the acceptance of the defendant in the community, and some reasonable grounds for belief that it will

Ainsi, les couvre-feux, les détentions à domicile (avec ou sans surveillance électronique), les contrôles de présence à domicile [. . .] etc., peuvent tous constituer « d'autres conditions » appropriées. Il importe peu que ces conditions soient perçues comme des mesures de réadaptation, des modes de contrôle ou des sanctions. Ce qui compte est non pas la façon de désigner une condition mais plutôt l'intention que cette condition

have a tendency to effect those purposes. [Emphasis added.]

(T. W. Ferris, *Sentencing: Practical Approaches* (2005), at pp. 79, 116 and 216-17)

Ferris reports that the courts in the following cases held that electronic monitoring is lawful under s. 732.1(3)(h) : *R. v. Carlson* (1996), 141 Sask. R. 168 (C.A.); *R. v. Curtis* (1996), 144 Sask. R. 156 (C.A.); *R. v. McLeod* (1992), 109 Sask. R. 8 (C.A.).

The range of possible conditions is broad. The purpose of such conditions is often to control aspects of the lifestyle of an accused to ensure that the goals of probation — protection of society and reintegration into the community — are achieved.

We should not assume that such a discretion would be abused by sentencing judges or exercised in an unconstitutional manner in the absence of a detailed statutory framework. In another context — a case concerning an exercise of discretion by an administrative authority — this Court asserted that it should not rely on assumptions of prospective breaches of the *Charter*:

I do not think there is any constitutional rule that requires Parliament to deal with Customs' treatment of constitutionally protected expressive material by legislation (as the appellants contend) rather than by way of regulation (as Parliament contemplated in s. 164(1)(j)) or even by ministerial directive or departmental practice. Parliament is entitled to proceed on the basis that its enactments "will be applied constitutionally" by the public service.

. . .

[I]t is in the nature of government work that the power of the state is exercised and the *Charter* rights of the citizen may therefore be engaged. While there is evidence of actual abuse here, there is the potential for

contribue à protéger le public ou à faciliter la réinsertion sociale du défendeur, ainsi que l'existence de motifs raisonnables de croire qu'elle contribuera à l'atteinte de ces objectifs. [Je souligne.]

(T. W. Ferris, *Sentencing : Practical Approaches* (2005), p. 79, 116 et 216-217)

Ferris indique que, dans les affaires suivantes, les tribunaux ont statué que l'al. 732.1(3)h) autorise la surveillance électronique : *R. c. Carlson* (1996), 141 Sask. R. 168 (C.A.); *R. c. Curtis* (1996), 144 Sask. R. 156 (C.A.); *R. c. McLeod* (1992), 109 Sask. R. 8 (C.A.).

Il existe un large éventail de conditions possibles. Ces conditions visent souvent à régir certains aspects du mode de vie d'un accusé de manière à assurer la réalisation des objectifs de la probation, à savoir la protection de la société et la réinsertion sociale de l'accusé.

Nous ne devrions pas supposer qu'en l'absence d'un cadre législatif détaillé les juges chargés de la détermination de la peine abuseraient d'un tel pouvoir discrétionnaire ou qu'ils l'exerceraient d'une manière non conforme à la Constitution. Dans un autre contexte où il était question de l'exercice d'un pouvoir discrétionnaire par une autorité administrative, notre Cour a souligné qu'elle ne devrait pas s'appuyer sur des présomptions de violation éventuelle de la *Charte* :

Je ne crois pas qu'il y ait quelque règle constitutionnelle obligeant le Parlement à prescrire au moyen d'une loi (comme le prétendent les appelants) plutôt que d'un règlement (comme l'a prévu le Parlement à l'al. 164(1)j)) ou même d'une directive ministérielle ou d'une pratique institutionnelle, la façon dont les Douanes doivent traiter le matériel expressif protégé par la Constitution. Le Parlement a le droit d'agir en tenant pour acquis que les textes de loi qu'il adopte « s[eront] appliqué[s] [...] d'une manière conforme à la Constitution » par les fonctionnaires.

. . .

[I]l est normal, de par la nature des activités de l'État, que celui-ci soit appelé à exercer son pouvoir et que les droits garantis au citoyen par la *Charte* puissent en conséquence être touchés. Quoiqu'il y ait preuve d'abus

abuse in many areas, and a rule requiring Parliament to enact in each case special procedures for the protection of *Charter* rights would be unnecessarily rigid. [Underlining added.]

(*Little Sisters Book and Art Emporium v. Canada (Minister of Justice)*, [2000] 2 S.C.R. 1120, 2000 SCC 69, at paras. 71 and 137)

40 Any challenge in the instant case should have related to the reasonableness of the order under s. 8 of the *Charter*. The authority to impose the monitoring conditions exists. It remains to be seen whether the conditions meet the standards of the *Charter* (see Ruby, at para. 10.63).

41 Before I move on to some brief comments on the application of s. 8 in the context of the case at bar, I must add that I agree with Charron J. that the part of the order that would, in essence, turn a positive test into a breach of the conditions set out in the order is contrary to the principles of criminal law. Guilt must be proved in the usual manner, that is, beyond a reasonable doubt, and the accused is entitled to the protection of the law of criminal evidence and criminal procedure.

III. Application of Section 8

42 Section 8 raises difficulties in respect of parts of the order. I agree that the part compelling the accused to undergo blood tests would be far too intrusive and would breach s. 8 absent a statutory framework consistent with the standards of the *Charter*.

43 Although it may very well be a more efficient way to monitor compliance, random drug testing at the probation officer's discretion could become highly arbitrary. Courts would have difficulty defining a proper framework to supplement the silence of the *Code*. This is a situation where Parliament would be in a better position to address the issue. Its solution would then be open to review by the courts under s. 8 and s. 1 of the *Charter*.

r  el en l'esp  ce, il y a risque d'abus dans de nombreux domaines, et une r  gle qui obligerait le Parlement   dicter dans chaque cas des proc  dures sp  ciales pour prot  ger les droits garantis par la Charte serait inutilement rigide. [Je souligne.]

(*Little Sisters Book and Art Emporium c. Canada (Ministre de la Justice)*, [2000] 2 R.C.S. 1120, 2000 CSC 69, par. 71 et 137)

En l'esp  ce, toute contestation aurait d   porter sur le caract  re raisonnable de l'ordonnance au regard de l'art. 8 de la *Charte*. L'imposition des conditions en mati  re de surveillance est permise. Il reste    voir si ces conditions respectent les normes de la *Charte* (voir Ruby, par. 10.63).

Avant de commenter bri  vement l'application de l'art. 8 dans le cadre du pr  sent pourvoi, je dois ajouter que je conviens avec la juge Charron que la partie de l'ordonnance qui, pour l'essentiel, ferait d'un test positif une violation des conditions   nonc  es dans cette ordonnance, contrevient aux principes du droit criminel. La culpabilit   doit   tre   tablie de la mani  re habituelle, c'est-  -dire hors de tout doute raisonnable, et l'accus   a droit    la protection des r  gles de preuve et de proc  dure en mati  re criminelle.

III. Application de l'art. 8

Certaines parties de l'ordonnance pr  sentent des difficult  s au regard de l'art. 8. Je suis d'accord pour dire que, en l'absence d'un cadre l  gislatif conforme aux normes de la *Charte*, la partie qui oblige l'accus      se soumettre    des analyses sanguines serait beaucoup trop envahissante et contreviendrait    l'art. 8.

Bien qu'ils puissent tr  s bien repr  senter un moyen plus efficace de veiller au respect des conditions impos  es, les tests de d  pistage de drogue faits au hasard,    la discr  tion de l'agent de probation, risqueraient de devenir tr  s arbitraires. Les tribunaux auraient de la difficult      d  finir un cadre appropri   pour suppl  er au silence du *Code*. Il s'agit d'un cas o   le l  gislateur serait mieux plac   pour r  gler la question. La solution qu'il retiendrait pourrait ensuite faire l'objet d'un examen judiciaire fond   sur l'art. 8 et l'article premier de la *Charte*.

For these reasons, I agree with my colleague that the appeal should be dismissed.

Appeal dismissed.

Solicitor for the appellant: Attorney General of British Columbia, Vancouver.

Solicitor for the respondent: Garth Barriere, Vancouver.

Solicitor for the intervener the Attorney General of Canada: Attorney General of Canada, Vancouver.

Solicitors for the intervener the Criminal Lawyers' Association (Ontario): Kapoor & Stribopoulos, Toronto.

Pour ces motifs, je partage l'opinion de ma collègue selon laquelle il y a lieu de rejeter le pourvoi.

Pourvoi rejeté.

Procureur de l'appelante : Procureur général de la Colombie-Britannique, Vancouver.

Procureurs de l'intimé : Garth Barriere, Vancouver.

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

Procureurs de l'intervenante Criminal Lawyers' Association (Ontario) : Kapoor & Stribopoulos, Toronto.

1987 CarswellSask 385

Supreme Court of Canada

R. v. Wigglesworth

Please see in particular paras. 30,
33

1987 CarswellSask 385, 1987 CarswellSask 519, [1987] 2 S.C.R. 541, [1987] S.C.J. No. 71, [1988] 1 W.W.R. 193, 24 O.A.C. 321, 28 Admin. L.R. 294, 32 C.R.R. 219, 37 C.C.C. (3d) 385, 3 W.C.B. (2d) 130, 45 D.L.R. (4th) 235, 60 C.R. (3d) 193, 61 Sask. R. 105, 81 N.R. 161, J.E. 87-1249, EYB 1987-67959

WIGGLESWORTH v. R. et al.

Dickson C.J.C., Beetz, Estey, McIntyre, Lamer, **Wilson** and La Forest JJ.

Heard: March 3 and 4, 1987

Judgment: November 19, 1987

Docket: No. 18613

Counsel: *G.N. Allbright, Q.C.*, for appellant.

C. Snell and *G.G. Mitchell*, for respondent.

J. Isaac, Q.C., and *Y. Vanasse*, for intervener the Attorney General of Canada.

D.W. Brown, Q.C., and *P.R. Jervis*, for intervener the Attorney General for Ontario.

Y. de Montigny and *F. Saint-Martin*, for intervener the Attorney General of Quebec.

Subject: Public

Headnote**Law enforcement agencies --- Police — Organization of police forces — Disciplinary proceedings — Relation to criminal charges**

Accused Royal Canadian Mounted Police (R.C.M.P.) constable was found guilty by a R.C.M.P. service tribunal of unnecessary violence towards a prisoner, a major service offence under the Act. A \$300 fine was imposed — Accused was also charged with common assault under the Code — The trial Judge held that the common assault charge was the same offence for which accused had already been found guilty under the Act and s. 11(h) of the Charter barred a second trial — Crown's appeal was allowed — Accused's appeal as to whether s. 11(h) of the Charter had been violated — The appeal should be dismissed — A prosecution for common assault in relation to an act for which accused had already been convicted under the Act did not violate s. 11(h) of the Charter — Accused was not being tried and punished for the same offence — Disciplinary offences were separate and distinct from criminal offences [Constitution Act, 1982, s 11\(h\)](#).

The accused was a Royal Canadian Mounted Police constable who, in the process of questioning a person from whom a breath sample had been demanded, grabbed the person by the throat and slapped him across the face. The constable was tried and found guilty by an R.C.M.P. service

tribunal of unnecessary violence towards a prisoner, a major service offence under the [Royal Canadian Mounted Police Act](#). A fine of \$300 was imposed. The accused was also charged under the [Criminal Code](#) with common assault. The trial judge held that the charge of common assault was the same offence for which the accused had already been found guilty under the [Royal Canadian Mounted Police Act](#) and that [s. 11\(h\) of the Canadian Charter of Rights and Freedoms](#) barred a second trial. The Crown's appeal was allowed and a conviction entered. The accused's appeal was dismissed, and a further appeal was heard on two constitutional questions: (1) Was a prosecution for common assault in relation to an act for which the accused had been convicted under the [Royal Canadian Mounted Police Act](#) in violation of [s. 11\(h\) of the Charter](#)? (2) If the prosecution did violate [s. 11\(h\)](#), was the prosecution justified by [s. 1 of the Charter](#)?

Held:

Appeal dismissed; Question 1 answered "No".

Per Wilson J. (Dickson C.J.C., Beetz, McIntyre, Lamer and La Forest JJ. concurring):

[Section 11 of the Charter](#) is available to persons prosecuted by the state for public offences involving punitive sanctions, that is, criminal, quasi-criminal and regulatory offences, either federally or provincially enacted. The language of the section contains terms which are classically associated with and have no meaning outside of criminal proceedings. Although the section refers to "offences", and not to "criminal offences" as does [s. 2\(f\) of the Canadian Bill of Rights](#), the intent is to ensure the section applies to provincial, as well as federal, laws. The marginal note to [s. 11](#), which refers to "Proceedings in criminal and penal matters", supports this interpretation. Although marginal notes are not an integral part of [the Charter](#) and the case for their utilization as aids to statutory interpretation is therefore weaker than for statutory headings, marginal notes can be used and this distinction recognized by the degree of weight attached to them. Finally, [s. 11](#) should be restricted to criminal or penal matters because of the serious difficulty otherwise, in giving the section a consistent application; other "offences" should be left subject to the more flexible criteria of fundamental justice in [s. 7 of the Charter](#).

A matter will fall under [s. 11](#) either because by its very nature it is a criminal proceeding or because a conviction in respect of the offence may lead to a true penal consequence. If a matter is of a public nature, intended to promote public order and welfare within a public sphere of activity, it falls within [s. 11](#) because of its nature. However, if it is a private, domestic or disciplinary matter, which is primarily intended to maintain discipline, professional integrity and professional standards, or to regulate conduct within a limited sphere of activity, it is not an "offence" proceeding within [s. 11](#); nor are proceedings of an administrative nature instituted for the protection of the public in accordance with statutory policy. At the same time, however, private, domestic or disciplinary matters which involve the imposition of true penal consequences, that is, imprisonment or a fine designed to redress the wrong done to society, will fall within [s. 11](#), and a person subject to such consequences should be entitled to the highest procedural protection known to our law.

Although proceedings under the [Royal Canadian Mounted Police Act](#) are neither criminal nor quasi-criminal proceedings, an officer charged with a major service offence faces a true penal consequence, since imprisonment for one year is a sentence available under [s. 36\(1\) of the Act](#).

Accordingly, [s. 11 of the Charter](#) applies to a major service offence before the Royal Canadian Mounted Police Service Court.

In this case, however, the accused was not being tried and punished for the same offence. Disciplinary offences are separate and distinct from criminal offences for the purposes of the rule against multiple convictions. The major service offence was an internal disciplinary matter under which the accused accounted to his profession, and the charge of common assault required the accused to account to the public at large. The answer to the first constitutional question was "no" and it was therefore unnecessary to answer the second question.

Per Estey J. (dissenting in part):

When a matter has a true penal consequence, [s. 11 of the Charter](#) applies and, accordingly, a proceeding with respect to a major service offence under the [Royal Canadian Mounted Police Act](#) is an offence under [s. 11](#). The offence of which the accused was convicted under that Act and the offence with which he was charged under the [Criminal Code](#) were the same, and accordingly [s. 11\(h\)](#) barred the [Criminal Code](#) proceeding. In this case there was only one factual assault for which the accused had been tried and punished. The test as to whether the two proceedings are in respect of the same offence is practical, and involves determining whether by registering a conviction the tribunal was performing a task in which the general public's interest in the administration of criminal law was recognized over and above the limited interest of internal discipline. Here, considering the possibility of imprisonment for one year under [s. 36 of the Royal Canadian Mounted Police Act](#) and of dismissal from the force under [s. 38](#), it was clear that the first procedure was in the nature of punishment to redress a social wrong. Finally, the breach of [s. 11\(h\)](#) could not conceivably be justified under [s. 1 of the Charter](#).

Table of Authorities

Cases considered:

Considered by majority:

Barry and Alta. Securities Comm., Re (1986), 25 D.L.R. (4th) 730, 24 C.R.R. 9, 67 A.R. 222 (C.A.) [leave to appeal to S.C.C. granted 74 A.R. 160, 72 N.R. 76] — referred to

Belhumeur v. Discipline Ctee. of Que. Bar Assn. (1983), 34 C.R. (3d) 279 (C.S. Que.) — considered

Bridges and Bridges, Re, Ont. Prov. Ct., Colter Prov. J. (unreported) — referred to
C.P. Ltd. v. A.G. Can., [1986] 1 S.C.R. 678, 11 C.C.E.L. 1, 27 D.L.R. (4th) 1, 86 C.L.L.C. 14,032, 66 N.R. 321 [Fed.] — referred to

Eastern Counties & London & Blackwall Ry. Cos. v. Marriage (1860), 9 H.L. Cas. 32, 11 E.R. 639 — referred to

Fang v. College of Physicians & Surgeons of Alta., [1986] 2 W.W.R. 380, 42 Alta. L.R. (2d) 89, 25 D.L.R. (4th) 632, 66 A.R. 352 (C.A.) referred to

Howard v. Stony Mountain Inst., Presiding Officer of Inmate Disciplinary Ct., 8 C.C.C. (3d) 557, 4 D.L.R. (4th) 147, 8 C.R.R. 301, reversed [1984] 2 F.C. 642, 11 Admin. L.R. 63, 45 C.R. (3d) 242, 19 C.C.C. (3d) 195, 19 D.L.R. (4th) 502, 17 C.R.R. 5, 57 N.R. 280 (C.A.)

[leave to appeal to S.C.C. granted 45 C.R. (3d) 242n, 19 C.C.C. (3d) 195n, 19 D.L.R. (4th) 502n, 17 C.R.R. 5n, 61 N.R. 78] — *referred to*

Inkster v. Radey, [1979] 2 F.C. 457, (sub nom. *Re Radey and Supt. of R.C.M.P.*) 47 C.C.C. (2d) 148 (C.A.) — *applied*

James, Re, [1982] 2 W.W.R. 316, 42 B.C.L.R. 10, (sub nom. *Re James and Law Soc. of B.C.*) 143 D.L.R. (3d) 379, 4 C.R.R. 293 (S.C.) — *referred to*

Kienapple v. R., [1975] 1 S.C.R. 729, 26 C.R.N.S. 1, 15 C.C.C. (2d) 524, 44 D.L.R. (3d) 351, 1 N.R. 322 [Ont.] — *referred to*

Knockaert v. Can. (Commr. of Corrections), [1986] 2 F.C. 361, 51 C.R. (3d) 183, 18 Admin. L.R. 273, 25 C.C.C. (3d) 373, 2 F.T.R. 179, affirmed [1987] 2 F.C. 202, (sub nom. *Knockaert v. Commr. of Corrections*) 55 C.R. (3d) 171, 22 Admin. L.R. 1, 32 C.C.C. (3d) 288, 8 F.T.R. 321n, 72 N.R. 161 (C.A.) [leave to appeal to S.C.C. refused 55 C.R. (3d) xxxii, 22 Admin. L.R. xxviii, 32 C.C.C. (3d) 288n] — *referred to*

L.S.U.C. v. Skapinker, [1984] 1 S.C.R. 357, 11 C.C.C. (3d) 481, 9 D.L.R. (4th) 161, 8 C.R.R. 193, 3 O.A.C. 321, 53 N.R. 169 — *applied*

Law Soc. of Man. v. Savino, [1983] 6 W.W.R. 538, 1 D.L.R. (4th) 285, 23 Man. R. (2d) 293 (C.A.) — *considered*

Lazarenko (Lazarendo), Re, [1984] 2 W.W.R. 24, 29 Alta. L.R. (2d) 28, (sub nom. *Re Lazarenko and Law Soc. of Alta.*) 4 D.L.R. (4th) 389, 9 C.R.R. 114, 50 A.R. 337 (Q.B.) — *referred to*

MacDonald v. Marriott (1984), 52 B.C.L.R. 346, 7 D.L.R. (4th) 697 (S.C.) — *referred to*
Malartic Hygrade Gold Mines (Can.) Ltd. v. Ont. Securities Comm. (1986), 54 O.R. (2d) 544, 9 O.S.C.B. 2286, 19 Admin. L.R. 21, 27 D.L.R. (4th) 112, 24 C.R.R. 1, 15 O.A.C. 124 (Div. Ct.) [leave to appeal to Ont. C.A. refused 19 Admin. L.R. xlv (C.A.)] — *referred to*

McCutcheon v. Toronto (1983), 41 O.R. (2d) 652, 20 M.V.R. 267, 22 M.P.L.R. 139, 147 D.L.R. (3d) 193 (H.C.) — *applied*

Nash and R., Re (1982), 70 C.C.C. (2d) 490 (Nfld. Prov. Ct.) — *not followed*

Pelissero and Loree, Re (1982), 140 D.L.R. (3d) 676 (Ont. Div. Ct.) — *referred to*

Peltari v. Dir. of Lower Mainland Regional Correctional Centre (1984), 42 C.R. (3d) 103, 15 C.C.C. (3d) 223 (B.C.S.C.) [quashed 18 C.C.C. (3d) 571 (B.C.C.A.)] — *referred to*

R. v. B & W Agricultural Services Ltd. (1982), 3 C.R.R. 354 (B.C. Prov. Ct.) — *not followed*

R. v. Belliveau; Belliveau v. Warden of Dorchester Penitentiary (1984), 55 N.B.R. (2d) 82, 144 A.P.R. 82 (C.A.) — *referred to*

R. v. Big M Drug Mart Ltd., [1985] 1 S.C.R. 295, [1985] 3 W.W.R. 481, 37 Alta. L.R. (2d) 97, 18 C.C.C. (3d) 385, 18 D.L.R. (4th) 321, 13 C.R.R. 64, 85 C.L.L.C. 14,023, 60 A.R. 161, 58 N.R. 81 — *applied*

R. v. DeBaie (1983), 60 N.S.R. (2d) 78, 128 A.P.R. 78 (C.A.) — *referred to*

R. v. Mingo (1982), 2 C.C.C. (3d) 23, 4 C.R.R. 18 (B.C.S.C.) — *considered*

R. v. Prince, [1986] 2 S.C.R. 480, [1987] 1 W.W.R. 1, 54 C.R. (3d) 97, 30 C.C.C. (3d) 35, 33 D.L.R. (4th) 724, 45 Man. R. (2d) 93, 70 N.R. 119 — *applied*

R. v. White, [1956] S.C.R. 154, 114 C.C.C. 77, 1 D.L.R. (2d) 305 [B.C.] — *applied*
Rosenbaum v. Law Soc. of Man., [1983] 5 W.W.R. 752, 2 Admin. L.R. 210, 6 C.C.C. (3d) 472,
150 D.L.R. (3d) 352, 22 Man. R. (2d) 260 (Q.B.) [affirmed [1984] 4 W.W.R. 95, 7 Admin.
L.R. 77, 8 C.C.C. (3d) 256, 3 D.L.R. (4th) 768, 25 Man. R. (2d) 154, leave to appeal to S.C.C.
refused 27 Man. R. (2d) 159n, 55 N.R. 400] *referred to*
Russell v. Radley, [1984] 1 F.C. 543, 5 Admin. L.R. 39, 11 C.C.C. (3d) 289 (T.D.) — *referred*
to
Sheffield Waterworks Co. v. Bennett (1872), L.R. 7 Ex. 409 — *referred to*
Stephens v. Cuckfield Rural Dist. Council, [1960] 2 Q.B. 373, [1960] 3 W.L.R. 248, [1960]
2 All E.R. 716 (C.A.) — *referred to*
Trumbley v. Fleming (1986), 55 O.R. (2d) 570, 21 Admin. L.R. 232, 29 D.L.R. (4th) 557,
24 C.R.R. 333, (sub nom. *Trumbley v. Toronto Police Force*) 15 O.A.C. 279 (C.A.) [leave
to appeal to S.C.C. granted 57 O.R. (2d) 320, 24 C.R.R. 333n, 21 O.A.C. 238, 74 N.R. 235]
— *applied*
Van Rassel v. Can. (Commr. of R.C.M.P.), [1987] 1 F.C. 473, 31 C.C.C. (3d) 10, (sub nom.
Van Rassel v. R.C.M.P.) 7 F.T.R. 187 (T.D.) — *considered*
Yeomans, Commr. of Corrections v. Gaw, [1985] 1 F.C. 561, [1986] 6 W.W.R. 72, 22 C.C.C.
(3d) 311 (C.A.) — *referred to*

Considered in dissent:

R. v. Prince, [1986] 2 S.C.R. 480, [1987] 1 W.W.R. 1, 54 C.R. (3d) 97, 30 C.C.C. (3d) 35, 33
D.L.R. (4th) 724, 45 Man. R. (2d) 93, 70 N.R. 119 — *distinguished*

Statutes considered:

Canadian Bill of Rights, R.S.C. 1970, App. III

s. 2(f)

Canadian Charter of Rights and Freedoms

s. 7

s. 11

s. 24(1)

Constitution Act, 1867

s. 92(15)

Criminal Code, R.S.C. 1970, c. C-34

s. 11

s. 245(1) [re-en. 1972, c. 13, s. 21]

Royal Canadian Mounted Police Act, R.S.C. 1970, c. R-9

s. 25(1)

s. 36(1)

s. 38

s. 45

Regulations considered:

Penitentiary Act, R.S.C. 1970, c. c. P-6 — Penitentiary Service Regulations, C.R.C. 1978, c. 1251

Words and phrases considered:

CRIMINAL AND PENAL MATTERS

The phrase "criminal and penal matters" which appears in the marginal note [of s. 11 of the *Charter*] would seem to suggest that a matter could fall within s. 11 either because by its very nature it is a criminal proceeding or because a conviction in respect of the offence may lead to a true penal consequence.

OFFENCE

. . . the narrower interpretation of s. 11 favoured by the majority of the authorities referred to above is in fact the proper interpretation of the section. The rights guaranteed by s. 11 of the *Charter* are available to persons prosecuted by the state for public offences involving punitive sanctions, i.e., criminal, quasi-criminal and regulatory offences, either federally or provincially enacted. A number of factors impel me to this conclusion.

.

. . . if a particular matter is of a public nature, intended to promote public order and welfare within a public sphere of activity, then that matter is a kind of matter which falls within s. 11 [of the *Charter*]. It falls within the section because of the kind of matter it is. This is to be distinguished from private, domestic or disciplinary matters which are regulatory, protective or corrective and which are primarily intended to maintain discipline, professional integrity and professional standards or to regular conduct within a limited private sphere of activity . . . There is also a fundamental distinction between proceedings undertaken to promote public order and

welfare within a public sphere of activity and proceedings undertaken to determine fitness to obtain or maintain a licence. Where disqualifications are imposed as part of a scheme for regulating an activity in order to protect the public, disqualification proceedings are not the sort of "offence" proceedings to which s. 11 is applicable. Proceedings of an administrative nature instituted for the protection of the public in accordance with the policy of a statute are also not the sort of "offence" proceedings to which s. 11 is applicable. But all prosecutions for criminal offences under the *Criminal Code* and for quasi-criminal offences under provincial legislation are automatically subject to s. 11. They are the very kind of offences to which s. 11 was intended to apply. . . . 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.

TRUE PENAL CONSEQUENCE

. . . a true penal consequence which would attract the application of s.11 [of the *Canadian Charter of Rights and Freedoms*] 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.

Appeal from judgment, *R. v. Wigglesworth* (1984), [1984] 3 W.W.R. 289, 38 C.R. (3d) 388, 31 Sask. R. 153, 7 D.L.R. (4th) 361, 11 C.C.C. (3d) 27, 9 C.R.R. 47, 1984 CarswellSask 546, [1984] S.J. No. 204 (Sask. C.A.), dismissing appeal from judgment, *R. v. Wigglesworth* (1983), 25 Sask. R. 149, 35 C.R. (3d) 322, 150 D.L.R. (3d) 748, 7 C.C.C. (3d) 170, 1983 CarswellSask 39, [1983] S.J. No. 554 (Sask. Q.B.), allowing Crown appeal from judgment, *R. v. Wigglesworth* (1983), 33 C.R. (3d) 44, 1983 CarswellSask 34, [1983] S.J. No. 1137 (Sask. Prov. Ct.), quashing common assault charge against R.C.M.P. constable previously found guilty in disciplinary proceedings arising from same incident.

Estey J. (dissenting in part):

1 I am in complete agreement with the judgment of Madame Justice Wilson through the first 21 pages [pp. 199-213, post] of 25 of the judgment, particularly the conclusion that where there is a "true penal consequence" it cannot be said as a matter of law that a tribunal with the responsibility of conviction and sentencing is but a disciplinary court administering justice to a professional or other body of specialized persons segregated for this purpose from the general community. Therefore I agree with Madame Justice Wilson when she concludes that s. 11 of the *Charter* applies to a trial conducted pursuant to the *Royal Canadian Mounted Police Act* for a "major service offence".

2 With much reflection and all due respect I do not follow the line thereafter pursued in the concluding few pages of my colleague's judgment in this appeal [from case reported at [1984] 3 W.W.R. 289, 38 C.R. (3d) 388, 11 C.C.C. (3d) 27, 7 D.L.R. (4th) 361, 31 Sask. R. 153, affirming

35 C.R. (3d) 322 7 C.C.C. (3d) 170 150 D.L.R. (3d) 748 25 Sask. R. 149, which reversed 33 C.R. (3d) 44].

3 The distinguishing feature of the tribunal sitting under the [Royal Canadian Mounted Police Act](#) is that this tribunal was equipped by Parliament to apply, following the registration of a conviction, a scale of punishment ranging from a reprimand through a fine up to \$500 to an ultimate penalty of one year imprisonment. The statute in addition ([s. 38](#)) empowers the convicting officer of the accused to recommend his removal from the force upon conviction. It can hardly be said, given the power under the [Royal Canadian Mounted Police Act](#) to couple a one-year imprisonment sentence with a virtually inevitable dismissal from the force upon conviction, that Parliament intended that the scale of punishment would reflect only the internal disciplinary interest of the R.C.M.P. and not the larger community interest in the suppression of the crime of assault wherever committed.

4 It is not irrelevant to note that Parliament when enacting the [Criminal Code](#) did anticipate the existence of a body outside the traditional courts administering criminal law in or outside the [Criminal Code](#) when it enacted s. 11 of the Code:

11. Where an act or omission is an offence under more than one Act of the Parliament of Canada, whether punishable by indictment or on summary conviction, a person who does the act or makes the omission is, unless a contrary intention appears, subject to proceedings under any of those Acts, but is not liable to be punished more than once for the same offence.

The section makes no reference to any particular tribunal but deals entirely with a prohibition against punishment more than once for the same offence. There is no question but that here the one accused committed the single offence of common assault and that he has been convicted and sentenced for that offence in a court established by Parliament for that purpose and is now faced with the like prosecution under another Act of Parliament, the [Criminal Code](#), and before another court.

5 In *R. v. Prince*, [1986] 2 S.C.R. 480, [1987] 1 W.W.R. 1, 54 C.R. (3d) 97, 30 C.C.C. (3d) 35, 33 D.L.R. (4th) 724, 45 Man. R. (2d) 93, 70 N.R. 119, the Chief Justice, in discussing the principles underlying the rule against multiple convictions, states (at pp. 498-99):

I conclude therefore, that the requirement of sufficient proximity between offences will only be satisfied if there is no additional and distinguishing element that goes to guilt contained in the offence for which a conviction is sought to be precluded by the *Kienapple* principle.

6 The facts in *Prince* are quite different from the circumstances in this case. Not only were there two victims of the one stabbing action but, also, the two offences under consideration, viz., causing bodily harm and manslaughter, required proof of different elements. The first required proof of bodily harm and the second required proof of the death of the baby. Clearly there was an insufficient legal nexus to apply the rule against multiple convictions in that case.

7 This case is completely different. Only one factual assault has occurred for which the appellant has been tried and punished. The potential imposition of a one-year imprisonment pursuant to a "trial" by the tribunal clearly points to this procedure as being in the nature of punishment to redress a social wrong and not only in the nature of disciplinary proceedings. The possibility of dismissal from the force pursuant to [s. 38](#) of the statute reinforces this view. With respect, I cannot agree with the view of Wilson J. that the two offences are in any way totally separate from or different from each other.

8 The test must be the practical one of determining whether the first court upon registering a conviction was performing a task assigned by Parliament which by the scale of punishment available to the tribunal is readily recognizable as a process in which the general public's interest in the administration of criminal law is recognized over and above the limited interest of internal discipline.

9 For the reasons given above it is my view that this test is met in this case. The subsequent proceeding under [s. 245\(1\) of the Criminal Code](#) falls squarely within the prohibition in [s. 11\(h\) of the Charter](#) that any person "finally found guilty and punished for the offence" has the right "not to be tried or punished for it again". Furthermore, a breach of [s. 11\(h\)](#) rights cannot be justified by any conceivable [s. 1](#) reasonable limits analysis. In any case, the Crown here has made no attempt to do so. The right to be tried and punished only once for an offence cannot, in my view, be fettered or circumscribed by Parliament. I would allow the appeal and answer the first constitutional question "yes", and the second constitutional question "no".

Wilson J. (Dickson C.J.C., Beetz, McIntyre, Lamer and La Forest JJ. concurring):

10 The central issue on this appeal is whether the appellant's conviction of a "major service offence" under the [Royal Canadian Mounted Police Act, R.S.C. 1970, c. R-9](#), precludes subsequent proceedings under the [Criminal Code](#) for the same mis conduct. The resolution of this issue requires a decision as to whether such a major service offence constitutes an "offence" within the meaning of [s. 11 of the Canadian Charter of Rights and Freedoms](#) and, if so, whether proceedings under the [Criminal Code](#) would violate the appellant's right under [s. 11\(h\) of the Charter](#) not to be tried and punished again for the same offence. Before turning to a consideration of these issues it is necessary to examine briefly the facts of the case.

I The Facts

11 The appellant was at all material times a constable of the Royal Canadian Mounted Police ["R.C.M.P."]. On 21st August 1981 one Donald Kerr was brought to the R.C.M.P. detachment in Yorkton, Saskatchewan, for a breathalyzer test. Kerr was taken into a room where he met the appellant.

12 The appellant started to question Kerr concerning the incident giving rise to his arrest. He asked Kerr who was driving the car at the time. Kerr indicated that his sister was driving. The appellant suspected he was lying. He repeated the question a couple of times, receiving the same response each time. The appellant then grabbed Kerr, who was seated in a chair at the time, by the throat and pushed him against a wall. The grab around the throat was sufficient to cause a choking sensation to Kerr.

13 After a few seconds the appellant questioned Kerr again as to who was driving the car. Kerr continued to maintain that his sister was driving. The appellant slapped Kerr across the face with his open hand and repeated the question. Kerr gave the same answer. However, after three or four slaps Kerr admitted that he had been driving the car. At no time did Kerr respond physically to the appellant's slaps. The defence has admitted, on these facts, that the appellant committed a common assault as defined in the [Criminal Code](#). As a result of the assault Kerr suffered a sore throat, a ringing in his ears and several minor marks on his face.

14 Two charges were laid following this incident. On 21st August 1981 the appellant was charged with common assault contrary to [s. 245\(1\) of the Criminal Code, R.S.C. 1970, c. C-34](#). The appellant was also charged under the [Royal Canadian Mounted Police Act](#) as follows:

That at or near Yorkton, in the Province of Saskatchewan, on the 21st day of August, 1981, that you were unnecessarily violent towards a prisoner, to wit: Donald Kerr, by forcibly grabbing him and slapping him in the face, contrary to Section [*sic*] (L), [Section 25 of the Royal Canadian Mounted Police Act](#).

II The Courts Below

15 On 2nd June 1982 the appellant appeared before Inspector S.G. Wilcox of the Royal Canadian Mounted Police Service Court for trial of the charge laid under the [Royal Canadian Mounted Police Act](#). The appellant was found guilty of a "major service offence" under s. 25(1) of that Act. The section reads as follows:

25. Every member who

(1) is cruel, harsh or unnecessarily violent to any prisoner or other person;

is guilty of an offence, to be known as a major service offence, and is liable to trial and punishment as prescribed in this Part.

The maximum penalty imposed by s. 36(1) of the Act for such an offence is imprisonment for one year. The appellant was assessed a fine of \$300.

16 On 2nd February 1983 the appellant appeared before His Honour Judge Meagher of the Saskatchewan Provincial Court for trial of the charge of common assault under [s. 245\(1\) of the Criminal Code](#) [reported at [33 C.R. \(3d\) 44](#)]. His counsel submitted that it would be improper to proceed with this charge following the conviction under the [Royal Canadian Mounted Police Act](#) since this would violate the accused's right under [s. 11\(h\) of the Charter](#) not to be tried and punished twice for the same offence. The trial judge accepted this submission and quashed the information pursuant to [s. 24\(1\) of the Charter](#). He held that both the proceeding before the service tribunal and the proceeding before the criminal court were penal in nature — both involved a trial for an alleged "offence" and a possible term of imprisonment following a determination of guilt. In his view, if punishment were meted out in each case, the appellant would be punished twice for the same offence.

17 The Crown appealed to the Court of Queen's Bench for Saskatchewan [reported at [35 C.R. \(3d\) 322](#) [7 C.C.C. \(3d\) 170](#) [150 D.L.R. \(3d\) 748](#) [25 Sask. R. 149](#)]. On 5th July 1983 that court allowed the appeal. Kindred J. held that the trial judge had erred in law in holding that the conviction under the [Royal Canadian Mounted Police Act](#) precluded him from trying the appellant under the [Criminal Code](#). The two constituted different offences. The former was a trial before a service tribunal for a breach of discipline amounting to a major service offence applicable only to members of the force, while the latter was a trial in a court of record for a criminal offence applicable to all. The court found the appellant guilty as charged and assessed a fine of \$250 to be paid within one month or imprisonment for 15 days.

18 The appellant appealed to the Court of Appeal for Saskatchewan. On 16th February 1984 the appeal was dismissed [reported at [\[1984\] 3 W.W.R. 289](#), [38 C.R. \(3d\) 388](#), [11 C.C.C. \(3d\) 27](#), [7 D.L.R. \(4th\) 361](#), [31 Sask. R. 153](#)]. The Court of Appeal held that the proceeding before the R.C.M.P. service tribunal was purely "disciplinary". In its view that proceeding was concerned only with the professional aspect of the appellant's conduct. It was still necessary for the appellant to answer to society for the criminal aspect of his conduct. It held that [s. 11\(h\) of the Charter](#) did not prevent the appellant from being tried and charged for the criminal offence of assault because he was not found guilty and punished for that "offence" within the meaning of [s. 11 of the Charter](#). Cameron J.A. stated [at pp. 294-95]:

A single act may have more than one aspect, and it may give rise to more than one legal consequence. It may, if it constitutes a breach of the duty a person owes to society, amount to a crime, for which the actor must answer to the public. At the same time, the act may, if it involves injury and a breach of one's duty to another, constitute a private cause of action for damages, for which the actor must answer to the person he injured. And that same act may have still another aspect to it: it may also involve a breach of the duties of one's office or calling, in which event the actor must account to his professional peers. For example a doctor who sexually assaults a patient will be liable, at one and the same time, to a criminal

conviction at the behest of the state; to a judgment for damages, at the instance of the patient; and to an order of discipline on the motion of the governing council of his profession. Similarly a policeman who assaults a prisoner is answerable to the state for his crime; to the victim for damage he caused; and to the police force for discipline.

Cameron J.A. concluded [at p. 295]:

In the light of this I think Constable Wigglesworth's contention must fail, since the proceeding before the R.C.M.P. service tribunal was purely disciplinary. It was concerned only with the professional aspect of his conduct: the "offence" of which he was found guilty, a "major service offence", lay in the breach by him of his policeman's duty not to treat his prisoners harshly, cruelly, or with unnecessary violence. He must still answer to society for the criminal aspect of his conduct, or for his "criminal offence".

Cameron J.A. also added that he expressed no opinion as to the constitutionality of the power given to the R.C.M.P. under the [Royal Canadian Mounted Police Act](#) to imprison members of its force found guilty of major service offences.

19 By order dated 22nd May 1986, Dickson C.J.C. stated the following constitutional questions:

1. Is a prosecution by the Crown for the offence of common assault pursuant to [s. 245\(1\) of the Criminal Code of Canada](#), in relation to an act for which the accused has been previously convicted and fined for an offence of unnecessary violence towards a prisoner contrary to [s. 25\(1\)](#) and [Part II of the Royal Canadian Mounted Police Act](#), in violation of [s. 11\(h\) of the Canadian Charter of Rights and Freedoms](#)?
2. If a prosecution by the Crown for the offence of common assault pursuant to [s. 245\(1\) of the Criminal Code of Canada](#) in relation to an act for which the accused has been previously convicted and fined for an offence of unnecessary violence towards a prisoner contrary to [s. 25\(1\)](#) and [Part II of the Royal Canadian Mounted Police Act](#) violates [s. 11\(h\) of the Canadian Charter of Rights and Freedoms](#), is the subsequent prosecution by the Crown justified by [s. 1 of the Canadian Charter of Rights and Freedoms](#) and therefore not inconsistent with the *Constitution Act, 1982*?

III The Issue

20 [Section 11 of the Charter](#) reads as follows:

11. Any person charged with an offence has the right:
 - (a) to be informed without reasonable delay of the specific offence;
 - (b) to be tried within a reasonable time;

- (c) not to be compelled to be a witness in proceedings against that person in respect of the offence;
- (d) to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal;
- (e) not to be denied reasonable bail without just cause;
- (f) except in the case of an offence under military law tried before a military tribunal, to the benefit of trial by jury where the maximum punishment for the offence is imprisonment for five years or a more severe punishment;
- (g) not to be found guilty on account of any act or omission unless, at the time of the act or omission, it constituted an offence under Canadian or international law or was criminal according to the general principles of law recognized by the community of nations;
- (h) if finally acquitted of the offence, not to be tried for it again and, if finally found guilty and punished for the offence, not to be tried or punished for it again; and
- (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.

21 As mentioned above, the first question to be considered is whether the appellant has been "charged with an offence" within the meaning of the opening words of s. 11. The proper approach to *Charter* interpretation was set out by this court in *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295, [1985] 3 W.W.R. 481, 37 Alta. L.R. (2d) 97, 18 C.C.C. (3d) 385, 18 D.L.R. (4th) 321, 13 C.R.R. 64, 85 C.L.L.C. 14,023, 60 A.R. 161, 58 N.R. 81. At p. 344 Dickson J. [now C.J.C.] stated:

The meaning of a right or freedom guaranteed by *the Charter* [is] to be ascertained by an analysis of the *purpose* of such a guarantee; it was to be understood, in other words, in the light of the interests it was meant to protect.

... this analysis is to be undertaken, and the purpose of the right or freedom in question is to be sought by reference to the character and the larger objects of *the Charter* itself, to the language chosen to articulate the specific right or freedom, to the historical origins of the concepts enshrined, and where applicable, to the meaning and purpose of the other specific rights and freedoms with which it is associated within the text of *the Charter*. The interpretation should be, as the judgment in *Southam* emphasizes, a generous rather than a legalistic one, aimed at fulfilling the purpose of the guarantee and securing for individuals the full benefit of *the Charter's* protection. At the same time it is important not to overshoot the actual purpose of the right or freedom in question, but to recall that *the Charter* was not enacted in a vacuum, and must therefore, as this Court's decision in *Law Society of Upper Canada v. Skapinker*,

[1984] 1 S.C.R. 357, illustrates, be placed in its proper linguistic, philosophic and historical contexts.

22 There have been a large number of cases decided on the issue whether the accused has been "charged with an offence" within the meaning of the section. A number of these cases have recognized a so-called "disciplinary exception" to the application of s. 11. Thus, in *R. v. Mingo* (1982), 2 C.C.C. (3d) 23, 4 C.R.R. 18(B.C.S.C.), s. 11(h) was held to be inapplicable to a criminal prosecution for the same conduct which had been the subject of disciplinary proceedings against an inmate. A similar result has been reached in cases dealing with proceedings following a conviction for a disciplinary offence under the Penitentiary Service Regulations: for example, *Yeomans, Commr. of Corrections v. Gaw*, [1985] 1 F.C. 561, [1986] 6 W.W.R. 72, 22 C.C.C. (3d) 311(C.A.), and *Howard v. Stony Mountain Inst., Presiding Officer of Inmate Disciplinary Ct.* (1983), 8 C.C.C. (3d) 557, 4 D.L.R. (4th) 147, 8 C.R.R. 301(Fed. T.D.), subsequently reversed but in reliance on s. 7 of the Charter at [1984] 2 F.C. 642, 11 Admin. L.R. 63, 45 C.R. (3d) 242, 19 C.C.C. (3d) 195, 19 D.L.R. (4th) 502, 17 C.R.R. 5, 57 N.R. 280(C.A.); contra *Russell v. Radley*, [1984] 1 F.C. 543, 5 Admin. L.R. 39, 11 C.C.C. (3d) 289(T.D.); *Peltari v. Dir. of Lower Mainland Regional Correctional Centre* 1984 42 C.R. (3d) 103 15 C.C.C. (3d) 223(B.C.S.C.); and *Knockaert v. Can. (Commr. of Corrections)*, [1986] 2 F.C. 361, 51 C.R. (3d) 183, 18 Admin. L.R. 273, 25 C.C.C. (3d) 373, 2 F.T.R. 179(T.D.), subsequently upheld by the Federal Court of Appeal in a judgment rendered on 21st November 1986 [now reported at [1987] 2 F.C. 202 *Knockaert v. Commr. of Corrections* 55 C.R. (3d) 171 22 Admin. L.R. 1 32 C.C.C. (3d) 288 8 F.T.R. 321n 72 N.R. 161]. The same conclusion that s. 11 does not apply to disciplinary proceedings has been reached in cases involving proceedings brought pursuant to professional disciplinary statutes: see, for example, *Re James* [1982] 2 W.W.R. 316 42 B.C.L.R. 10, (sub nom. *Re James and Law Soc. of B.C.*) 143 D.L.R. (3d) 379, 4 C.R.R. 293(S.C.) ; *Rosenbaum v. Law Soc. of Man.*, [1983] 5 W.W.R. 752, 2 Admin. L.R. 210, 6 C.C.C. (3d) 472, 150 D.L.R. (3d) 352, 22 Man. R. (2d) 260(Q.B.); *Belhumeur v. Discipline Ctee. of Que. Bar Assn.* 1983 34 C.R. (3d) 279(C.S. Que.); *Law Soc. of Man. v. Savino*, [1983] 6 W.W.R. 538, 1 D.L.R. (4th) 285, 23 Man. R. (2d) 293(C.A.); and *Fang v. College of Physicians & Surgeons of Alta.*, [1986] 2 W.W.R. 380, 42 Alta. L.R. (2d) 89, 25 D.L.R. (4th) 632, 66 A.R. 352(C.A.).

23 The breadth of the opening words of s. 11, "Any person charged with an offence", suggests that the section may well apply to non-criminal proceedings. A few cases support this interpretation, holding that the rights guaranteed by s. 11 of the Charter are available to those "charged" with disciplinary offences. In *Re Nash and R.* (1982), 70 C.C.C. (2d) 490(Nfld. Prov. Ct.), it was submitted before Kennedy Prov. J. that an internal disciplinary panel of the Royal Newfoundland Constabulary contravened s. 11(d) of the Charter because it was not an independent and impartial tribunal. In considering the meaning of the word "offence" in s. 11(d), Kennedy Prov. J. stated at p. 494:

The word "offence" is broad enough to apply to any breach or charge whereby an accused can be punished. "Offence" is broad enough to apply to any of the actions taken against members of self-governing professional groups and associations and is also applicable to offences involving breaches of codes of conduct for such groups as police forces and members of the armed services.

24 An equally broad interpretation of the word "offence" appears in *Re Lazarenko (Lazarendo)*[1984] 2 W.W.R. 2429 Alta. L.R. (2d) 28*Re Lazarenko and Law Soc. of Alta.* 4 D.L.R. (4th) 389 at 3989 C.R.R. 11450 A.R. 337(Q.B.), subsequently disapproved by the Alberta Court of Appeal in *Fang v. College of Physicians & Surgeons of Alta., supra*. In *R. v. B & W Agricultural Services Ltd. (1982)*, 3 C.R.R. 354(B.C. Prov. Ct.), the accused was charged with a violation of the *Aeronautics Act* even although his licence had already been suspended for 30 days by an Air Transport Committee. Shupe Prov. J., noting that the term "offence" in s. 11 of the Charter was much broader than the term "criminal offence" in s. 2(f) of the Canadian Bill of Rights, R.S.C. 1970, App. III, granted the accused's request for a stay of proceedings based on s. 11(h) of the Charter. There is also some academic support for the broader interpretation of the word "offence" in s. 11. Morris Manning in *Rights, Freedoms and the Courts: A Practical Analysis of the Constitution Act, 1982* (1983) states at p. 362 that the breach of a law which carries a penalty is a "penal matter" and is thus an "offence". He adds that the absence of the word "criminal" is indicative of the intent of the framers of the Charter to have s. 11 apply to more than purely criminal offences. At p. 83 in his text on *Legal Rights in the Canadian Charter of Rights and Freedoms: A Manual of Issues and Sources* (1982), D.C. McDonald J. states:

... "offence" may include ... offences which may be committed only by persons who are members of certain organizations such as the Armed Forces and the Royal Canadian Mounted Police ... The word "offence", which signifies "a breach of law" or "an infraction of law", may be so broad as to include conduct which constitutes a ground upon which, by statute, a professional body may impose discipline upon its members, by disqualification, suspension or a fine.

25 It is my view that the narrower interpretation of s. 11 favoured by the majority of the authorities referred to above is in fact the proper interpretation of the section. The rights guaranteed by s. 11 of the Charter are available to persons prosecuted by the state for public offences involving punitive sanctions, i.e., criminal, quasi-criminal and regulatory offences, either federally or provincially enacted. A number of factors impel me to this conclusion.

26 I turn first to the text of s. 11. The Ontario Court of Appeal in *Trumbley v. Fleming* 198655 O.R. (2d) 57021 Admin. L.R. 23229 D.L.R. (4th) 55724 C.R.R. 333*Trumbley v. Toronto Police Force* 15 O.A.C. 279, in concluding that s. 11 is concerned with only criminal or penal matters, properly observed [at p. 583] that "the clear impression created by s. 11, read as a whole, is

that it is intended to provide procedural safeguards relating to the criminal law process." [Section 11](#) contains terms which are classically associated with criminal proceedings: "tried", "presumed innocent until proven guilty", "reasonable bail", "punishment for the offence", "acquitted of the offence" and "found guilty of the offence". Indeed, some of the rights guaranteed in [s. 11](#) would seem to have no meaning outside the criminal or quasi-criminal context. As Hugessen A.C.J.S.C. stated in *Belhumeur v. Discipline Ctee. of Que. Bar Assn.*, [supra](#), at p. 281, [s. 11](#) [translation] "is directed exclusively at procedure in criminal and penal matters". This same observation was made by Stevenson J.A. in *Re Barry and Alta. Securities Comm.* (1986), 25 D.L.R. (4th) 730 at 734, 24 C.R.R. 9, 67 A.R. 222(C.A.), and by Monnin C.J.M. in *Law Soc. of Man. v. Savino*, [supra](#), at p. 292.

27 The Ontario Court of Appeal in *Trumbley* noted that the legislative history of the section indicates that it was not intended to be restricted solely to criminal law but was meant to extend to "penal proceedings" as well. Section 2(f) of the Canadian Bill of Rights reads as follows:

2. ... no law of Canada shall be construed or applied so as to

(f) deprive a person charged with a criminal offence of the right to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal, or of the right to reasonable bail without just cause. [emphasis added.]

Section 2(f) differs from [s. 11 of the Charter](#) in that it refers to a "criminal offence" whereas [the Charter](#) refers only to an "offence". As already mentioned, some authorities see this difference as intended to give [s. 11](#) a broader application than mere "criminal offences": see *R. v. B & W Agricultural Services Ltd.*, [supra](#); Morris Manning, *Rights, Freedoms and the Courts*. But this leaves open the issue of how much broader the application of [s. 11](#) should be. One possible inference is that the word "criminal" was deleted in order to ensure that [s. 11](#) would also be applicable to summary conviction and provincial offence prosecutions under quasi-criminal public welfare statutes. The Canadian Bill of Rights was a federal statute which had no application to prosecutions of provincial offences created pursuant to [s. 92\(15\) of the Constitution Act, 1867](#). I would agree with the conclusion of Toy J. in *R. v. Mingo*, [supra](#), at p. 36:

In my respectful view, the authors of the new [Charter](#), when they employed the unqualified word "offence" as opposed to "criminal offence", were doing nothing more than providing for the equal protection of Canadian citizens from breaches of their rights under provincial as well as federal laws in so far as public as opposed to private or domestic prohibitions were concerned.

The same view was expressed by Monnin C.J.M. in *Law Soc. of Man. v. Savino*, [supra](#), at p. 292:

[Section 11](#) speaks of a person charged with an offence; its nine subsections deal with criminal matters ...

Its main purpose is matters dealing with criminal offences ...

[Section 11](#) certainly was primarily meant to cover crimes or *quasi*-crimes whether under federal or provincial legislation.

28 The marginal note to [s. 11](#) seems to support this interpretation of the section. It reads "Proceedings in criminal and penal matters". The Attorney General of Ontario and the respondent submitted, however, that the court ought not to place any emphasis on the marginal note to [s. 11](#) in interpreting the section. There is no doubt that the traditional view was that marginal notes could not be used as aids to interpretation as they formed no part of the Act which was passed by Parliament: see E.A. Driedger, *The Construction of Statutes*, 2nd ed. (1983), at p. 133; P.B. Maxwell, *Maxwell on the Interpretation of Statutes*, 12th ed. (1969), at p. 10; W.F. Craies, *Craies on Statute Law*, 7th ed. (1971), at p. 195. But reference to marginal notes has been made in some English authorities: see, for example, *Eastern Counties & London & Blackwall Ry. Cos. v. Marriage* 18609 H.L. Cas. 32 at 41, 11 E.R. 639; *Sheffield Waterworks Co. v. Bennett* 1872 L.R. 7 Ex. 409 at 421; and *Stephens v. Cuckfield Rural Dist. Council*, [1960] 2 Q.B. 373, [1960] 3 W.L.R. 248, [1960] 2 All E.R. 716 at 720 (C.A.). And this court has used statutory headings to assist in interpreting sections of [the Charter](#): see *L.S.U.C. v. Skapinker*, [1984] 1 S.C.R. 357, 11 C.C.C. (3d) 481, 9 D.L.R. (4th) 161, 8 C.R.R. 193, 3 O.A.C. 321, 53 N.R. 169. In that case, Estey J., writing for a unanimous court, held that the headings were deliberately included as part of [the Charter](#) and formed part of the resolution which Parliament debated. At pp. 376-77 he stated:

It is clear that these headings were systematically and deliberately included as an integral part of [the Charter](#) for whatever purpose. At the very minimum, the Court must take them into consideration when engaged in the process of discerning the meaning and application of the provisions of [the Charter](#). The extent of the influence of a heading in this process will depend upon many factors including (but the list is not intended to be all-embracing) the degree of difficulty by reason of ambiguity or obscurity in construing the section; the length and complexity of the provision; the apparent homogeneity of the provision appearing under the heading; the use of generic terminology in the heading; the presence or absence of a system of headings which appear to segregate the component elements of [the Charter](#); and the relationship of the terminology employed in the heading to the substance of the headlined provision.

... I conclude that an attempt must be made to bring about a reconciliation of the heading with the section introduced by it. If, however, it becomes apparent that the section when read as a whole is clear and without ambiguity, the heading will not operate to change that clear and unambiguous meaning. Even in that midway position, a court should not, by the adoption of a technical rule of construction, shut itself off from whatever small assistance might be gathered from an examination of the heading as part of the entire constitutional document.

It must be acknowledged, however, that marginal notes, unlike statutory headings, are not an integral part of the Charter: see *C.P. Ltd. v. A.G. Can.*, [1986] 1 S.C.R. 678 at 682, 11 C.C.E.L. 1, 27 D.L.R. (4th) 1, 86 C.L.L.C. 14,032, 66 N.R. 321 [Fed.]. The case for their utilization as aids to statutory interpretation is accordingly weaker. I believe, however, that the distinction can be adequately recognized by the degree of weight attached to them. I find some support in the marginal note therefore for the proposition that the opening words of s. 11, "charged with an offence", restrict the application of the section to criminal or quasi-criminal proceedings and proceedings giving rise to penal consequences.

29 Another factor which leads me to adopt a somewhat narrow definition of the opening words of s. 11 is a concern for the future coherent development of the section if it is made applicable to a wide variety of proceedings. Unless the section is restricted to criminal or penal matters there may be serious difficulty in giving the section a reasonably consistent application. The particular content of the various rights set out in s. 11 may well vary according to the type of proceeding if a broader definition is given to the opening words of the section. It is beyond question that those rights are accorded to those charged with criminal offences, to those who face the prosecutorial power of the state and who may well suffer a deprivation of liberty as a result of the exercise of that power. The content of those rights ought not to suffer from a lack of predictability or a lack of clarity because of a universal application of the section. As is obvious from a study of the various rights enumerated in the section, they are crucial fundamental rights whose meaning ought to be made crystal clear to the authorities who prosecute the offences falling within the section. For this reason it is, in my view, preferable to restrict s. 11 to the most serious offences known to our law, i.e., criminal and penal matters, and to leave other "offences" subject to the more flexible criteria of "fundamental justice" in s. 7.

30 While it is easy to state that those involved in a criminal or penal matter are to enjoy the rights guaranteed by s. 11, it is difficult to formulate a precise test to be applied in determining whether specific proceedings are proceedings in respect of a criminal or penal matter so as to fall within the ambit of the section. The phrase "criminal and penal matters" which appears in the marginal note would seem to suggest that a matter could fall within s. 11 either because by its very nature it is a criminal proceeding or because a conviction in respect of the offence may lead to a true penal consequence. I believe that a matter could fall within s. 11 under either branch.

31 There are many examples of offences which are criminal in nature but which carry relatively minor consequences following conviction. Proceedings in respect of these offences would nevertheless be subject to the protections of s. 11 of the Charter. It cannot be seriously contended that just because a minor traffic offence leads to a very slight consequence, perhaps only a small fine, that offence does not fall within s. 11. It is a criminal or quasi-criminal proceeding. It is the sort of offence which by its very nature must fall within s. 11. I would agree, therefore, with the comments made by Linden J. in *McCutcheon v. Toronto* (1983), 41 O.R. (2d) 652, 20 M.V.R.

267, 22 M.P.L.R. 139, 147 D.L.R. (3d) 193(H.C.). In that case, the accused claimed the benefit of s. 11 following the alleged commission of a parking offence. At p. 205 Linden J. said:

This provision of the Charter is available only to persons charged with an offence. On my reading of the by-laws and the legislation, the applicant is such a person, having been charged with offences when the summonses were issued against her ...

There can be no question that parking infractions are "offences" as that word is used in s. 11 of the Charter. The respondents contend that these are not the types of transgressions against society s. 11 of the Charter is directed at, since there is virtually no stigma attached to a parking ticket. In my view, however, the degree of stigma is of no significance.

32 In my view, if a particular matter is of a public nature, intended to promote public order and welfare within a public sphere of activity, then that matter is the kind of matter which falls within s. 11. It falls within the section because of the kind of matter it is. This is to be distinguished from private, domestic or disciplinary matters which are regulatory, protective or corrective and which are primarily intended to maintain discipline, professional integrity and professional standards or to regulate conduct within a limited private sphere of activity: see, for example, *Law Soc. of Man. v. Savino*, at p. 292; *Malartic Hygrade Gold Mines (Can.) Ltd. v. Ont. Securities Comm.* (1986), 54 O.R. (2d) 544 at 549, 9 O.S.C.B. 2286, 19 Admin. L.R. 21, 27 D.L.R. (4th) 112, 24 C.R.R. 1, 15 O.A.C. 124(Div. Ct.); and *Re Barry and Alta. Securities Comm.*, supra, at p. 736, per Stevenson J.A. There is also a fundamental distinction between proceedings undertaken to promote public order and welfare within a public sphere of activity and proceedings undertaken to determine fitness to obtain or maintain a licence. Where disqualifications are imposed as part of a scheme for regulating an activity in order to protect the public, disqualification proceedings are not the sort of "offence" proceedings to which s. 11 is applicable. Proceedings of an administrative nature instituted for the protection of the public in accordance with the policy of a statute are also not the sort of "offence" proceedings to which s. 11 is applicable. But all prosecutions for criminal offences under the Criminal Code and for quasi-criminal offences under provincial legislation are automatically subject to s. 11. They are the very kind of offences to which s. 11 was intended to apply.

33 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 matter 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. In "Annotation to *R. v. Wigglesworth*" 198438 C.R. (3d) 388, at p. 389, Professor Stuart states:

... other punitive forms of disciplinary measures, such as fines or imprisonment, are indistinguishable from criminal punishment and should surely fall within the protection of s. 11(h).

I would agree with this comment but with two caveats. First, the possibility of a fine may be fully consonant with the maintenance of discipline and order within a limited private sphere of activity and thus may not attract the application of s. 11. It is my view that if a body or an official has an unlimited power to fine, and if it does not afford the rights enumerated under s. 11, it cannot impose fines designed to redress the harm done to society at large. Instead, it is restricted to the power to impose fines in order to achieve the particular private purpose. One indicium of the purpose of a particular fine is how the body is to dispose of the fines that it collects. If, as in the case of proceedings under the Royal Canadian Mounted Police Act, the fines are not to form part of the Consolidated Revenue Fund but are to be used for the benefit of the force, it is more likely that the fines are purely an internal or private matter of discipline: Royal Canadian Mounted Police Act, s. 45. The second caveat I would raise is that it is difficult to conceive of the possibility of a particular proceeding failing what I have called the "by nature" test but passing what I have called the "true penal consequence" test. I have grave doubts whether any body or official which exists in order to achieve some administrative or private disciplinary purpose can ever imprison an individual. Such a deprivation of liberty seems justified as being in accordance with fundamental justice under s. 7 of the Charter only when a public wrong or transgression against society, as opposed to an internal wrong, is committed. However, as this was not argued before us in this appeal I shall assume that it is possible that the "by nature" test can be failed but the "true penal consequence" test passed. Assuming such a situation is possible, it seems to me that in cases where the two tests conflict the "by nature" test must give way to the "true penal consequence" test. If an individual is to be subject to penal consequences such as imprisonment — the most severe deprivation of liberty known to our law — then he or she, in my opinion, should be entitled to the highest procedural protection known to our law.

34 Before turning to the application of the law to the facts of this case, I want to emphasize that nothing in the above discussion takes away from the possibility that constitutionally guaranteed procedural protections may be available in a particular case under s. 7 of the Charter even although s. 11 is not available. The appellant in this case has chosen to base his case solely on s. 11 of the Charter. In view of this I make no comment on the applicability of s. 7.

35 It is clear that the R.C.M.P. Code of Discipline is concerned with the maintenance of discipline and integrity within the force. It is designed to regulate conduct within a limited private sphere of activity, i.e., conduct relevant to one's position as a member of the R.C.M.P. In considering the

offences set out in the [Royal Canadian Mounted Police Act](#) in *R. v. White*, [1956] S.C.R. 154 at 158, 114 C.C.C. 77, 1 D.L.R. (2d) 305 [B.C.], Rand J. stated:

... the delinquencies in s. 30 [of the [Royal Canadian Mounted Police Act](#)] are strictly of domestic discipline, that is, the member, by joining the Force, has agreed to enter into a body of special relations, to accept certain duties and responsibilities, to submit to certain restrictions upon his freedom of action and conduct and to certain coercive and punitive measures prescribed for enforcing fulfilment of what he has undertaken. These terms are essential elements of a status voluntarily entered into which affect what, by the general law, are civil rights, that is, action and behaviour which is not forbidden him as a citizen.

At p. 168 Abbott J. stated:

The [Royal Canadian Mounted Police Act](#) and the regulations made thereunder constitute a code of law regulating the recruitment, administration and discipline of the Force.

36 In *Inkster v. Radey* [1979] 2 F.C. 457 *Re Radey and Supt. of R.C.M.P.* 47 C.C.C. (2d) 148 at 150 (C.A.), Le Dain J. stated:

The major service offences specified in s. 25 of the Act obviously relate to matters of discipline. They are not, generally speaking, offences of the public character punishable under the [Criminal Code](#) or other statutes of a criminal law nature, although they might in some cases give rise to prosecution under the criminal law.

It would therefore seem that the proceedings before the Royal Canadian Mounted Police Service Court fail what I have called the "by nature" test. They are neither criminal proceedings nor quasi-criminal proceedings. They do not appear to be the kind of proceedings which fall within the ambit of s. 11. But it is apparent that an officer charged under the Code of Discipline faces a true penal consequence. He or she may be imprisoned for one year pursuant to s. 36(1) of the [Royal Canadian Mounted Police Act](#) if he or she is found guilty of a major service offence. As was stated by Joyal J. in *Van Rassel v. Can. (Commr. of R.C.M.P.)* [1987] 1 F.C. 473 at 48431 C.C.C. (3d) 10 *Van Rassel v. R.C.M.P.* 7 F.T.R. 187 (T.D.), a case which also dealt with a s. 11(h) claim with respect to proceedings for a major service offence under the [Royal Canadian Mounted Police Act](#), "The statute as a consequence [of the provision for imprisonment] is as much a penal statute as is the [Criminal Code](#)". This would seem, therefore, to be that unusual case where proceedings have failed the "by nature" test but have passed the "true penal consequence" test. As I have indicated above, in a case of conflict the "by nature" test must give way to the "true penal consequence" test. I find, therefore, that s. 11 applies to proceedings in respect of a major service offence before the Royal Canadian Mounted Police Service Court. Is the appellant entitled then to have the prosecution for the alleged criminal assault stayed on the ground that punishment for that offence would result in double punishment of the appellant for the same offence contrary to s. 11(h) of the [Charter](#)?

37 This court in *R. v. Prince*, [1986] 2 S.C.R. 480, [1987] 1 W.W.R. 1, 54 C.R. (3d) 97, 30 C.C.C. (3d) 35, 33 D.L.R. (4th) 724, 45 Man. R. (2d) 93, 70 N.R. 119, recently examined the scope of the rule against multiple convictions enunciated in *Kienapple v. R.*, [1975] 1 S.C.R. 729, 26 C.R.N.S. 1, 15 C.C.C. (2d) 524, 44 D.L.R. (3d) 351, 1 N.R. 322 [Ont.]. In *Prince* the accused's single act caused injury to one person and allegedly caused the death of another person. The accused was convicted of causing bodily harm in respect of the injured victim. The court considered whether she could also be tried for manslaughter in respect of the deceased victim. The court held that she could be so tried. In its view, although a single act of the accused grounded both charges, there was not sufficient correspondence between the elements of the two offences to sustain the operation of the rule against multiple convictions. The two offences, the court found, involved distinct elements. In the course of his reasons Dickson C.J.C. discussed the requirement that there be a sufficient nexus between the offences charged before the rule against multiple convictions is triggered. He said at pp. 494-95:

In my opinion, the weight of authority since *Kienapple* also supports the proposition that there must be sufficient nexus between the offences charged to sustain the rule against multiple convictions. In a unanimous judgment in *McKinney v. The Queen*, [1980] 1 S.C.R. 401, delivered orally by Laskin C.J., the Court saw no reason for interfering with a decision of the Manitoba Court of Appeal ... McKinney and others were charged and convicted of hunting out of season and hunting at night with lights contrary to ss. 16(1) and 19(1), respectively, of the *Wildlife Act*, R.S.M. 1970, c. W140. Both charges arose out of the same hunting incident. O'Sullivan J.A. for the majority held that the case involved two "delicts". Monnin J.A., dissenting on another issue, said that hunting out of season and hunting with lights were two different "matters", totally separate one from the other and not alternative one to the other. The judges of the Court of Appeal all agreed that *Kienapple* was inapplicable. Thus, notwithstanding there was but a single act of hunting, there were distinct delicts, causes or matters which would sustain separate convictions ... If an accused is guilty of several wrongs, there is no injustice in his or her record conforming to that reality.

In the context of proceedings before disciplinary tribunals there is ample authority for the view that disciplinary offences are separate and distinct from criminal offences for the purpose of the rule against multiple convictions: see *Re Pelissero and Loree* 1982 140 D.L.R. (3d) 676 (Ont. Div. Ct.); *MacDonald v. Marriott* 1984 52 B.C.L.R. 346 7 D.L.R. (4th) 697 (S.C.); *Van Rassel v. Can.*, *supra*; *Re Bridges and Bridges*, Ont. Prov. Ct., per Colter Prov. J. (unreported); *R. v. DeBaie* (1983), 60 N.S.R. (2d) 78, 128 A.P.R. 78 (C.A.); and *R. v. Belliveau*; *Belliveau v. Warden of Dorchester Penitentiary* (1984), 55 N.B.R. (2d) 82 at 86, 144 A.P.R. 82 (C.A.). In their text on *The Doctrine of Res Judicata*, 2nd ed. (1969), Spencer Bower and Turner state at pp. 279-80:

An example is readily found in an inquiry instituted by the disciplinary authority of a professional body, with a view to the expulsion of one against whom conduct infamous in a

professional respect is alleged. In such a case it may be that the conduct alleged is no more and no less than conduct in respect of which the accused person has already been acquitted by a criminal court on a criminal charge. Neither a conviction nor an acquittal before a criminal court on a criminal charge will bar the use of the same conduct before such a tribunal on an application to suspend or expel; for the purpose of the proceeding is not to punish the practitioner for the commission of an offence as such, but to exercise disciplinary power over the members of a profession so as to ensure that their conduct conforms to the standards of the profession.

38 I would hold that the appellant in this case is not being tried and punished for the same offence. The "offences" are quite different. One is an internal disciplinary matter. The accused has been found guilty of a major offence and has, therefore, accounted to his profession. The other offence is the criminal offence of assault. The accused must now account to society at large for his conduct. He cannot complain, as a member of a special group of individuals subject to private internal discipline, that he ought not to account to society for his wrongdoing. His conduct has a double aspect as a member of the R.C.M.P. and as a member of the public at large. To borrow from the words of the Chief Justice quoted above, I am of the view that the two offences were "two different 'matters', totally separate one from the other and not alternative one to the other". While there was only one act of assault there were two distinct delicts, causes or matters which would sustain separate convictions. I would respectfully adopt the following passage from the reasons of Cameron J.A. in the court below [at pp. 294-95]:

A single act may have more than one aspect, and it may give rise to more than one legal consequence. It may, if it constitutes a breach of the duty a person owes to society, amount to a crime, for which the actor must answer to the public ... And that same act may have still another aspect to it: it may also involve a breach of the duties of one's office or calling, in which event the actor must account to his professional peers. For example a doctor who sexually assaults a patient will be liable, at one and the same time, to a criminal conviction at the behest of the state; to a judgment for damages, at the same instance of the patient; and to an order of discipline on the motion of the governing council of his profession. Similarly, a policeman who assaults a prisoner is answerable to the state for his crime; to the victim for damage he caused; and to the police force for discipline.

39 For these reasons I would dismiss the appeal. I would answer the constitutional questions as follows:

1. Is a prosecution by the Crown for the offence of common assault pursuant to [s. 245\(1\) of the Criminal Code of Canada](#), in relation to an act for which the accused has been previously convicted and fined for an offence of unnecessary violence towards a prisoner contrary to [s. 25\(1\)](#) and [Part II of the Royal Canadian Mounted Police Act](#), in violation of [s. 11\(h\) of the Canadian Charter of Rights and Freedoms](#)?

40 Answer: No.

2. If a prosecution by the Crown for the offence of common assault pursuant to s. 245(1) of the *Criminal Code of Canada* in relation to an act for which the accused has been previously convicted and fined for an offence of unnecessary violence towards a prisoner contrary to s. 25(1) and Part II of the *Royal Canadian Mounted Police Act* violates s. 11(h) of the *Canadian Charter of Rights and Freedoms*, is the subsequent prosecution by the Crown justified by s. 1 of the *Canadian Charter of Rights and Freedoms* and therefore not inconsistent with the *Constitution Act, 1982*?

41 Answer: In view of the answer to Q. 1 it is not necessary to answer this question.

Appeal dismissed. <?page 216> <?page 217> <?page 218> <?page 219> <?page 220> <?page 221> <?page 222> <?page 223> <?page 224> <?page 225> <?page 226> <?page 227> <?page 228> <?page 229> <?page 230> <?page 231> <?page 232> <?page 233> <?page 234> <?page 235> <?page 236> <?page 237> <?page 238> <?page 239> <?page 240> <?page 241>

Ontario Supreme Court
Ravenshoe Services Ltd. v. Canada (Commissioner of Competition)¹,
Date: 2001-11-29

Ravenshoe Services Ltd. et al.

and

Commissioner of Competition

Court File No. 10829

Ontario Superior Court of Justice Chadwick J.

Heard: August 28, 2001

Judgement rendered: November 29, 2001

Chris N. Buhr, Ian Donaldson, Q.C., and Jennifer Gleitman, for applicants.

J.D. Sutton and Donna Blois, for respondent, the Crown.

[1] **CHADWICK J.**:—The applicants seek an order setting aside the order of the Honourable Mr. Justice Soubliere, made the 2nd day of January, 2001, in relation to s. 11 of the *Competition Act*, R.S.C. 1985, c. C-34. The applicants also seek an order declaring s. 11 of the *Competition Act* to be of no force or effect to the extent that it authorizes an order to obtain information to substantiate a prosecution of alleged offences under the *Competition Act*, much less from the target of such a prosecution, in the absence of compliance with the constitutionally mandated prerequisites to a lawful search as determined in *Hunter v. Southam Inc.*, *infra*.

[2] The facts are not in dispute.

[3] On June 3, 1999, the Commissioner of Competition commenced an inquiry under s. 10(1)(b)(iii) of the *Competition Act* into allegations that Ravenshoe, 483775, Hailstone, HMS, Kirk, FSA, and Int Access had breached the provisions of s. 52 of the Act, prohibiting false or misleading representations to the public. On June 17, 1999, the Honourable Mr. Justice Panet of the Ontario Superior Court in Ottawa issued search warrants authorizing the search and seizure of certain records relating to the investigation. A further warrant was

¹ Notice of appeal was filed on January 7, 2002 (Court File No. C37515).

issued on June 24, 1999 by the Honourable Mr. Justice Charbonneau. The search warrants alleged the existence of reasonable grounds to believe that Ravenshoe, 483775, Hailstone, HMS and Int Access had committed offences of false or misleading representations under s. 52 of the *Competition Act*. The search warrants were executed at the business premises of Ravenshoe, 483775, Hallstone, HMS, Kirk, Fulfillment Solutions and Int Access.

[4] As a result of information uncovered during the execution of the search warrants, the Commissioner of Competition expanded his inquiry to include a further direct mail promotion called Worldwide Lotteries Financial Group, alleged to be part of the activities of the companies which were already under investigation.

[5] On January 2, 2001, an *ex parte* Application was brought on behalf of the Commissioner of Competition pursuant to s. 11 of the *Competition Act* before Mr. Justice Soubliere of the Superior Court of Justice. The Application requested an Order requiring the Applicants to produce records to the Commissioner of Competition and to make written returns of information to be delivered to the Commissioner. In support of this Application, the Commissioner of Competition relied upon the affidavit of Richard Harrison, a Commerce Officer at Industry Canada, Competition Bureau, Fair Business Practices Branch. In his affidavit, Mr. Harrison stated that the materials sought in the Application were not found during previous searches because they were not available at that time. On January 2, 2001, Mr. Justice Soubliere of the Ontario Superior Court of Justice ordered the Applicants to produce the extensive documentation sought in the Application, which included the production of analyses of information, the existence of which had not been established. Mr. Justice Soubliere also ordered the production of materials in certain electronic formats.

[6] On January 19, 2001, Mr. Justice Rutherford of the Ontario Superior Court of Justice issued a warrant pursuant to ss. 15 and 16 of the *Competition Act*, authorizing the search of the premises of Pacific Network Services Ltd. at 595 Howe Street, Suite 405, Vancouver, and of Accu-Rate Foreign Exchange Corporation at 2573 Carling Avenue, Ottawa. The materials sought under the warrant were in relation to the offences against Ravenshoe, Hallstone, HMS, Kirk, FSA and Int Access, as outlined originally in the warrants issued in June 1999.

[7] It is the position of the applicants that s. 11 of the *Competition Act* contravenes s. 8 of the *Canadian Charter of Rights and Freedoms* which provides as follows:

8. Everyone has the right to be secure against unreasonable search or seizure.

[8] Counsel for the applicants argue that the criteria for constitutionally valid search is clearly set out in *Hunter v Southam Inc.* (1984), 14 C.C.C. (3d) 97, 2 C.P.R. (3d) 1 (S.C.C.), and it must be applied to a search under s. 11 of the *Competition Act*.

[9] The *Hunter* criteria was summarized by Wilson J., in *Regina v. McKinlay Transport Ltd.* (1990), 55 C.C.C. (3d) 530 (S.C.C.) at 541 as follows:

(a) a system of prior authorization, by an entirely neutral and impartial arbiter who is capable of acting judicially in balancing the interests of the State against those of the individual;

(b) a requirement that the impartial arbiter must satisfy himself that the person seeking the authorization has reasonable grounds, established upon oath, to believe that an offence has been committed;

(c) a requirement that the impartial arbiter must satisfy himself that the person seeking the authorization has reasonable grounds to believe that something which will afford evidence of the particular offence under investigation will be recovered; and

(d) a requirement that the only documents which are authorized to be seized are those which are strictly relevant to the offence under investigation.

[10] Counsel for the applicants have placed a great deal of emphasis on a number of tax cases to support their position. Such cases as *Baron v. Canada* (1993), 78 C.C.C. (3d) 510 (S.C.C.); *R. v. Norway Insulation Inc.* (1995), 23 O.R. (3d) 432 (Ont. Ct. (Gen. Div.)); and *Regina v. Saplys* (1999), 132 C.C.C. (3d) 515 (Ont. Ct. (Gen. Div.)).

[11] Likewise, counsel for the applicants point out that searches or seizures which are authorized and constitutionally valid for one purpose may be found to be invalid if conducted for another purpose. Supportive of that proposition they rely upon bodily substance cases where blood has been taken for medical purposes and used in prosecutions such as in *Regina v. Dymment* (1988), 45 C.C.C. (3d) 244 (S.C.C.).

[12] I do not find the tax cases or the bodily substance cases helpful in determining the issue under s. 11 of the *Competition Act*. These cases can be distinguished on the nature of the

statute, such as the *Criminal Code*, R.S.C. 1985, c. C-46, and the *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.) and, also, on the degree of privacy an individual would expect.

[13] In this regard, one has to look at the *Competition Act* to determine its purpose. The Supreme Court of Canada in *Thomson Newspapers Ltd. v. Canada (Director of Investigation and Research, Restrictive Trade Practices Commission)*, [1990] 1 S.C.R. 425, 29 C.P.R. (3d) 97, considered the characterization of the *Combines Investigation Act*, R.S.C. 1985, c. C-34, the predecessor of the *Competition Act*.

[14] Although there were five separate judgments in the *Thomson* case, the majority of the court found that the provisions of s. 17 of the then *Combines Investigation Act* was not inconsistent with the provisions of ss. 7 and 8 of the *Canadian Charter of Rights and Freedoms*.

[15] La Forest J., in *Thomson Newspapers*, reviews the nature of *Combines Legislation* and states at p. 509 as follows:

Nor do I regard it as determinative that the Act defines offences and provides for the imprisonment of those who commit them. While I recognize that these features give the Act something of the flavour of criminal law, I do not believe that the fact that an Act provides for sanctions usually associated with the criminal law necessarily means that those subject to its operation have the same expectations of privacy as persons suspected of committing what are by their very nature criminal offences. While I will have more to say about this matter later, it is for the present sufficient to observe that there are pragmatic reasons for the inclusion of imprisonment among the sanctions provided for in the Act which do not alter its essential character as regulatory legislation and which are in fact indicative of the activities and matters it is designed to regulate.

What, in my view, is determinative is the nature of the conduct addressed by the legislation and the purposes for which it is designed to regulate that conduct. There can be little doubt that the conduct prohibited by the Act is far removed from what is the typical concern of the criminal law system, i.e. the “underlining [of] crucial *social* values” (emphasis added) where “[t]he sort of things prohibited—acts of violence, dishonesty and so on—are acts violating common sense standards of humanity” which we regard as meriting disapprobation and punishment; see Law Reform Commission of Canada,

Our Criminal Law (1976), at pp. 3, 5, and 7; see also *R. v. Chiasson* (1982), 135 D.L.R. (3d) 499 (N.B.C.A.), at p. 503; reasons adopted [1984] 1 S.C.R. 266; *R. v. Morgentaler*, [1988] 1 S.C.R. 30, at p. 70. At bottom, the Act is really aimed at the regulation of the economy and business, with a view to the preservation of the competitive conditions which are crucial to the operation of a free market economy. This goal has obvious implications for Canada's material prosperity. It also has broad political overtones in that it is aimed at preventing concentration of power, of critical importance in the present case as it involves control of the press. It must be remembered that private organizations can be just as oppressive as the state when they gain such a dominant position within their sphere of operations that they can effectively force their will upon others.

The conduct regulated or prohibited by the Act is not conduct which is by its very nature morally or socially reprehensible. It is instead conduct we wish to discourage because of our desire to maintain an economic system which is at once productive and consistent with our values of individual liberty. It is, in short, not conduct which would be generally regarded as by its very nature criminal and worthy of criminal sanction. It is conduct which is only criminal in the sense that it is in fact prohibited by law. One's view of whether it should be so proscribed is likely to be functional or utilitarian, in the sense that it will be based on an assessment of the desirability of the economic goals to which combines legislation is directed or its potential effectiveness in achieving those goals. It is conduct which is made criminal for strictly instrumental reasons.

The Act is thus not concerned with "real crimes" but with what has been called "regulatory" or "public welfare" offences. The distinction is clearly made by the Law Reform Commission of Canada in *Criminal Responsibility for Group Action* (Working Paper 16, 1976), at pp. 11-12. After having defined real crimes as those concerned with the reinforcement of society's fundamental values, the Commission says, at p. 12, that a regulatory offence

"is not primarily concerned with values, but with results. While values necessarily underlie all legal prescriptions, the regulatory offence really gives expression to the view that it is expedient for the protection of society and for the orderly use and sharing of society's resources that people act in a prescribed manner in prescribed situations, or

that people take prescribed standards of care to avoid risks of injury. The object is to induce compliance with rules for the overall benefit of society.”

[16] Section 1.1 of the *Competition Act* sets out its purpose as follows:

...to maintain and encourage competition in Canada in order to promote the efficiency and adaptability of the Canadian economy, in order to expand opportunities for Canadian participation in world markets while at the same time recognizing the role of foreign competition in Canada, in order to ensure that small and medium-sized enterprises have an equitable opportunity to participate in the Canadian economy and in order to provide consumers with competitive prices and product choices.

[17] The nature of the *Competition Act* is regulatory and, as such, s. 8 of the Charter is treated with more flexibility than in cases where it is of a criminal context.

[18] Section 17 of the *Combines Investigation Act* was similar to s. 11 of the *Competition Act*. It empowered the Director or a member of the Commission to compel persons to produce relevant records. The procedure was by way of an *ex parte* motion.

[19] The nature of the Commissioner's Order under s. 11 of the *Competition Act* is with reference to corporate information and data and, as such, there would be a limited expectation of privacy.

[20] Although prior searches and seizures had been carried out pursuant to ss. 15 and 16 of the *Competition Act*, in my view, this does not preclude the Commissioner from proceeding in making demands under s. 11 of the *Competition Act*. Search warrants were issued on the basis of reasonable and probable grounds that offence has been committed, but s. 11 of the *Competition Act* does not require such a high standard. The documents and information sought in the s. 11 application came about after the searches were carried out.

[21] In my view, s. 11 of the *Competition Act* does not contravene s. 8 of the Charter. The Application is dismissed. The respondent shall be entitled to their costs. I will receive written submissions from counsel within 15 days regarding the fixing of costs.

Application dismissed.

Rowan et al. v. Ontario Securities Commission

[Indexed as: Rowan v. Ontario Securities Commission]

110 O.R. (3d) 492

2012 ONCA 208

Court of Appeal for Ontario,
Sharpe, Blair and Juriansz JJ.A.
March 29, 2012

Securities regulation -- Penalties -- Administrative penalties -- Ontario Securities Commission correctly dismissing appellants' application to strike down s. 127(1)(9) of Securities Act (which authorizes administrative penalties of up to \$1 million for each failure to comply with Ontario securities law) on basis that it violates s. 11(d) of Charter -- Administrative tribunal's power to impose substantial monetary penalties must be assessed on basis of penalty imposed rather than on basis of penalties that are theoretically possible -- Administrative [page493] penalty of \$1 million per infraction not prima facie penal -- Administrative penalties of up to \$520,000 imposed on appellants not sufficiently high to amount to true penal consequence -- Commission not erring by taking conduct contrary to public interest into account as contextual factor when imposing administrative penalties -- Canadian Charter of Rights and Freedoms, s. 11(d) -- Securities Act, R.S.O. 1990, c. S.5, s. 127(1)(9).

The appellant R was president and chief operating officer of the appellant WCI, a broker and registered investment dealer. The appellant C was the chairman, chief executive officer and ultimate designated person of WCI, and the appellant M was the chief financial officer and chief compliance officer. The Ontario Securities Commission found that R breached Ontario

securities law by failing to report insider trades, and that C, M and WCI had failed to adequately supervise R's trading in shares of a company of which he was a director. Section 127(1)(9) of the Securities Act allows the Commission to impose administrative monetary penalties ("AMPs") of up to \$1 million for each failure to comply with Ontario securities law. The appellants argued that the potential size of an AMP is so large that it amounts to a penal sanction, and that a party who is subject to such a penalty is a person "charged with an offence" within the meaning of s. 11(d) of the Canadian Charter of Rights and Freedoms. As the Commission does not accord the rights guaranteed by s. 11(d) when conducting administrative hearings, the appellants argued that s. 127(1)(9) of the Act should be struck down. The Commission rejected that argument. Among other sanctions imposed, R was ordered to pay an AMP of \$520,000, C was ordered to pay an AMP of \$250,000 and WCI was ordered to pay an AMP of \$450,000. The Divisional Court upheld the Commission's decision. The appellants appealed.

Held, the appeal should be dismissed.

The power of an administrative tribunal to impose substantial monetary penalties is to be assessed on the basis of the penalty imposed rather than on penalties that are theoretically possible. The Constitution does not impose a defined limit on what is permissible by way of administrative monetary sanctions. Penalties at the level of \$1 million per infraction are not inherently penal in nature and are entirely in keeping with the Commission's mandate to regulate the capital markets where enormous sums of money are involved and where substantial penalties are necessary to remove economic incentives for non-compliance with market rules. The AMPs imposed by the Commission on the appellants were not at a level to bring them within the "true penal consequences" category. Given the very large number of infractions involving over a billion dollars' worth of securities and over \$2 million in commissions, fines totalling \$1,220,000 were within the constitutionally permissible range.

The Commission did not err in taking conduct contrary to the public interest into account as a contextual factor when

imposing an AMP on R. It is clear from the opening words of s. 127(1)(9) that before ordering any sanction, including an AMP, the Commission must be of the opinion that it is in the public interest to make the order. That provision requires the Commission to consider the public interest before imposing an AMP. R's conduct found to be contrary to the public interest was inextricably linked to his breach of Ontario securities law.

C and WCI should not be permitted to argue for the first time on appeal that the Commission erred and exceeded its jurisdiction by imposing AMPs against them without making a specific finding that they had breached Ontario securities law. That argument should have been addressed to the sanctions hearing, as it was for the Commission to interpret its own finding on the issue of whether or not those appellants had breached Ontario securities law. In any event, the argument was [page494] without merit. At the sanctions hearing, especially in the absence of any argument to the contrary, it was open to the Commission to interpret its own reasons for its merits findings as amounting to a finding that C had failed to comply with Ontario securities law.

C should also not be permitted to argue for the first time on appeal that the Commission erred and exceeded its jurisdiction by finding that he was under a duty imposed by Ontario securities law to supervise R. It would be inappropriate to describe the alleged error as jurisdictional. The finding that as the CEO and UDP of WCI, C was under a duty to supervise R fell within the expertise of the Commission, was entitled to deference and was not unreasonable. The Commission's decision that C, M and WCI failed to adequately supervise R was also not unreasonable.

Cases referred to

Canada (Attorney General) v. United States Steel Corp., [2011] F.C.J. No. 726, 2011 FCA 176, 419 N.R. 203, 333 D.L.R. (4th) 1, 86 B.L.R. (4th) 24, 236 C.R.R. (2d) 1; Lavallee v. Alberta (Securities Commission), [2010] A.J. No. 144, 2010 ABCA 48, 474 A.R. 295, 100 Admin. L.R. (4th) 9, 317 D.L.R. (4th) 373, 255 C.R.R. (2d) 1, 185 A.C.W.S. (3d) 546, 22 Alta. L.R. (5th) 201, [2010] 8 W.W.R. 38; R. v. Wigglesworth, [1987]

2 S.C.R. 541, [1987] S.C.J. No. 71, 45 D.L.R. (4th) 235, 81 N.R. 161, [1988] 1 W.W.R. 193, 24 O.A.C. 321, 61 Sask. R. 105, 28 Admin. L.R. 294, 37 C.C.C. (3d) 385, 60 C.R. (3d) 193, 32 C.R.R. 219, 3 W.C.B. (2d) 130, consd

Other cases referred to

Alberta (Information and Privacy Commissioner) v. Alberta Teachers' Assn., [2011] 3 S.C.R. 654, [2011] S.C.J. No. 61, 2011 SCC 61, 2011EXP-3798, J.E. 2011-2083, 424 N.R. 70, 339 D.L.R. (4th) 428, 208 A.C.W.S. (3d) 434, 28 Admin. L.R. (5th) 177, 52 Alta. L.R. (5th) 1, [2012] 2 W.W.R. 434, 519 A.R. 1; Cartaway Resources Corp. (Re), [2004] 1 S.C.R. 672, [2004] S.C.J. No. 22, 2004 SCC 26, 238 D.L.R. (4th) 193, 319 N.R. 1, [2004] 8 W.W.R. 62, J.E. 2004-954, 195 B.C.A.C. 161, 28 B.C.L.R. (4th) 1, 14 Admin. L.R. (4th) 190, 130 A.C.W.S. (3d) 192; C.U.P.E. Local 963 v. New Brunswick Liquor Corp., [1979] 2 S.C.R. 227, [1979] S.C.J. No. 45, 97 D.L.R. (3d) 417, 26 N.R. 341, 25 N.B.R. (2d) 237, 79 CLLC 14,209 at 111, [1979] 2 A.C.W.S. 108; Martineau v. M.N.R., [2004] 3 S.C.R. 737, [2004] S.C.J. No. 58, 2004 SCC 81, 247 D.L.R. (4th) 577, 328 N.R. 48, J.E. 2005-89, 192 C.C.C. (3d) 129, 24 C.R. (6th) 207, 125 C.R.R. (2d) 301, 9 T.T.R. (2d) 487, 135 A.C.W.S. (3d) 1019; Slight Communications Inc. v. Davidson, [1989] 1 S.C.R. 1038, [1989] S.C.J. No. 45, 59 D.L.R. (4th) 416, 93 N.R. 183, J.E. 89-775, 26 C.C.E.L. 85, 89 CLLC 14,031 at 12247, 40 C.R.R. 100, 15 A.C.W.S. (3d) 132

Statutes referred to

Canadian Charter of Rights and Freedoms, s. 11, (d)

Customs Act, R.S.C. 1985, c. 1 (2nd Supp.), s. 124 [as am.]

Financial Services and Markets Act 2000 (U.K.), 2000 c. 8, s. 206

Investment Canada Act, R.S.C. 1985, c. 28 (1st Supp.), s. 40 [as am.]

Securities Act, R.S.A. 2000, c. S-4, s. 199 [as am.]

Securities Act, R.S.B.C. 1996, c. 418, s. 162 [as am.]

Securities Act, R.S.N.S. 1989, c. 418, s. 135 [as am.]

Securities Act, R.S.O. 1990, c. S.5, ss. 1 [as am.], 3.4(2)(b) [as am.], 76 [as am.], 107 [as am.], Part XXII [as am.], 122 [as am.], (1) [as am.], 127(1) [as am.], (9), 127.1

Securities Act, R.S.Q., c. V-1.1, s. 273.1 [as am.]

Securities Exchange Act of 1934 (U.S.), 15 U.S.C. 78u-2(b)(3)

Authorities referred to

Ontario Ministry of Finance, Five Year Review Committee Final Report: Reviewing the Securities Act (Ontario) (Toronto: Queen's Printer for Ontario, 2003) [page495]
Ontario Securities Commission, OSC Rule 31-505 (Toronto: Ontario Securities Commission)

APPEAL from the order of the Divisional Court (Ferrier, Molloy and Herman JJ.) (2010), 103 O.R. (3d) 484, [2010] O.J. No. 5681, 2010 ONSC 7029 (Div. Ct.) upholding orders of the Ontario Securities Commission.

Nigel Campbell, Peter Hogg, Q.C., and Ryder Gilliland, for appellant Roger D. Rowan.

John A. Campion, David A. Hausman and Laura R. Baron, for appellants Watt Carmichael Inc., Harry J. Carmichael and G. Michael McKenney.

Alexandra Clark, Johanna Superina and Usman M. Sheikh, for respondent.

S. Zachary Green, for intervenor Ministry of the Attorney General.

The judgment of the court was delivered by

[1] SHARPE J.A.: -- At an administrative hearing, the Ontario Securities Commission ("Commission") found that the appellants had breached Ontario securities law, that they had engaged in conduct contrary to the public interest and that it was in the public interest to make certain orders against them pursuant to the Ontario Securities Act, R.S.O. 1990, c. S.5 (the "Act"), s. 127(1). The orders included substantial administrative monetary penalties. The Commission rejected the submission that those penalties ran afoul s. 11(d) of the Canadian Charter of Rights and Freedoms. The Divisional Court dismissed an appeal against the Commission's orders. The appellants obtained leave to appeal to this court.

[2] The proceedings arose from allegations that Roger Rowan, president and chief operating officer of Watt Carmichael Inc. ("WCI"), breached Ontario securities law by trading in, and failing to report his trades in, a large volume of shares of Biovail Corporation. WCI is a broker and registered investment dealer. Rowan was also a director of Biovail. Eugene N. Melnyk, Biovail's chairman and chief executive officer, set up various offshore trusts which held Biovail securities and maintained discretionary trading accounts at WCI. Rowan, as registered representative on the trust accounts, was permitted to trade in securities without client authorization. Before the Commission, the parties agreed that Rowan traded millions of Biovail shares, generating approximately \$2,350,000 in commissions for WCI between 2002 and 2004. The Commission dismissed allegations of insider trading [page496] but found that Rowan breached Ontario securities law by failing to file insider reports as required by s. 107 of the Act.

[3] Harry Carmichael was the chairman, chief executive officer and ultimate designated person ("UDP") of WCI and Michael McKenney was the chief financial officer and chief compliance officer ("CCO"). The Commission found that WCI, Carmichael and McKenney had failed adequately to supervise Rowan's trading in Biovail shares.

[4] The appellants challenge the constitutionality of s. 127(1)(9) of the Act, the provision that allows the Commission to impose administrative monetary penalties ("AMPs"). The appellants argue that because the maximum penalty of \$1 million can be imposed for each transaction in a single course of infractions, the potential size of an AMP is so large that it amounts to a penal sanction, and a party who is subject to such a penalty is a person "charged with an offence" within the meaning of the Charter, s. 11(d). As the Commission does not accord the rights guaranteed by s. 11(d) when conducting administrative hearings, the appellants say that s. 127(1)(9) should be struck down. Rowan also argues that the Commission erred by taking into account breaches of the public interest in awarding an AMP against him. WCI and Carmichael contend that the Commission made no finding that they breached Ontario

securities law and that, as a result, the Commission had no jurisdiction to impose an AMP against them. Carmichael also argues that there was no basis to find that he was under any duty under Ontario securities law to supervise Rowan and that the Commission's sanctions imposed against him on that account should be set aside. WCI, Carmichael and McKenney also argue that the finding that they failed to adequately supervise Rowan was unreasonable. Finally, the appellants appeal the Commission's award of costs.

[5] In my view, the Commission and the Divisional Court correctly concluded that the only remedy available to the appellants under s. 11(d) of the Charter is to limit the authority of the Commission to impose AMPs to levels that qualify as administrative, rather than penal, sanctions. The AMPs at issue here do not transgress that limit. Accordingly, I would dismiss the constitutional challenge to s. 127(1)(9). I would also dismiss the other grounds of appeal on the basis that [the] Divisional Court properly concluded that the Commission's reasons are to be reviewed on a standard of reasonableness, and that they met that standard. The Commission provided careful and detailed reasons for its decision, making all the necessary findings to support the sanctions it imposed. I agree with the Divisional Court that the appellants have failed to show any basis for appellate intervention. [page497]
Facts

[6] WCI was an investment dealer registered under the Ontario Securities Act and a member of the Investment Dealers Association (the "IDA") (now the Investment Industry Regulatory Organization of Canada). Rowan, Carmichael and McKenney were senior officers of WCI. Rowan was the president and chief operating officer. Carmichael was the chairman, chief executive officer and ultimate designated person ("UDP"). McKenney served as WCI's chief financial officer and chief compliance officer ("CCO").

[7] A firm's UDP is responsible for overall compliance with regulatory requirements as well as overseeing the development and implementation of its compliance practices and procedures. The CCO is responsible for day-to-day compliance activities,

for supervising the firm's accounts as well as developing and implementing its compliance policies and procedures.

[8] Biovail Corporation ("Biovail") is a reporting issuer in Ontario whose shares traded on both the Toronto Stock Exchange and the New York Stock Exchange. Eugene N. Melnyk was Biovail's chairman and chief executive officer. In 1996, Melnyk established four trusts in the Cayman Islands. The trusts' assets consisted largely of Biovail securities. The trusts had discretionary trading accounts with WCI, enabling Rowan, the registered representative for the accounts, to make trades without prior client authorization.

[9] During the relevant period, Rowan was an insider of Biovail, serving as a director and as a member of Biovail's Audit Committee. From 2002 to 2004, Rowan engaged in a substantial volume of discretionary trading of Biovail securities held in the trust accounts. These transactions were summarized by the Commission as follows:

[QL:GRAPHIC NAME="1100R3d492-1.jpg"/]

[page498]

The Commission's Findings

"Merits" decision

Rowan

[10] By a majority, the Commission dismissed the most serious allegation against Rowan, namely, that he was guilty of insider trading while in possession of material undisclosed information contrary to s. 76 of the Act. However, as an insider, Rowan was required by s. 107 of the Act to report his trades and the Commission found that he had repeatedly breached that section by failing to do so.

[11] The Commission also found that Rowan had acted in a manner contrary to the public interest on several counts. He failed to provide complete and accurate information to Biovail concerning the number of Biovail shares over which he exercised

control or direction, and his failure caused Biovail's management information circulars to contain incomplete and misleading information. The Commission further held that, throughout 2002 and 2003, Rowan had engaged in a [2009 LNOBOSC 941, at para. 63] "high volume of discretionary trading in Biovail securities in the Trust Accounts during Biovail's 'blackout periods'" -- periods declared by public companies during which insiders may not trade company shares because of the increased risk of insiders having access to material undisclosed information. Rowan's trades were summarized by the Commission in its Sanctions decision as follows:

[QL:GRAPHIC NAME="1100R3d492-2.jpg"/]

[12] The Commission described [at para. 151] Rowan's trading during the blackout periods to be contrary to the public interest and "abusive of the integrity of the capital markets of Ontario".

McKenney

[13] The Commission held that, as WCI's chief compliance officer, McKenney was responsible for supervising Rowan's [page499] trading to ensure compliance with regulatory requirements. Despite this, he had

- failed to properly monitor Rowan's trading in the trust accounts "in spite of the clear risks" of non-compliance posed by the trading;
- made "only sporadic and inadequate attempts" to determine when Rowan had knowledge of undisclosed information;
- accepted information provided by Rowan at "face value" rather than performing independent checks;
- relied on "happenstance" to determine when Rowan was attending Biovail Board or Audit Committee meetings; and
- failed to adhere to WCI's own policies by only monitoring trading in Biovail securities in accounts controlled by

Rowan.

Carmichael

[14] The Commission held that as chairman, CEO and UDP of WCI, Carmichael was responsible for the firm's overall compliance with regulatory requirements and for overseeing the development and implementation of its compliance practices and procedures. Despite this, Carmichael

- had failed to ensure that WCI had adequate policies and procedures in place to discharge its responsibility to ensure Rowan's compliance; and
- had failed to ensure that McKenney was providing proper oversight to the trading in the trust accounts.

WCI

[15] Finally, the Commission found that WCI had breached its supervisory obligations by

- failing to implement compliance policies, procedures and practices to address the inherent risk in Rowan's dual role as a registered representative for the trust accounts and an insider of Biovail; and
- failing to adequately supervise Rowan's trading in Biovail shares in the trust accounts, in that WCI failed to ensure the containment of inside information, failed to ensure Rowan's compliance with insider trading and disclosure [page500] rules and the Biovail Blackout Policy, and failed to properly document its compliance activities.

[16] The Commission noted that Rowan's trading in Biovail trust shares during the relevant period had generated approximately \$2,350,000 in commissions for WCI.

"Sanctions" decision

[17] In its subsequent Sanctions decision, the Commission

imposed significant sanctions against each of the appellants to reflect the "seriousness of the securities law violations that occurred in this matter" and to "not only deter the [Appellants] but also like-minded people from engaging in future conduct that violates securities law".

[18] The Commission gave comprehensive reasons dismissing the challenge to the constitutionality of the AMP provision and, as described below, imposed significant AMPs on all appellants except for McKenney. In assessing the size of the AMPs, the Commission took into account that approximately one-half of Rowan's 7,410 trades in Biovail shares took place prior the date when the power to impose AMPs came into force.

[19] Rowan's registration was suspended for 12 months and made subject to conditions upon his return. He was prohibited from being a director or officer of a reporting issuer for seven years, prohibited from being a director [or] officer of a registrant for three years, reprimanded and ordered to pay an AMP of \$520,000.

[20] Carmichael was required to resign any current position as an officer or director of a registrant and prohibited from acting as such for 45 days, prohibited from acting in a supervisory role for 45 days, reprimanded and required to pay an AMP of \$250,000.

[21] McKenney was required to resign any current position as an officer or director of a registrant and prohibited from acting as such for 12 months. He was also prohibited from acting in a supervisory role for 12 months and reprimanded.

[22] WCI was required to undergo an independent review of its compliance structure, reprimanded and required to pay an AMP of \$450,000.

[23] The Commission ordered that all of the AMPs were to be allocated for the benefit of third parties pursuant to s. 3.4(2)(b). The Commission also ordered the appellants to pay costs of \$140,000.

The Divisional Court

[24] The Divisional Court dismissed the appeal without calling on the respondents. The Divisional Court observed that most of [page501] the grounds of appeal raised issues that fell squarely within the expertise of the Commission and were therefore to be reviewed on a standard of reasonableness. The Divisional Court described [at para. 6] the Commission's decisions as "careful and thorough", "correct in law" and "reasonable in light of the evidence and the public interest".

[25] Applying a standard of correctness to the constitutional challenge to the AMP provision, the Divisional Court adopted the detailed reasons of the Commission's Sanctions decision rejecting the constitutional challenge.

[26] Without squarely deciding which standard of review should apply, the Divisional Court found no error of law in the Commission's consideration of conduct contrary to the public interest in awarding an AMP against Rowan.

[27] Noting that the appellants had not raised the issue below, the Divisional Court rejected the argument that the Commission erred in awarding AMPs against Carmichael and WCI without finding that their failure to supervise was itself a breach of Ontario securities law. The Divisional Court held that the Commission's findings supported the conclusion that Carmichael and WCI breached Ontario securities law.

Issues

- (1) Should s. 127(1)(9), authorizing the Commission to impose an AMP of up to \$1 million per infraction, be struck down as contrary to s. 11(d) of the Charter of Rights and Freedoms?
- (2) Did the Commission err and exceed its jurisdiction by taking conduct contrary to the public interest into account when imposing an AMP against Rowan?
- (3) Did the Commission err and exceed its jurisdiction by imposing AMPs against Carmichael and WCI without making a finding that they had breached Ontario securities law?
- (4) Did the Commission err and exceed its jurisdiction by finding that Carmichael was under a duty imposed by Ontario

securities law to supervise Rowan?

(5) Was the Commission's finding that Carmichael, McKenney and WCI had failed to adequately supervise Rowan unreasonable?

(6) Should the Commission's costs award be set aside? [page502]

Analysis

1. Should s. 127(1)(9), authorizing the Commission to impose an AMP of up to \$1 million per infraction, be struck down as contrary to s. 11(d) of the Charter of Rights and Freedoms?

[28] Section 127(1) provides as follows:

127(1) The Commission may make one or more of the following orders if in its opinion it is in the public interest to make the order or orders:

.

9. If a person or company has not complied with Ontario securities law, an order requiring the person or company to pay an administrative penalty of not more than \$1 million for each failure to comply.

[29] Section 127(1) is contained in Part XXII of the Act, which deals with enforcement. Also of relevance to the case at bar is s. 122, which provides that a person who "contravenes Ontario securities law" may be charged with an offence and is liable on conviction to a fine of up to \$5 million and imprisonment of up to five years less a day.

[30] Most s. 127(1) orders may be made on the basis of the Commission's opinion that "it is in the public interest to make the order or orders", but some, including the power to impose an AMP, can only be made where the Commission has found that the "person or company has not complied with Ontario securities law".

[31] "Ontario securities law" is defined in s. 1 as follows:

"Ontario securities law" means,

- (a) this Act,
- (b) the regulations, and

- (c) in respect of a person or company, a decision of the Commission or a Director to which the person or company is subject;

.

"regulations" means the regulations made under this Act and, unless the context otherwise indicates, includes the rules

.

"rules" means,

- (a) the rules made under section 143, and
- (b) orders, rulings and policies listed in the Schedule[.][page503]

[32] The Charter of Rights and Freedoms, s. 11(d) provides:

11. Any person charged with an offence has the right

.

- (d) to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal[.]

[33] The respondent concedes that the appellants were not accorded the rights guaranteed by s. 11(d) and, accordingly, the issue is whether the appellants were entitled to s. 11(d) protections: that is, were they persons "charged with an offence" because they were in jeopardy of having the Commission impose the AMPs authorized by s. 127(1)(9).

[34] The appellants argue that s. 127(1)(9) allows the Commission to impose an AMP of virtually unlimited magnitude. In the present case, if the maximum fine of \$1 million per infraction were multiplied by the thousands of infractions Rowan was found to have committed, a penalty in the billions of dollars would be theoretically possible. The appellants say that a fine of that magnitude cannot possibly qualify as an administrative sanction and that it is necessarily penal in nature. They submit that a person put in jeopardy of having such a penalty imposed must be someone "charged with an offence" and therefore entitled to the rights conferred by s. 11(d) of the Charter. They insist that whether a proceeding is

covered by s. 11 must be assessed ex ante, on the basis of the amount of the potential fine, and not ex post, on the basis of the actual monetary penalty imposed.

[35] The starting point for analysis of the Charter challenge is the decision of the Supreme Court of Canada in *R. v. Wigglesworth*, [1987] 2 S.C.R. 541, [1987] S.C.J. No. 71, the seminal case on the meaning of the phrase "charged with an offence" in s. 11. *Wigglesworth* rejected the proposition that all persons subject to proceedings leading to the imposition of a penalty should be regarded as charged with an offence for the purposes of s. 11. Wilson J., who wrote the majority opinion, took a narrower view and held, at p. 558 S.C.R., that s. 11 should be restricted "to the most serious offences known to our law, i.e., criminal and penal matters".

[36] There are two categories of "criminal or penal matters". A matter may be a criminal or penal matter either because "by its very nature it is a criminal proceeding" or "because a conviction in respect of the offence may lead to a true penal consequence": p. 559 S.C.R. Matters "of a public nature, intended to promote public order and welfare within a public sphere of activity" are by their very nature criminal or penal while "private, domestic [page504] or disciplinary matters which are regulatory, protective or corrective and which are primarily intended to maintain discipline, professional integrity and professional standards or to regulate conduct within a limited private sphere of activity" are not: p. 560 S.C.R. "Proceedings of an administrative nature instituted for the protection of the public in accordance with the policy of a statute are also not the sort of 'offence' proceedings to which s. 11 is applicable": p. 560 S.C.R.

[37] The appellants do not suggest that the proceedings they faced before the Commission met the "by nature" test as being criminal or penal. The proceedings were clearly regulatory in nature and designed to enhance public confidence in the integrity and reliability of the capital markets. The appellants base their challenge to s. 127(1)(9) on the "true penal consequence" test. They contend that because of the potential magnitude of the AMP the Commission could impose,

they were faced with "a true penal consequence", thereby triggering the protection of s. 11 of the Charter.

[38] Wigglesworth holds that a private, domestic or disciplinary matter that escapes the reach of the first "by nature" test may still be caught by s. 11 because the matter could lead to "a true penal consequence". This was explained by Wilson J., at p. 561 S.C.R.:

[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.

[39] However, at pp. 561-62 S.C.R., Wilson J. added what she described as "two caveats". Both caveats bear directly on the issue posed in this case. Wilson J.'s first caveat was that [at p. 561 S.C.R.]:

[T]he possibility of a fine may be fully consonant with the maintenance of discipline and order within a limited private sphere of activity and thus may not attract the application of s. 11. It is my view that if a body or an official has an unlimited power to fine, and if it does not afford the rights enumerated under s. 11, it cannot impose fines designed to redress the harm done to society at large. Instead, it is restricted to the power to impose fines in order to achieve the particular private purpose.

(Emphasis added)

[40] Wilson J.'s second caveat was that only rarely would a proceeding fail to qualify for s. 11 protection under the "by nature" test but fall under s. 11 by virtue of the "true penal consequence test". As Wilson J. put it [at p. 561 S.C.R.], it is highly doubtful that "any body or official which exists in order to [page505] achieve some administrative or private disciplinary purpose can ever imprison an individual". However, where [at p. 562 S.C.R.] "an individual is to be subject to penal consequences such as imprisonment -- the most severe

deprivation of liberty known to our law -- then he or she, in my opinion, should be entitled to the highest procedural protection known to our law".

[41] In my view, Wilson J.'s first caveat is fatal to the appellant's argument that we should strike down s. 127(1)(9) on the ground that it allows for the imposition of a monetary penalty of potential virtually unlimited magnitude. The italicized portion of the passage I have quoted above stands for the proposition that the appropriate remedy to protect the rights guaranteed by s. 11 in the case of an unlimited power to impose a fine is not to nullify the power altogether, but rather to limit the tribunal's discretion so that it may only impose penalties that are consistent with the purpose of maintaining discipline and order within a particular sphere of activity.

[42] The appellants contend that the italicized passage cannot mean what it appears to say given the actual decision in Wigglesworth. In his careful argument, Prof. Hogg pointed out that in Wigglesworth, the accused RCMP officer was charged with a disciplinary offence for which he could be fined and sentenced to imprisonment by the tribunal. The officer was given a modest fine and not sent to jail, yet the Supreme Court of Canada held that the possibility of imprisonment brought the proceedings within s. 11 because the officer faced the possibility of "true penal consequences". Professor Hogg submits that the actual holding in Wigglesworth was to assess whether s. 11 applied *ex ante*, on the basis of the potential penalty, not *ex post*, on the basis of the actual penalty. He submits that we should take the same approach and effectively disregard the italicized passage as non-binding obiter dictum.

[43] I am unable to accept that argument for the following reasons.

[44] It is clear from Wilson J.'s "second caveat" that she regarded Wigglesworth as an exceptional case. What made Wigglesworth exceptional was that a domestic tribunal was given the power to imprison, a possibility that Wilson J. regarded as difficult to imagine. When explaining her conclusion that the

RCMP officer did face "true penal consequences", she wrote, at pp. 563-64 S.C.R.: "This would seem, therefore, to be that unusual case where proceedings have failed the 'by nature' test but have passed the 'true penal consequence' test." The power to order imprisonment is so obviously penal in nature and so exceptional in the setting of administrative tribunals that the [page506] mere possibility of a sentence of imprisonment was sufficient, in Wilson J.'s view, to colour the proceedings as having "true penal consequences" and thereby to trigger the protection of s. 11.

[45] In my view, we should decline the invitation to follow and to extend reasoning intended to meet the exceptional and rarely encountered power to imprison to the circumstances of this case. Instead, I would apply the plain language of the passage in Wigglesworth dealing with the power to fine that is commonly encountered in administrative proceedings.

[46] There is now an established line of authority holding that the power of an administrative tribunal to impose substantial monetary penalties is to be assessed on the basis of the penalty imposed rather than on penalties that are theoretically possible. This is consistent not only with the language of Wigglesworth, but also with the general principles that "legislation conferring an imprecise discretion does not confer the power to infringe the Charter unless that power is conferred expressly or by necessary implication" and that "[l]egislation conferring an imprecise discretion must therefore be interpreted as not allowing the Charter rights to be infringed": *Slaight Communications Inc. v. Davidson*, [1989] 1 S.C.R. 1038, [1989] S.C.J. No. 45, at pp. 1078-79 S.C.R.

[47] In *Lavallee v. Alberta (Securities Commission)*, [2010] A.J. No. 144, 2010 ABCA 48, 317 D.L.R. (4th) 373, the Alberta Court of Appeal upheld the power of the Alberta Securities Commission to impose administrative penalties of \$1 million per infraction. Similarly, in *Canada (Attorney General) v. United States Steel Corp.*, [2011] F.C.J. No. 726, 2011 FCA 176, 333 D.L.R. (4th) 1, the Federal Court of Appeal upheld a provision of the Investment Canada Act, R.S.C. 1985, c. 28 (1st Supp.), s. 40, authorizing a penalty of up to \$10,000 per day for

failure to comply with a ministerial directive. The court held, at para. 80:

A statutory power to impose fines that comes along with little statutory guidance will not be subject to s. 11 as long as it is exercised in a way so as to achieve proper administrative aims. If, as U.S. Steel contends, the procedure provided for in section 40 does not meet the standard of subsection 11(d) of the Charter, this simply means that the Court is limited in the goals it can consider in imposing monetary fines . . . [This] accords with the principle that we should not assume before the fact that judges will exercise their discretion in an unconstitutional way[.]

[48] The appellants contend that both cases were wrongly decided and that we should set Ontario law on a different course. I disagree. These decisions are consistent with *Wigglesworth* and I am not persuaded that we should depart from the established pattern in the jurisprudence. [page507]

[49] Penalties of up to \$1 million per infraction are, in my view, entirely in keeping with the Commission's mandate to regulate the capital markets where enormous sums of money are involved and where substantial penalties are necessary to remove economic incentives for non-compliance with market rules. The recommendation of the Securities Act Five Year Review Committee that the Commission be given the power to impose administrative penalties of up to \$1 million per contravention was based on the need to ensure that the administrative penalty would not simply be viewed as a "cost of doing business" or a "licensing fee" for unscrupulous market participants: Ontario, Five Year Review Committee Final Report: Reviewing the Securities Act (Ontario) (Toronto: Queen's Printer for Ontario, 2003), at p. 214. The Committee noted the importance of allowing "the Commission to send an appropriate deterrent message, having regard to, among other things, the gravity and impact of the conduct under consideration and the nature of the respondents that are the subject of the proceedings".

[50] As the Commission indicated in its Sanctions decision, the level of penalty permitted by s. 127(1)(9) is in keeping with legislation in other provinces. One million dollar penalties are authorized in Nova Scotia, Alberta and British Columbia, while Quebec allows for penalties of up to \$2 million: Securities Act, R.S.N.S. 1989, c. 418, s. 135; Securities Act, R.S.A. 2000, c. S-4, s. 199; Securities Act, R.S.B.C. 1996, c. 418, s. 162; Securities Act, R.S.Q., c. V-1.1, s. 273.1. The United States Securities and Exchange Commission can impose administrative fines of varying levels up to a maximum of \$100,000 for natural persons and \$500,000 for companies: Securities Exchange Act of 1934 (U.S.), 15 U.S.C. 78u-2(b)(3). There is no specified maximum on administrative monetary penalties that can be imposed by the United Kingdom Financial Services Authority: Financial Services and Markets Act 2000 (U.K.), 2000 c. 8, s. 206. Penalties at the \$1 million level are also in keeping with those levied by self-regulatory agencies operating in the securities field: see paras. 53-55 of the Commission's Sanctions reasons.

[51] Penalties at the level of \$1 million almost certainly have a deterrent purpose, but that does not make them penal in nature. As the Supreme Court of Canada held in *Cartaway Resources Corp. (Re)*, [2004] 1 S.C.R. 672, [2004] S.C.J. No. 22, 2004 SCC 26, in carrying out their regulatory and preventative mandate provincial securities commissions may legitimately consider deterrence when imposing a monetary penalty. Writing for the court, Le Bel J. stated, at para. 60, that "it is reasonable to view general deterrence as an appropriate, and perhaps necessary, [page508] consideration in making orders that are both protective and preventative". See, also, *Martineau v. M.N.R.*, [2004] 3 S.C.R. 737, [2004] S.C.J. No. 58, 2004 SCC 81, at para. 38.

[52] I agree with the the Commission's conclusion, at para. 56, that an administrative penalty of \$1 million is not *prima facie* penal [2009 LNONOSC 941]:

In pursuit of the legitimate regulatory goal of deterring others from engaging in illegal conduct, the Commission must, therefore, have proportionate sanctions at its disposal. The

administrative penalty represents an appropriate legislative recognition of the need to impose sanctions that are more than "the cost of doing business". In the current securities regulation and today's capital markets context, a \$1,000,000 administrative penalty is not prima facie penal.

[53] Nor am I persuaded that the AMPs imposed by the Commission on the appellants were at a level to bring them within the "true penal consequence" category. The constitution does not impose a defined limit on what is permissible by way of administrative monetary sanctions. The limit can only be determined by reference to the purpose of the penalty in relation to the regulatory mandate of the tribunal. In *Martineau*, the Supreme Court of Canada considered a penalty under s. 124 of the Customs Act, R.S.C. 1985, c. 1 (2nd Supp.), which conferred a power to require a cash payment with no statutory maximum. The key question, as stated at para. 60, is whether the penalty "constitutes a fine that, by its magnitude, is imposed for the purpose of redressing a wrong done to society at large, as opposed to the purpose of maintaining the effectiveness of customs requirements" (emphasis in original).

[54] In my view, the Commission did not err in concluding that magnitude of the AMP was geared to its regulatory mandate. The maximum AMP for one contravention is one fifth of the maximum penalty that can be imposed in a prosecution under the Act: see s. 122(1). The amount of an AMP is determined by regulatory considerations distinct from the principles of criminal liability and sentencing. No criminal record results. A further indication of the internal rather than criminal purpose of the AMPs is that the proceeds of the AMPs imposed were allocated by the Commission for the benefit of third parties pursuant to s. 3.4(2)(b) and not paid to the consolidated revenue fund: see *Wigglesworth*, at p. 561 S.C.R.

[55] Given the very large number of infractions involving over a billion dollars' worth of securities and over \$2 million dollars in commissions, fines totalling \$1,220,000 were within the constitutionally permissible range. [page509]

2. Did the Commission err and exceed its jurisdiction by taking conduct contrary to the public interest into

account when imposing an AMP against Rowan?

[56] As I have already noted, under s. 127(1)(9) of the Act, the Commission can only impose an AMP where there has been a breach of Ontario securities law. Rowan argues that the Commission wrongly took into account conduct that was found to be contrary to the public interest when assessing the amount to impose against him by way of an AMP. Particular importance was attached to para. 161 of the Commission's Sanctions reasons [2009 LNONOSC 941]:

Rowan failed to comply with Ontario securities law by: breaching section 107 of the Act by failing to file insider reports in respect of trades in Biovail securities that he executed in the Trust Accounts; engaging in conduct contrary to the public interest by failing to provide complete and accurate information to Biovail concerning the number of Biovail common shares held in the Trust Accounts over which he exercised or shared control or direction; and engaging in conduct contrary to the public interest by trading in Biovail securities in the Trust Accounts during Biovail's Blackout Periods. Further, the Hearing Panel found that Rowan's conduct was contrary to the public interest.

[57] As it was common ground before us, I accept without deciding that Rowan's only transgression that amounted to a breach of Ontario securities law was his failure to file insider reports. He submits that by listing the matters on which he was found to have acted contrary to the public interest as if those were also breaches of Ontario securities law, the Commission conflated the former with the latter. It follows, in his submission, that this passage demonstrates that the Commission improperly considered acts contrary to the public interest when fixing the amount of the AMP.

[58] I am not persuaded by counsel's characterization of the Commission's alleged error as amounting to a "jurisdictional error". I agree with the Divisional Court that on this issue the Commission's reasons are to be reviewed on a reasonableness standard. However, I will proceed on the assumption that if the Commission did impose the AMP on the basis of some irrelevant

or legally improper basis, the decision could not escape being characterized as unreasonable.

[59] I am unable to accept the submission that the Commission's AMP order was imposed on an improper basis, for the following reasons.

[60] It is clear from the opening words of s. 127(1)(9) that before ordering any sanction, including an AMP, the Commission must be of the opinion that it is in the public interest to make [page510] the order. I read this provision as requiring the Commission to consider the public interest before imposing an AMP.

[61] In *Cartaway Resources Corp. (Re)*, at para. 63, the Supreme Court of Canada, interpreting a provision of the B.C. Securities Act, s. 162, conferring the power to order AMPs, held that "the penalty that the Commission ultimately imposes should take into account the entire context, as well as the preservation of the public interest".

[62] Rowan's conduct found to be contrary to the public interest was inextricably linked to his breach of Ontario securities law. When imposing an AMP for Rowan's failure to report, the Commission was surely entitled to consider what it was he failed to report. Viewed in that light, the conduct found contrary to the public interest had a direct bearing on a proper assessment of the gravity of his specific breach of Ontario securities law.

[63] The question, then, is whether the Commission went beyond using findings of conduct contrary to the public interest as contextual factors and instead used the AMP as a sanction against the conduct contrary to the public interest. Rowan submits that para. 161 demonstrates that the Commission did just that, treating Rowan's trades as if they were violations of Ontario securities law. I cannot accept this submission.

[64] I agree with the Divisional Court that para. 161 cannot be read in isolation. I agree with the Divisional Court's

conclusion, at para. 20, that para. 161 of the Sanction reasons "is merely a summary of findings previously made". The balance of the reasons and findings clearly demonstrate that the Commission fully understood and carefully applied the important distinction between a breach of Ontario securities law and conduct contrary to the public interest.

[65] I also agree with and adopt paras. 21 and 22 of the Divisional Court's reasons:

Other references by the Commission in its reasons to multiple violations of securities law are, in my view, more reasonably interpreted as a reference to the fact that the Commission found that Mr. Rowan repeatedly violated s. 107 over an extended period of time. Indeed, the Commission found that there were 7,410 such breaches.

It is also apparent from the Commission's reasons that its primary focus in determining the appropriate administrative penalty under s. 127(1)(9) was the repeated breach by Mr. Rowan of s. 107 of the Act. At para. 96 of the Penalty Reasons, the Commission referred to there being 7,410 breaches, but also said that only 3,690 (being 52% of the total breaches), occurred after the administrative penalty provisions came into force. The Commission held that this provision should not be applied retrospectively and therefore ruled that any administrative penalty it imposed against Mr. Rowan would only be 52% of the penalty it would have imposed if all of the conduct under s. 107 were taken into account. In para. 166 of its Reasons, the [page511] Commission did just that. It imposed an administrative penalty of \$520,000 and then stated that but for its decision on retrospectivity, the penalty would be \$900,000 to \$1 million. It is therefore clear that the Commission tied the administrative penalty directly to the s. 107 breaches.

[66] Moreover, in my view it is clear that para. 161 of the Commission's reasons do not only relate to the imposition of the AMP. The impugned paragraph summarizes all of Rowan's transgressions as a basis for the imposition of a long list of sanctions, most of which were properly made on the basis that

he had acted contrary to the public interest. There was nothing wrong with the Commission providing a complete list of the conduct it found to justify the various sanctions it imposed.

[67] Accordingly, I would reject this ground of appeal.

3. Did the Commission err and exceed its jurisdiction by imposing AMPs against Carmichael and WCI without making a finding that they had breached Ontario securities law?

[68] The lynchpin to this argument is that while the Commission found "that McKenney, Carmichael and Watt Carmichael failed to adequately supervise Rowan's trading in Biovail securities in the Trust Accounts" (see, especially, Merits decision, at para. 353 [2008 LNONOSC 473]), at no point in the Merits decision did the Commission make a specific finding that Carmichael and WCI had breached a specific provision of Ontario securities law.

[69] In finding that Carmichael and WCI "failed to adequately supervise Rowan's trading in Biovail securities in the Trust Accounts", the Commission did not attach the words "contrary to" a specific section of the Act, regulations, rules or policies falling within the definition of Ontario securities law. Carmichael and WCI contend that this means that the Commission failed to make a finding of a breach of Ontario securities law, and therefore the Commission lacked jurisdiction to impose an AMP against them under s. 127(1)(9).

[70] In my view, this was an argument that should have been addressed to the Sanctions hearing as it was for the Commission to interpret its own finding on the issue of whether or not these appellants had breached Ontario securities law. Carmichael and WCI knew that Commission staff was asking the Commission to impose an AMP yet they failed to raise this argument at the Sanctions hearing. It was advanced in written argument before the Divisional Court but abandoned in oral argument.

[71] The fact that experienced counsel did not raise an argument at first instance is often telling. As I will discuss

in relation [page512] to the fourth issue, a court reviewing the decisions of an administrative tribunal has the discretion to refuse to entertain an argument not advanced before the tribunal and modern jurisprudence cautions against labelling alleged errors as jurisdictional to justify review on a standard of correctness. In the circumstances, I would refuse to exercise my discretion to entertain this new argument.

[72] Moreover, even if Carmichael and WCI were entitled to raise this argument on appeal, in my view, it is without merit. I cannot accept their characterization of the Merits reasons of the Commission. We must read the passage relied on in support of this argument in its proper context. At several points in its Merits reasons, the Commission recognized that the issue was whether Carmichael and WCI had failed to comply with their supervisory obligations under OSC Rule 31-505.

[73] Rule 31-505 is part of Ontario securities law as defined in s. 1 of the Act. Section 3.1 of that rule, entitled "Supervisory Terms", provided as follows:

3.1 A registered dealer shall supervise each of its registered salespersons, officers and partners and a registered adviser shall supervise each of its registered officers and partners in accordance with Ontario securities law and terms or conditions imposed by the Director or the Commission on the registration of the salesperson, officer or partner of the dealer or the officer or partner of the adviser requiring that the actions of the registered salesperson, officer or partner of the registered dealer or the registered officer or partner of the registered adviser be supervised in a particular manner.

Section 1.3 of the Rule required the registered dealer to designate a compliance officer to be "responsible for discharging the obligations of the registered dealer or adviser under Ontario securities law", including the supervisory function provided for by s. 3.1. Section 1.1(2) provided that an IDA member dealer was permitted to discharge its supervisory obligations by performing any equivalent requirement set out by the IDA and approved by the Commission. As an IDA member, WCI adopted the IDA procedure and designated Carmichael as UDP and

McKenney as CCO, thereby making Carmicheal and McKenney responsible for the supervision required by OSC Rule 31-505.

[74] When setting out the issues to be decided, at para. 35(h) [2008 LNONOSC 473], the Commission described this issue as "[w]hether Watt Carmichael, McKenney and Carmichael failed to adequately supervise Rowan's trading in Biovail securities in the Trust Accounts, contrary to OSC Rule 31-505, IDA Regulation 1300.2 and IDA Policy No. 2". The Merits reasons contain a considered analysis of what OSC Rule 31-505 requires. At the Sanctions hearing, especially in the absence of any argument [page513] from Carmichael to the contrary, it was open to the Commission to interpret its own reasons for its merits findings as amounting to a finding that Carmichael "failed to comply with Ontario securities law": Sanctions decision, at para. 193.

[75] Accordingly, I would dismiss this ground of appeal.

4. Did the Commission err and exceed its jurisdiction by finding that Carmichael was under a duty imposed by Ontario securities law to supervise Rowan?

[76] Again, Carmichael advances an argument on appeal that he failed to advance before the Commission. The Merits reasons of the Commission make it clear, at para. 309 [2008 LNONOSC 473], that the defence Carmichael raised at the hearing was not that he was under no duty imposed by Ontario securities law but that he had done all he was required to do by way of supervision:

The Respondents submit that the allegation against Carmichael is even less well-founded than the allegation against McKenney. As the UDP, Carmichael was responsible for ensuring that Watt Carmichael had appropriate policies and procedures in place and qualified personnel to supervise compliance. The Respondents submit that Carmichael fulfilled these obligations, and that Watt Carmichael's policies were crafted in consultation with, and expressly approved by, the IDA. In the Respondents' submission, there is no basis for this allegation against Carmichael, who has had 45 years of experience in the industry.

(Emphasis added)

[77] In these circumstances, I would exercise my discretion against permitting Carmichael to advance this argument before this court. As the Supreme Court of Canada held in *Alberta (Information and Privacy Commissioner) v. Alberta Teachers' Assn.*, [2011] 3 S.C.R. 654, [2011] S.C.J. No. 61, 2011 SCC 61, 339 D.L.R. (4th) 428, at paras. 22-26, courts have the discretion to refuse to entertain issues on judicial review where the issue could have been but was not raised before the specialized tribunal.

[78] I do not accept the submission that Carmichael can escape his failure to raise the argument before the Commission on the basis that the alleged error deprived the Commission of jurisdiction to make the order. Since *C.U.P.E. Local 963 v. New Brunswick Liquor Corp.*, [1979] 2 S.C.R. 227, [1979] S.C.J. No. 45, courts have been dissuaded from labelling matters as jurisdictional. As Dickson J. explained, at p. 233 S.C.R., "[t]he question of what is and is not jurisdictional is often very difficult to determine" and courts should hesitate "to brand as jurisdictional, and therefore subject to broader curial review, that which may be doubtfully so". This point was made with even greater [page514] force in *Alberta (Information and Privacy Commissioner) v. Alberta Teachers' Assn.*, at para. 39:

True questions of jurisdiction are narrow and will be exceptional. When considering a decision of an administrative tribunal interpreting or applying its home statute, it should be presumed that the appropriate standard of review is reasonableness.

[79] In my view, it would be singularly inappropriate to describe the alleged error as jurisdictional. To decide whether or not Carmichael was under any duty imposed by Ontario Securities law to supervise Rowan, the Commission would have to interpret and apply its home statute, regulations, rules and policies. That interpretive exercise would involve careful consideration of how those provisions operate in the complex world of the securities industry. It is difficult to imagine an issue that more squarely fell with the province and the

expertise of the Commission.

[80] The Commission did find that as the CEO and UDP of WCI, Carmichael was under a duty to supervise Rowan. That finding fell within the expertise of the Commission; it is entitled to deference on appeal and to be reviewed on a standard of reasonableness. Again, the fact that the argument raised on appeal was not advanced at first instance is telling. In my view, there is no basis upon which this court could conclude that the Commission's finding on this point was unreasonable.

[81] Accordingly, I would dismiss this ground of appeal.

5. Was the Commission's finding that Carmichael, McKenney and WCI had failed to adequately supervise Rowan unreasonable?

[82] Carmichael, McKenney and WCI (for the purposes of this issue the "WCI appellants") submit that the Commission's finding that they had failed to adequately supervise Rowan was unreasonable. This argument is essentially based upon the assertion that Rowan's transgressions arose because he was a director and an insider of Biovail and not because he was a registrant under the Act. The WCI appellants say that any duty to supervise him rested with Biovail, not the WCI appellants. The WCI appellants further submit that as a practical matter, it would have been impossible for them to supervise Rowan's trading during the blackout periods.

[83] Counsel properly conceded that the Commission's findings on this issue are to be reviewed on the standard of reasonableness. Once again, we are presented with an issue that falls squarely within the province and the expertise of the Commission. [page515]

[84] In its Merits decision, the Commission provided very extensive reasons rejecting the very submissions made before us. The Commission came to that conclusion on the basis of its own interpretation of the relevant regulatory requirements, including OSC Rule 31-505, multilateral and Commission policies, the relevant jurisprudence and the evidence of Guenther Kleberg, an expert in industry standards for brokerage

compliance practices. The WCI appellants led no evidence to contradict that of Kleberg, who testified that the trust accounts were "screaming for attention" because of the factors summarized, at para. 321 of the Commission's Merits reasons [2008 LNONOSC 473]:

- (a) the accounts held a very large position in Biovail securities;
- (b) the accounts were highly concentrated in Biovail securities;
- (c) the accounts conducted very active trading in Biovail securities;
- (d) the registered representative assigned to the accounts was an insider of Biovail; and
- (e) the registered representative held discretionary trading authority over the accounts.

[85] The Commission took into account, at para. 322, the point relied on by the WCI appellants "that industry standards would not generally require the CCO to monitor adherence to corporate blackout periods by a brokerage client who is an insider of a reporting issuer". Nonetheless, the Commission accepted Kleberg's opinion "that where a registered representative who is also an insider of a reporting issuer ('RR/insider') has discretionary authority to trade in securities of the reporting issuer, close supervision by the CCO is required to ensure that an RR/insider does not trade in the issuer's securities during the issuer's blackout periods". The Commission also accepted Kleberg's opinion that it would have been possible for the WCI appellants to supervise Rowan's trading during the scheduled blackout periods.

[86] The WCI appellants are asking this court to substitute its findings regarding the interpretation of the applicable supervisory standard under OSC Rule 31-505, an exercise that involves specialized knowledge of securities industry practice, for the express and fully explained findings on the point by the Commission, an expert tribunal. As the Supreme Court of Canada observed in *Cartaway*, at para. 46, "[t]he courts . . . have less expertise than securities commissions in interpreting their constituent statutes given the broad policy context within which securities commissions operate". [page516]

[87] I agree with and adopt the reasons of the Divisional Court on this issue, at para. 25:

The Commission found that Carmichael, McKenny and Watt Carmichael Inc. failed to adequately supervise Rowan. Its findings in that regard were largely factual and policy based. They were within the special expertise of the Commission and the reasonableness standard therefore applies. The Commission's findings easily meet that standard and we would not interfere.

[88] Accordingly, I would dismiss this ground of appeal.

6. Should the Commission's costs award be set aside?

[89] Commission staff sought a costs order, pursuant to s. 127.1, in the amount of \$283,691.40. The Commission found that costs should be ordered against the appellants but, on account of the failure of the Commission staff to make out the allegations of insider trading, ordered \$140,000. The appellants say that award should be set aside.

[90] The appellants complain that the Act's one-way costs regime, allowing only for costs to be awarded against a party found to have failed to comply with Ontario securities law or to have acted contrary to the public interest, is fundamentally unfair. I fail to see how that argument can assist the appellants as, in the absence of any challenge to the regime's validity, this court cannot ignore the law that was duly enacted by the legislature.

[91] The appellants further complain that the costs award is unfair because they defeated the most serious allegation, that Rowan engaged in insider trading, which took up a substantial amount of time at the hearing. However, the Commission explicitly took that into account when fashioning its costs award, at para. 239 [2009 LNONOSC 941]:

Further, we have also considered the unique circumstances of this case, and the fact that four of the eight allegations were not made out, in determining the appropriate amount of

costs that should be paid by the Respondents. In particular, we considered the fact that the vast majority of the evidence led at the hearing was directed at allegations that were not made out.

[92] Costs orders are entitled to deference on appeal. Where the tribunal making the order has expressly taken into account the very point advanced on appeal, an appellate court will rarely interfere. I agree with and adopt the reasons of the Divisional Court on this point, at para. 33:

The Commission addressed its mind to the fact that the appellants were successful on many of the issues raised against them. The Commission took that into account in assessing costs and reduced the award accordingly. [page517]

[93] Accordingly, I would dismiss the appeal of the Commission's costs order.

Disposition

[94] For these reasons, I would dismiss the appeals. The Commission did not seek costs in this court and, accordingly, I would dismiss the appeals without costs.

Appeal dismissed.

1989 CarswellNat 193
Supreme Court of Canada

Please see in particular paras. 90,
93-94

Slaight Communications Inc. v. Davidson

1989 CarswellNat 695, 1989 CarswellNat 193, [1989] 1 S.C.R. 1038, [1989]
S.C.J. No. 45, 15 A.C.W.S. (3d) 132, 26 C.C.E.L. 85, 40 C.R.R. 100, 59 D.L.R.
(4th) 416, 89 C.L.L.C. 14,031, 93 N.R. 183, J.E. 89-775, EYB 1989-67228

SLAIGHT COMMUNICATIONS INC. v. DAVIDSON

Dickson C.J.C., Beetz, Lamer, Wilson, Le Dain, * La Forest and L'Heureux-Dubé JJ.

Heard: October 8, 1987

Judgment: May 4, 1989

Docket: No. 19412

Counsel: *Brian A. Grosman, Q.C.* and *John Martin*, for appellant.
Morris Cooper and *Fern Weinper*, for respondent.

Subject: Constitutional; Public; Employment; Human Rights

Headnote

Labour and employment law --- Employment law — Termination and dismissal — Termination of employment by employer — Procedure on dismissal — Miscellaneous

Employee wrongfully dismissed — Employer ordered to only send letter in response to any requests for references about employee — Limitation on freedom of expression justifiable — [Canadian Charter of Rights and Freedoms](#), ss. 1, 2(b) — [Canada Labour Code](#), R.S.C. 1970, c. L-1, s. 61.5(9)(c).

Constitutional law --- Charter of Rights and Freedoms — Nature of rights and freedoms — Freedom of expression — Provisions requiring disclosure of information

Employer terminated employee salesman's employment without cause — Employer made unfounded allegations of unsatisfactory performance by employee — An adjudicator awarded employee compensation and ordered employer to provide a letter of recommendation certifying details of the wrongful dismissal and to answer all inquiries concerning employee with that letter exclusively — Employer's appeal was dismissed — Employer appealed further to determine whether s. 61.5(9)(c) of the Code authorized an adjudicator to make such orders — The appeal should be dismissed — The positive order to draw up and to give employee a specified letter of reference infringed [s. 2\(b\) of the Charter](#) but was saved by [s. 1](#) — The negative order that any inquiry about employee's employment be answered exclusively by the letter of reference was an infringement of [s. 2\(b\)](#) — The objective of both orders was to counteract the effects of the unjust dismissal by enhancing employee's ability to seek new employment without being lied about by

employer — Constitutionally protecting the freedom of expression on the facts of the case would be tantamount to condoning the continuation of an abuse of an unequal relationship — There was no less intrusive measure that the adjudicator could have taken and have achieved the objective with any likelihood — The effects of the measures were not so deleterious as to outweigh the objective of the measures — The positive and negative orders were saved by s. 1 Constitution Act, 1982, R.S.C. 1985, App. II, No. 44, [s 1](#); Constitution Act, 1982, R.S.C. 1985, App. II, No. 44, [s 2\(b\)](#).

The respondent radio time salesman was found under [s. 61.5\(6\) of the Canada Labour Code](#), by an adjudicator appointed by the Minister of Labour, to have been unjustly dismissed. Pursuant to [s. 61.5\(9\) of the Labour Code](#), the adjudicator ordered that the appellant employer give the respondent a letter of recommendation setting out the length of his employment, the sales quotas set for him and the extent to which he met those quotas, and the fact that he had been unjustly dismissed (the first order). The adjudicator further ordered that queries about the respondent were to be answered only with this letter (the second order). The appellant applied for judicial review of the adjudicator's decision. The Federal Court of Appeal dismissed the application. The appellant appealed. The issues on the appeal were: (1) does [s. 6.5\(9\)\(c\) of the Labour Code](#) authorize an adjudicator to make such an order, and (2) did the order infringe the appellant's freedom of expression guaranteed by s. 2(b) of the *Canadian Charter of Rights and Freedoms*?

Held:

The appeal was dismissed.

Per Dickson C.J.C. (Wilson, La Forest and L'Heureux-Dubé JJ. concurring)

Lamer J.'s discussion of the applicability of the *Charter* to administrative decision making was agreed with. Lamer J.'s conclusion that the second order was patently unreasonable, thereby obviating the need for *Charter* review, was not. Administrative law unreasonableness, as a preliminary standard of review, should not impose a more onerous standard upon government than would *Charter* review. While patent unreasonableness is important to maintain for questions untouched by the *Charter*, in the realm of value inquiry Courts should have recourse to this standard only in the clearest of cases in which a decision could not be justified under s. 1 of the *Charter*.

The first order infringed the appellant's freedom of expression under s. 2(b) of the *Charter* but was saved under [s. 1](#).

The second order, that the appellant answer any reference inquiry exclusively by sending the specified letter, also infringed [s. 2\(b\)](#); it, too, was justified under [s. 1](#). The objective sought to be achieved by both orders, i.e. to counteract the effects of the unjust dismissal by enhancing the ability of the respondent to seek new employment without the appellant lying about him, was of sufficient importance to warrant overriding the appellant's freedom of expression. The adjudicator's remedy was a legislatively sanctioned attempt to remedy the unequal balance of power that normally exists between an employer and an employee. Thus, this case falls within a class of cases in which the governing objective is that of protection of a particularly vulnerable group or members thereof. The Courts must be concerned to avoid constitutionalizing inequalities

of power in the workplace. As long as the proportionality test is met, it would not, on the facts of this case, be in accordance with the underlying principles and values of a democratic society for the *Charter* to be successfully invoked by an employer. On the facts of this case, constitutionally protecting freedom of expression would be tantamount to condoning the continuation of an abuse of an already unequal relationship.

Both orders were rationally limited to the objective. Since there was a proven history of attempts by the appellant to promote a fabricated version of the quality of the respondent's services, it was rational for the adjudicator to attach a rider to the order for a reference letter so as to ensure that representatives of the employer did not subvert the effect of the letter by unjustifiably maligning the respondent in the guise of giving a reference.

The adjudicator could not have taken a less intrusive measure and still achieved the objective, with any likelihood. The letter was tightly and carefully designed to reflect only a very narrow range of facts which were not actually contested. The appellant was not forced to state opinions which were not its own. The second order sought to prevent the appellant from passing on an opinion, such prohibition being closely tied to the abuse of power which had been found to exist. That prohibition was very circumscribed in that it was triggered only when the appellant was contacted for a reference and there was no requirement to send the letter to anyone other than prospective employers.

The effects of the measures were not so deleterious as to outweigh the objectives. Among the underlying values essential to a free and democratic society are the inherent dignity of the human person and commitment to social justice and equality. Canada has ratified the *International Covenant on Economic, Social and Cultural Rights*, and committed itself thereby to protecting the right to work found in art. 6 of that treaty. The fact that a value has the status of an international human right, either in customary international law or under a treaty to which Canada is a state party, should generally be indicative of a high degree of importance attached to that objective.

Per Lamer J. (dissenting in part)

The word "like" in the English version of s. 61.5(9)(c) of the *Labour Code* does not have the effect of limiting the powers conferred on the adjudicator by allowing him to make orders similar to the orders expressly mentioned in paras. (a) and (b) of that subsection. The interpretation according to which the word "like" in the English version of para. (c) does not have the effect of limiting the general power conferred on the adjudicator is more consistent with the general scheme of the *Labour Code*, and in particular with the purpose of Division V.7, which is to give non-unionized employees a means of challenging a dismissal they feel to be unjust, and at the same time to equip the adjudicator with the powers necessary to remedy the consequences of such a dismissal.

The adjudicator had the jurisdiction, quite apart from any constitutional argument, to make the first order. However, the adjudicator was not authorized by s. 61.5(9)(c) to make the second order compelling the appellant to respond to reference requests only by sending the letter of recommendation, since such an order was patently unreasonable. Requiring someone to write a letter is not unreasonable as such, but the requirement becomes wholly unreasonable when the circumstances are such that the letter may be seen as reflecting that person's opinions when that

is not necessarily the case. The second order prohibited the appellant from making comments of any kind. The effect of that part of the order was to create circumstances in which the letter of recommendation could be seen as the expression of the appellant's opinion.

The *Charter* applies to the order made by the adjudicator. The adjudicator is a statutory creature, appointed pursuant to a legislative provision and deriving all his powers from the statute. As the Constitution is the supreme law of Canada and any law that is inconsistent with its provisions is, to the extent of the inconsistency, of no force or effect, it is impossible to interpret legislation conferring discretion as conferring a power to infringe the *Charter*, unless that power is expressly conferred or necessarily implied. Legislation conferring an imprecise discretion must therefore be interpreted as not allowing the *Charter* rights to be infringed. Accordingly, an adjudicator exercising delegated powers does not have the power to make an order that would result in an infringement of the *Charter*, and exceeds his jurisdiction if he does so.

The first order limited the appellant's freedom of expression. However, that limitation was justified under s. 1 of the *Charter*. The purpose of the order, i.e. to counteract the consequences of the unjust dismissal, was sufficiently important to warrant a limitation on freedom of expression. The means chosen to attain the objective were reasonable in the circumstances. The letter was rationally connected to the dismissal since it was the only way of effectively remedying the consequences of the dismissal. The consequences of the order were proportional to the objective sought. The limitation on freedom of expression in this case was not very serious.

Per Beetz J. (dissenting)

Both orders violated the appellant's freedom of expression and were not justified under s. 1 of the *Charter*. The first order forced the appellant to write, as if they were his own, statements of fact in which the appellant might not believe. The first order, then, could have the effect of forcing the appellant to lie. Such an effect is totalitarian in nature and can never be justified under s. 1. The second order could lead to the implication that the appellant had no further comment to make about the respondent's performance and that the letter, therefore, reflected the appellant's opinion. In any event, the second order was disproportionate and unreasonable.

Table of Authorities

Cases considered by the majority:

Blanchard v. Control Data Can. Ltd., [1984] 2 S.C.R. 476, 14 Admin. L.R. 133, 84 C.L.L.C. 14,070, 55 N.R. 194, 14 D.L.R. (4th) 289 — referred to

Edwards Books & Art Ltd. v. R., [1986] 2 S.C.R. 713, 87 C.L.L.C. 14,001, 28 C.R.R. 1, (sub nom. *Edwards Books & Art Ltd. v. R.*; *R. v. Nortown Foods Ltd.*) 58 O.R. (2d) 442 (note), 30 C.C.C. (3d) 385, 35 D.L.R. (4th) 1, (sub nom. *R. v. Videoflicks Ltd.*) 55 C.R. (3d) 193, 19 O.A.C. 239, 71 N.R. 161 — referred to

National Bank of Can. v. Retail Clerks' International Union, [1984] 1 S.C.R. 269, 84 C.L.L.C. 14,037, 53 N.R. 203, 9 D.L.R. (4th) 10 — distinguished

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Cases considered by the dissent:

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C.U.P.E., Local 963 v. N.B. Liquor Corp., [1979] 2 S.C.R. 227, 25 N.B.R. (2d) 237, 51 A.P.R. 237, 79 C.L.L.C. 14,209, 26 N.R. 341, 97 D.L.R. (3d) 417, N.B.L.L.C. 24259 — *referred to* *National Bank of Can. v. Retail Clerks' International Union*, [1984] 1 S.C.R. 269, 84 C.L.L.C. 14,037, 53 N.R. 203, 9 D.L.R. (4th) 10 — *applied, considered*

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R. v. Oakes, [1986] 1 S.C.R. 103, 53 O.R. (2d) 719 (headnote only), 50 C.R. (3d) 1, 65 N.R. 87, 24 C.C.C. (3d) 321, 14 O.A.C. 335, 26 D.L.R. (4th) 200, 19 C.R.R. 308 — referred to
Reference re Alta. Legislation, [1938] S.C.R. 100, [1938] 2 D.L.R. 81, appeal dismissed
[1938] 3 W.W.R. 337, [1939] A.C. 117, (sub nom. *A.G. Alta. v. A.G. Can.*), [1938] 4 D.L.R.
433 — referred to

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Div. V.7

s. 3(a), as am. S.C. 1970-71-72, c. 50, s. 2

s. 61.5(6), as en. S.C. 1977-78, c. 27, s. 21 [now R.S.C. 1985, c. L-2, s. 242(1)]

s. 61.5(7), as en. S.C. 1977-78, c. 27, s. 21 [now R.S.C. 1985, c. L-2, s. 242(2)]

s. 61.5(8), as en. S.C. 1977-78, c. 27, s. 21 [now R.S.C. 1985, c. L-2, s. 242(3)]

s. 61.5(9), as en. S.C. 1977-78, c. 27, s. 21 [now R.S.C. 1985, c. L-2, s. 242(4)]

s. 184(1)(a), as en. S.C. 1972, c. 18, s. 1 [now R.S.C. 1985, c. L-2, s. 94(1)(a)]

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. 2

s. 32(1)

Federal Court Act, R.S.C. 1970, 2d Supp., c. 10 [now R.S.C. 1985, c. F-7] —

s. 52(d)

Treaties considered:

International Covenant on Economic, Social and Cultural Rights, Res. 2200 A (XXI), 21 U.N. GAOR, Supp. (No. 16) 49, U.N. Doc. A/6316 (1966) —

art. 6

Words and phrases considered:

LIKE

In the case at bar I consider . . . that the presence of the word "like" in para. (c) of the English version [of s. 61.5(9) of the Canada Labour Code, R.S.C. 1970, c. L-1] was not intended to limit the powers conferred on the adjudicator by allowing him to make only orders similar to the orders expressly mentioned in paras. (a) and (b) of that subsection, and does not have that effect.

APPEAL from a judgment of the Federal Court of Appeal [reported at [\[1985\] 1 F.C. 253, 12 C.C.E.L. 251, 58 N.R. 150, 85 C.L.L.C. 14,053, 16 C.R.R. 45](#)] dismissing appellant's application pursuant to s. 28 of the Federal Court Act to set aside an order made by an adjudicator under s. 61.5(9)(c) of the Canada Labour Code. Appeal dismissed, Beetz J. dissenting and Lamer J. dissenting in part.

Dickson C.J.C. (Wilson, La Forest and L'Heureux-Dubé concurring):

I

1 The respondent, Mr. Ron Davidson, a radio time salesman, was dismissed by his employer, the appellant Slaight Communications Inc., operating as Q107 FM Radio. A complaint was filed by Mr. Davidson under the [Canada Labour Code, R.S.C. 1970, c. L-1](#), and an inquiry undertaken. As the matter could not be resolved or settled, Mr. Edward B. Joliffe, Q.C., was appointed by the Minister of Labour to act as adjudicator and to render a decision in accordance with the provisions of [subss. \(6\) to \(9\)](#) of s. 61.5, as en. S.C. 1977-78, c. 27, s. 21, Division V.7, Part III of the *Canada Labour Code*. Two days of hearings were held in Toronto. Twelve days later, Mr. Joliffe received a letter, written on behalf of the employer, requesting Mr. Joliffe to consider reopening the adjudication because, the letter read in part, "our client has advised us that it is in possession of certain material which may indicate that Mr. Davidson perjured his testimony before you in one or more respects." Mr. Joliffe demanded particulars of this very serious allegation. The company's counsel failed to comply. The application for another hearing was dismissed.

2 Adjudicator Joliffe reviewed at length the evidence of Ms. Stitt. Ms. Stitt was the sole witness on behalf of the employer and at the relevant time she was general sales manager of the company, though later dismissed. The adjudicator noted:

In Ms. Stitt's letter to Labour Canada of February 27, 1984 ... she specified that the 'major complaint' was Mr. Davidson's failure to achieve 'monthly sales budgets since October of 1983.' To select four months (or less) from a total of 43 months of service as evidence of unsatisfactory service is obviously specious.

Later in his ruling the adjudicator stated:

From first to last Ms. Stitt's attitude faithfully reflected the advice she attributes to Mr. Gary Slaight: 'If he failed to make budget, I'd hear about it. If he made it, the complaint would be that he could do more.' By this perverse logic it appears that the more Mr. Davidson sold, the more unacceptable his performance. Such absurd statements led this adjudicator to suggest disclosure of 'the real reason for dismissal,' but there was no response.

He concluded:

An attempt has been made in this case to prove unsatisfactory performance as just cause for dismissal. The attempt has failed. I find that Mr. Davidson was dismissed without just cause.

3 Mr. Joliffe then turned his attention to the question of an appropriate remedy, quoting subs. (9) of s. 61.5 as follows:

(9) Where an adjudicator decides pursuant to subsection (8) that a person has been unjustly dismissed, he may, by order, require the employer who dismissed him to

(a) pay the person compensation not exceeding the amount of money that is equivalent to the remuneration that would, but for the dismissal, have been paid by the employer to the person;

(b) reinstate the person in his employ; and

(c) do any other like thing that it is equitable to require the employer to do in order to remedy or counteract any consequence of the dismissal.

4 He ordered payment of \$46,628.96 plus interest and legal costs of \$2,500. He made a further order, which is central to this appeal, reading:

Under the power given me by paragraph (c) in subsection (9) of Section 61.5, I further order:

That the employer give the complainant a letter of recommendation, with a copy to this adjudicator, certifying that:

- (1) Mr. Ron Davidson was employed by Station Q107 from June, 1980, to January 20, 1984, as a radio time salesman;
- (2) That his sales 'budget' or quota for 1981 was \$248,000, of which he achieved 97.3 per cent;
- (3) That his sales 'budget' or quota for 1982 was \$343,500, of which he achieved 100.3 per cent;
- (4) That his sales 'budget' or quota for 1983 was \$402,200, of which he achieved 114.2 per cent;
- (5) That following termination in January, 1984, an adjudicator (appointed by the Minister of Labour) after hearing the evidence and representations of both parties, held that the termination had been an unjust dismissal.

I further order that any communication to Q107, its management or staff, whether received by letter, telephone or otherwise, from any person or company inquiring about Mr. Ron Davidson's employment at Q107, shall be answered exclusively by sending or delivering a copy of the said letter of recommendation.

5 An appeal by the employer to the Federal Court of Appeal was dismissed [reported at [\[1985\] 1 F.C. 253](#), [12 C.C.E.L. 251](#), [58 N.R. 150](#), [85 C.L.L.C. 14,053](#), [16 C.R.R. 45](#), Urie and Mahoney JJ., Marceau J. dissenting].

6 The question to be decided by this Court is whether para. (c) of [s. 61.5\(9\) of the Canada Labour Code](#) authorizes the adjudicator to order the employer to give the employee a letter of reference of specified content and to order the employer to say nothing further about the employee. Paragraph (c), it will be recalled, reads:

(c) do any other like thing that it is equitable to require the employer to do in order to remedy or counteract any consequence of the dismissal.

7 Resolution of the problem involves (1) the construction and the true meaning and effect of para. (c), (2) whether the adjudicator's order in this case infringed freedom of expression under s. 2(b) of the *Canadian Charter of Rights and Freedoms*, and (3) if so, whether the infringement is justified under s. 1 of the *Charter*.

8 Two constitutional questions were stated in this appeal as follows:

1. Do the provisions of the adjudicator's order, pursuant to [s. 61.5\(9\) of the Canada Labour Code](#), [R.S.C. 1970, c. L-1](#), as amended, whereby the appellant was ordered to provide the respondent with a letter of recommendation of specified content combined with the further stipulation that any communication to the appellant relating to the respondent's employment

with the appellant be answered exclusively by sending or delivering a copy of the letter of recommendation, infringe or deny the rights and freedoms guaranteed by s. 2(b) of the *Canadian Charter of Rights and Freedoms*?

2. If the provisions of the adjudicator's order infringe or deny the rights and freedoms guaranteed by s. 2(b) of the *Canadian Charter of Rights and Freedoms*, are they justified by s. 1 of the *Charter* and therefore not inconsistent with the *Constitution Act, 1982*?

II — The Relationship Between Administrative Law Review And Review Under The Charter

9 I have had the benefit of reading the opinion of Justice Lamer and I am in complete agreement with his discussion of the applicability of the *Charter* to administrative decision making. I also agree with his conclusion that the positive order made by adjudicator Joliffe (to draw up and to give the respondent a specified letter of reference) infringes s. 2(b) of the *Charter* but is saved by s. 1. However, with regard to the negative order (that any inquiry about the respondent's employment at Q107 be answered exclusively by the letter of reference which is the subject of the positive order) I must respectfully disagree with the conclusion of Lamer J. that it is patently unreasonable, thereby obviating the need to consider the *Charter*. Furthermore, not only am I of the view that the negative order is reasonable in the administrative law sense, but I also believe that it is reasonable and demonstrably justified in the sense of s. 1 of the *Charter*.

10 I agree with Mahoney J. of the Federal Court of Appeal [[1985] 1 F.C., at 260-261] that:

The ordering of provision of a totally factual letter of recommendation and foreclosing the undermining of its effect which, in the circumstances disclosed by the evidence, was patently foreseeable, seems to me to be an equitable remedial requirement. It is not punitive. It is appropriate redress to the wronged employee without, in any way, injuring the employer. In my view, the order was authorized by paragraph 61.5(9)(c).

11 The precise relationship between the traditional standard of administrative law review of patent unreasonableness and the new constitutional standard of review will be worked out in future cases. A few comments nonetheless may be in order. A minimal proposition would seem to be that administrative law unreasonableness, as a preliminary standard of review, should not impose a more onerous standard upon government than would *Charter* review. While patent unreasonableness is important to maintain for questions untouched by the *Charter*, such as review of determinations of fact (see *Blanchard v. Control Data Can. Ltd.* [1984] 2 S.C.R. 476 at 494-495, 14 Admin. L.R. 13384 C.L.L.C. 14,07055 N.R. 19414 D.L.R. (4th) 289) in the realm of value inquiry the Courts should have recourse to this standard only in the clearest of cases in which a decision could not be justified under s. 1 of the *Charter*. In contrast to s. 1, patent unreasonableness rests to a large extent on unarticulated and undeveloped values and lacks the same degree of structure and sophistication of analysis. It seems to me that had Lamer J. gone on to conduct a s. 1 inquiry, his excellent analysis of the contending values in the context of the positive order

would have been equally applicable to the negative order which he has instead found to be patently unreasonable.

12 I agree with Lamer J. that the order in this case is considerably different from that at issue in *National Bank of Can. v. Retail Clerks' International Union*, [1984] 1 S.C.R. 269, 84 C.L.L.C. 14,037, 53 N.R. 203, 9 D.L.R. (4th) 10, and therefore, the determination by Beetz J. that the letter in question in *National Bank* was patently unreasonable is not applicable to the facts of this case. The focus of condemnation in *National Bank* was on the "compelling [of] anyone to utter opinions that [were] not his own" (per Beetz J., at p. 296, S.C.R.) which was exacerbated by the wide publication of the letter to all employees and management staff of the bank. That is not this case. As the adjudicator noted here, there was no real conflict of evidence about the accounts and reports.

III — The Negative Order and Section 2(b) of the Charter

13 Adjudicator Joliffe's order that Slaight Communications Inc. answer any reference inquiry exclusively by sending the specified letter is an infringement of s. 2(b) freedom of expression. The government is attempting to prevent Q107 from expressing its opinion as to the qualifications of Mr. Davidson beyond the facts set out in the letter. The harm that it was aiming to prevent (decreased job prospects for Mr. Davidson) is only relevant to s. 1 analysis and not to s. 2(b) analysis.

IV — Section 1 of the Charter

14 The basic test for s. 1 analysis formulated in *R. v. Oakes* [1986] 1 S.C.R. 103 at 138-139, 53 O.R. (2d) 719 (headnote only), 50 C.R. (3d) 1 65 N.R. 87 24 C.C.C. (3d) 321 14 O.A.C. 335 26 D.L.R. (4th) 200 19 C.R.R. 308, has been reviewed in the reasons of Lamer J. and need not be reproduced here.

1. Importance of the Objective

15 I am in firm agreement with the conclusions of Lamer J. about the importance of the objective sought to be achieved by the positive order, namely, counteracting the effects of the unjust dismissal by enhancing the ability of the employee to seek new employment without being lied about by the previous employer. This is also the objective of the negative order which, in the words of Mahoney J. in the Federal Court of Appeal [[1985] 1 F.C., at 260] was designed to "foreclos[e] the undermining of [the] effect" of the positive order. Both orders seek to achieve the same goal, the negative order complementing and reinforcing the positive order.

16 It cannot be overemphasized that the adjudicator's remedy in this case was a legislatively-sanctioned attempt to remedy the unequal balance of power that normally exists between an employer and employee. Thus, in a general sense, this case falls within a class of cases in which the governmental objective is that of protection of a particularly vulnerable group, or members thereof.

In *Edwards Books & Art Ltd. v. R.* [1986] 2 S.C.R. 71387 C.L.L.C. 14,00128 C.R.R. 1 *Edwards Books & Art Ltd. v. R.*; *R. v. Nortown Foods Ltd.* 58 O.R. (2d) 442 (note) 30 C.C.C. (3d) 38535 D.L.R. (4th) 1 *R. v. Videoflicks Ltd.* 55 C.R. (3d) 19319 O.A.C. 23971 N.R. 161, I stated for the majority [S.C.R., at 779]:

In interpreting and applying the *Charter* I believe that the courts must be cautious to ensure that it does not simply become an instrument of better situated individuals to roll back legislation which has as its object the improvement of the condition of less advantaged persons. When the interests of more than seven vulnerable employees in securing a Sunday holiday are weighed against the interests of their employer in transacting business on a Sunday, I cannot fault the Legislature for determining that the protection of the employees ought to prevail.

Consistent with the above view of the place of the *Charter*, I can think of no better way to describe the employment relationship than as expressed in P. Davies and M. Freeland, *Kahn-Freund: Labour and the Law*, 3d ed. (London: Sweet & Maxwell, 1983) at 18:

[T]he relation between an employer and an isolated employee or worker is typically a relation between a bearer of power and one who is not a bearer of power. In its inception it is an act of submission, in its operation it is a condition of subordination. ... The main object of labour law has always been, and we venture to say will always be, a countervailing force to counteract the inequality of bargaining power which is inherent and must be inherent in the employment relationship. Most of what we call protective legislation — legislation on the employment of women, children and young persons, on safety in mines, factories, and offices, on payment of wages in cash, on guarantee payments, on race or sex discrimination, on unfair dismissal, and indeed most labour legislation altogether — must be seen in this context. It is an attempt to infuse law into a relation of command and subordination.

The objective of both the positive and negative orders made by adjudicator Joliffe is sensitive to the reality identified by Kahn-Freund, Davies and Freeland. The Courts must be just as concerned to avoid constitutionalizing inequalities of power in the workplace and between societal actors in general. It must be recalled that *Oakes supra*, at p. 136 [[1986] 1 S.C.R.] stated that "[t]he underlying values and principles of a free and democratic society are the genesis of the rights and freedoms guaranteed by the *Charter* and the ultimate standard against which a limit on a right or freedom must be shown, despite its effect, to be reasonable and demonstrably justified." As long as the proportionality test is met, it would not, on the facts of this case, be in accordance with those underlying principles and values for the *Charter* to be successfully invoked by an employer. The inequality in one employment relationship would be continued even after its termination, with the result that the worker looking for a new job would be placed in an even more unequal bargaining position vis-à-vis prospective employers than is normally the case. On the facts of this

case, constitutionally protecting freedom of expression would be tantamount to condoning the continuation of an abuse of an already unequal relationship.

2. Proportionality

(a) *Rational Connection*

17 The negative order is very much rationally linked to the objective, no less than the positive order. The adjudicator was plainly of the view that the respondent had been the subject of some kind of personal vendetta or "set-up", as Mahoney J. termed it [[1985] 1 F.C., at 258] which had been initiated by the employer's general manager and executed by its sales manager, the latter of whom was Mr. Davidson's immediate superior.

18 As I have indicated, the representative of the employer was found to have engaged in bad faith and duplicitous conduct, giving misleading evidence about Mr. Davidson's work performance both at the time of his dismissal and during the unjust dismissal hearing. Further, in deciding that reinstatement was not a viable remedy, the adjudicator gave as his reason that "[t]here is no sign that he would receive fair treatment by an employer which has made such vigorous efforts to justify the indefensible." With this proven history of promoting a fabricated version of the quality of Mr. Davidson's service and the concern that the employer would continue to treat him unfairly if he went back to work for the employer, it was rational for the adjudicator to attach a rider to the order for a reference letter so as to ensure that representatives of the employer did not subvert the effect of the letter by unjustifiably maligning its previous employee in the guise of giving a reference.

(b) *Minimal Impairment*

19 In my view, there was no less intrusive measure that the adjudicator could have taken and still have achieved the objective with any likelihood. To the extent there was a likelihood that representatives of Q107 would not be content to pass on the letter of reference absent the kind of untrue comments that had resulted in the finding of unjust dismissal, the letter of reference would have been rendered illusory to the same degree of likelihood.

20 While an order of additional monetary compensation would clearly be less intrusive upon the appellant's freedom of expression, it would not be an acceptable substitute. Even if the adjudicator had ordered that Mr. Davidson could come back once he had secured a job and be granted compensation, above and beyond unemployment insurance for the actual period out of work, this would only be compensation for the *economic* effects of lack of employment, not the *personal* effects. This is directly contrary to the objective sought to be achieved by the order, which is securing new employment in the shortest order possible; the corollary of this objective is, of course, a concern to alleviate the personal problems associated with being out of work. As Professor David M. Beatty puts it in "Labour Is Not a Commodity" in B.J. Reiter and J. Swan, eds, *Studies in Contract Law* (London: Butterworths, 1980) at 323-324:

The personal meaning of work is seen to go beyond rather than to be completely dependent upon the purposes of production. ... [R]eflecting the characterization of humans as, for the most part, doers and makers, the identity aspect of employment is increasingly seen to serve deep psychological needs. ... It recognizes the importance of providing the members of society with an opportunity to realize some sense of identity and meaning, some sense of worth in the community beyond that which can be taken from the material product of the institution. ... [E]mployment is seen as providing recognition of the individual's being engaged in something worthwhile. ... [E]mployment comes to represent the means by which most members of our community can lay claim to an equal right of respect and of concern from others. It is this institution through which most of us secure much of our self-respect and self-esteem. With such an emphasis on contributing to society one avoids the demoralization that inevitably attends idleness and exile, even when it is assuaged by social assistance.

Monetary compensation can only be an alternative measure if labour is treated as a commodity and every day without work seen as being exhaustively reducible to some pecuniary value. As I had occasion to say in *Reference re Public Service Employee Relations Act (Alta.)*, [1987] 1 S.C.R. 313 at 368, 51 Alta. L.R. (2d) 97, [1987] 3 W.W.R. 577, 28 C.R.R. 305, 38 D.L.R. (4th) 161, 74 N.R. 99, 78 A.R. 1, [1987] D.L.Q. 225, 87 C.L.L.C. 14,021: "A person's employment is an essential component of his or her sense of identity, self-worth and emotional well-being." Viewing labour as a commodity is incompatible with such a perspective, which is reflected in the remedial objective chosen by the adjudicator. To posit monetary compensation as a less intrusive measure is, in effect, to challenge the legitimacy of the objective.

21 Consider the facts of this particular case. The letter was tightly and carefully designed to reflect only a very narrow range of *facts* which, we saw, were not really contested. As already discussed, unlike in *National Bank*, supra, the employer has not been forced to state *opinions* ("views and sentiments", per Beetz J., [1984] 1 S.C.R., at 295) which are not its own. Rather, the negative order seeks to prevent the employer from passing on an opinion, such prohibition being closely tied to the history of abuse of power which had been found to exist. Furthermore, that prohibition is very circumscribed. Firstly, it is triggered only in cases when the appellant is contacted for a reference and, secondly, there is no requirement to send the letter to anyone other than prospective employers. In sum, this is a much less intrusive and carefully designed order than that in *National Bank* in which the bank was required to send to a very large audience (all the employees and management staff of the bank) what amounted to a letter of contrition which conveyed the impression that certain opinions expressed therein were those of the employer.

22 Finally, it cannot be ignored that a letter such as this may not have a great beneficial impact on an employee's job hunt. The letter is very neutral in tone, totally unembellished as it is by any opinion customary in letters of reference, and it refers to the fact of the finding of unjust dismissal. It seems to me that the adjudicator went no further than was necessary to achieve the objective

and, even then, the measures adopted by the adjudicator cannot be said to have done more than to have enhanced, as opposed to having ensured, the chances of the respondent finding a job. The adjudicator did not in any sense pursue the objective without regard to the appellant's right to free expression.

(c) Deleterious Effects

23 It is clear to me that the effects of the measures are not so deleterious as to outweigh the objective of the measures. The importance of the above-discussed objective cannot be overemphasized. There are many diverse values that deserve protection in a free and democratic society such as that of Canada, only some of which are expressly provided for in the *Charter*. The underlying values of a free and democratic society both guarantee the rights in the *Charter* and, in appropriate circumstances, justify limitations upon those rights. As was said in *Oakes at p. 136* [[1986] 1 S.C.R.] among the underlying values essential to our free and democratic society are "the inherent dignity of the human person" and "commitment to social justice and equality". Especially in light of Canada's ratification of the *International Covenant on Economic, Social and Cultural Rights*, G.A. Res. 2200 A (XXI), 21 U.N. GAOR, Supp. (No. 16) 49, U.N. Doc. A/6316 (1966) and commitment therein to protect, inter alia, the right to work in its various dimensions found in art. 6 of that treaty, it cannot be doubted that the objective in this case is a very important one. In *Reference re Public Service Employee Relations Act (Alta.)*, supra, I had occasion to say at p. 349 [[1987] 1 S.C.R.]:

The content of Canada's international human rights obligations is, in my view, an important indicia of the meaning of 'the full benefit of the *Charter*'s protection'. I believe that the *Charter* should generally be presumed to provide protection at least as great as that afforded by similar provisions in international human rights documents which Canada has ratified.

Given the dual function of s. 1 identified in *Oakes*, Canada's international human rights obligations should inform not only the interpretation of the content of the rights guaranteed by the *Charter* but also the interpretation of what can constitute pressing and substantial s. 1 objectives which may justify restrictions upon those rights. Furthermore, for purposes of this stage of the proportionality inquiry, the fact that a value has the status of an international human right, either in customary international law or under a treaty to which Canada is a state party, should generally be indicative of a high degree of importance attached to that objective. This is consistent with the importance that this Court has placed on the protection of employees as a vulnerable group in society.

24 In normal course, the suppression of one's right to express an opinion about a subject or person will be a serious infringement of s. 2(b) and only outweighed by very important objectives. In the foregoing analysis, I have sought to show that the negative order was minimally intrusive in a relative sense and also that the careful tailoring of both parts of the order has made this a much less serious infringement of s. 2(b) than, for instance, occurred in the *National Bank* case.

V — Conclusion

25 In conclusion, I am of the opinion that both of the adjudicator's orders at issue (the positive order and the negative order) infringe [s. 2\(b\)](#) but are saved by [s. 1](#). I would answer both constitutional questions in the affirmative and dismiss the appeal with costs.

Beetz J.:

I — Introduction

26 I have had the advantage of reading the reasons for judgment written by Mr. Justice Lamer and then the reasons for judgment written by the Chief Justice. I refer to their statements of the facts, proceedings and constitutional questions as well as to their summary of the decisions rendered by the adjudicator and the Federal Court of Appeal.

27 Like the Chief Justice, I am in agreement with Mr. Justice Lamer's discussion of the applicability of the *Charter* to administrative decision making. I also agree with Mr. Justice Lamer's construction of [s. 61.5\(9\)\(c\) of the Canada Labour Code](#).

28 However, I have the misfortune of not being able to concur with one of the two main conclusions reached by both my colleagues, and while I agree with the other main conclusion reached by Mr. Justice Lamer, I do so for reasons which differ in part from his own reasons.

29 The two impugned orders issued by the adjudicator in the case at Bar read as follows:

Under the power given me by paragraph (c) in [subsection \(9\) of Section 61.5](#), I further order:

That the employer give the complainant a letter of recommendation, with a copy to this adjudicator, certifying that:

(1) Mr. Ron Davidson was employed by Station Q107 from June, 1980, to January 20, 1984, as a radio time salesman;

(2) That his sales 'budget' or quota for 1981 was \$248,000, of which he achieved 97.3 per cent;

(3) That his sales 'budget' or quota for 1982 was \$343,500, of which he achieved 100.3 per cent;

(4) That his sales 'budget' or quota for 1983 was \$402,200, of which he achieved 114.2 per cent;

(5) That following termination in January, 1984, an adjudicator (appointed by the Minister of Labour) after hearing the evidence and representations of both parties, held that the termination had been an unjust dismissal.

I further order that any communication to Q107, its management or staff, whether received by letter, telephone or otherwise, from any person or company inquiring about Mr. Ron Davidson's employment at Q107, shall be answered exclusively by sending or delivering a copy of the said letter of recommendation.

30 The first order, which has been labelled the positive order, relates to a letter of recommendation comprising five attestations numbered (1) to (5).

31 The second order, which has been labelled the negative order, forbids the appellant to answer any inquiry about the respondent's employment at Q107 otherwise than by the letter of recommendation dictated by the adjudicator in the first order.

32 The main issues are whether these two orders infringe or deny the freedoms guaranteed to the appellant by s. 2(b) of the *Canadian Charter of Rights and Freedoms* and, if so, whether they are justified by s. 1 of the *Charter*.

33 Section 1 and 2(b) of the *Charter* provide:

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

.....

2. Everyone has the following fundamental freedoms:

.....

(b) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication.

34 I state my conclusions at the outset. In my view, the first order, that is the positive one, except attestation number (5) thereof, as well as the second order, that is the negative one in its entirety, violate the appellant's freedom of opinion and expression and cannot be justified under s. 1 of the *Charter*.

35 I hasten to add that the flaw which I find in the first order can easily be corrected. As for the second order, it can be replaced by another order which tends toward the same end without violating the *Charter*.

II — The First Order

36 The flaw which I find in the first order, with particular reference to its attestations numbered (1) to (4), is that this order forces the employer to write, as if they were his own, statements of facts in which, rightly or wrongly, he may not believe, or which he may ultimately find or think to be inaccurate, misleading or false. In other words, the first order may force the former employer to

tell a lie. In this particular respect, this case cannot in my opinion be distinguished from the case of *National Bank of Can. v. Retail Clerks' International Union*, where a majority of this Court held as follows at p. 296 [[1984] 1 S.C.R.]:

Remedies Nos. 5 and 6 thus force the Bank and its president to do something, and to write a letter, which may be misleading or untrue.

This type of penalty is totalitarian and as such alien to the tradition of free nations like Canada, even for the repression of the most serious crimes. I cannot be persuaded that the Parliament of Canada intended to confer on the Canada Labour Relations Board the power to impose such extreme measures, even assuming that it could confer such a power bearing in mind the *Canadian Charter of Rights and Freedoms*, which guarantees freedom of thought, belief, opinion and expression. These freedoms guarantee to every person the right to express the opinions he may have: *a fortiori* they must prohibit compelling anyone to utter opinions that are not his own.

37 It was argued that the case at Bar is different in that the letter of recommendation in question is totally factual and that the facts stated therein and found by the adjudicator were undisputed. In the Federal Court of Appeal, Mahoney J. accepted this argument. He wrote at p. 260 [[1985] 1 F.C.]:

I am, of course, aware of the decision in *National Bank of Canada v. Retail Clerks' International Union et al.*, [1984] 1 S.C.R. 269. The letter ordered in that case required the employer to express, or at least imply, opinions which it did not necessarily hold. Here, the applicant has simply been *ordered to tell the truth*. The letter sets out bald facts that are neither misleading nor disputed.

(Emphasis added.)

38 With the greatest of respect, in so accepting the argument, Mahoney J. missed the point altogether and begged the essential question: what is the truth? The facts found to be true by the adjudicator are binding for the purpose of establishing whether or not there had been an unjust dismissal. But the former employer cannot be forced to acknowledge and state them as the truth apart from his belief in their veracity. If he states these facts in the letter, as ordered, but does not believe them to be true, he does not tell the truth; he tells a lie. He may not have disputed these facts at the time of the hearing but he could change his mind later, for instance on the basis of evidence discovered after the adjudicator's decision was rendered.

39 There may be a distinction, somewhat difficult to apply, between being forced to express opinions or views which one does not necessarily entertain, and being compelled to state facts, the veracity of which one does not necessarily believe; but, in my opinion, both types of coercion constitute gross violations of the freedoms of opinion and expression or, at the very least, of the freedom of expression. That is why, with respect, I cannot possibly agree with the suggestion that

the restriction to freedom of expression which results from the first order is not very serious or very grave. The superficial innocuousness of the first order should not blind us to the nature of this order and to the positive manner in which it violates the freedom of expression. It is one thing to prohibit the disclosure of certain facts. It is quite another to order the affirmation of facts, apart from belief in their veracity by the person who is ordered to affirm them. The prohibition constitutes a prima facie violation of the freedoms of opinion and expression but such a prohibition may, in some circumstances, be justified under s. 1 of the *Charter*. On the other hand, to order the affirmation of facts, apart from belief in their veracity by the person who is ordered to affirm them, constitutes a much more serious violation of the freedoms of opinion and expression, as was held in the case of the *National Bank of Can.* In my view, such a violation is totalitarian in nature and can never be justified under s. 1 of the *Charter*. It does not differ, essentially, from the command given to Galileo by the Inquisition to abjure the cosmology of Copernicus. As was stated in the unanimous reasons of this Court in *Que. Assn. of Protestant School Bds. v. A.G. Que.*; *Wong-Woo v. A.G. Que.*; *Orman v. A.G. Que.*; *Mak v. A.G. Que.*; *Toma v. A.G. Que.* [1984] 2 S.C.R. 6654 N.R. 19610 D.L.R. (4th) 3219 C.R.R. 133, s. 1 of the *Charter* cannot be used to justify a complete negation of a constitutionally protected right or freedom [S.C.R., at 88]:

The provisions of s. 73 of *Bill 101* collide directly with those of s. 23 of the *Charter*, and are not limits which can be legitimized by s. 1 of the *Charter*. Such limits cannot be exceptions to the rights and freedoms guaranteed by the *Charter* nor amount to amendments of the *Charter*. *An Act of Parliament or of a legislature which, for example, purported to impose the beliefs of a State religion would be in direct conflict with s. 2(a) of the Charter, which guarantees freedom of conscience and religion, and would have to be ruled of no force of effect without the necessity of even considering whether such legislation could be legitimized by s. 1.*

(Emphasis added.) (See also *Reference re Alta. Legislation*, [1938] S.C.R. 100, [1938] 2 D.L.R. 81, appeal dismissed [1938] 3 W.W.R. 337 [1939] A.C. 117, (sub nom. *A.G. Alta. v. A.G. Can.*), [1938] 4 D.L.R. 433, with respect to the *Accurate News and Information Act* of Alberta.)

40 In spite of its gravity however, and as indicated earlier, the flaw which I find in the first order can easily be corrected. It would suffice to add to the letter a sentence or sentences indicating that the attestations numbered (1) to (4) refer to facts as found by the adjudicator.

41 As for attestation number (5), it does not give rise to any difficulty in my view since it refers to a matter of record.

III — The Second Order

42 The second order is in the form of a prohibition to answer enquiries relating to the respondent's employment at Q107 otherwise than be the letter of recommendation described in the first order.

43 I agree with Mr. Justice Lamer that the sending of the letter as drafted by the adjudicator, coupled with the prohibition to say or write anything else, could lead to the implication that the former employer has no further comment to make upon the performance of the respondent and that, accordingly, the letter reflects the opinion of the former employer. This being the case, the second order, coupled with the first, also violates the former employer's freedoms of opinion and expression in a manner which, for the reasons given above, cannot be justified under s. 1 of the *Charter*.

44 The risks of such an implication might be reduced and perhaps eliminated should the first order be corrected as I suggested earlier. But I believe that we must decide the case on the basis of the orders as they now stand, and not as we would if they were corrected.

45 In any event, I find the second order disproportionate and unreasonable. I believe one should view with extreme suspicion an administrative order or even a judicial order which has the effect of preventing the litigants from commenting upon and even criticizing the rulings of the deciding board or Court.

46 Adjudicators and boards who, in cases of unjust dismissal, order the sending of letters of recommendation by former employers face a dilemma. They cannot foresee all the possible types of exchanges which are susceptible to occur between former and prospective employers. They accordingly issue a blanket and perpetual prohibition to write or say anything but what they have dictated in the letter of recommendation. This can lead to absurd and even counter-productive results.

47 Thus, in the case at Bar, if after having received the letter dictated by the adjudicator, a prospective employer were to address specific questions to the former employer, relating for instance to the respondent's health or drinking habits, the appellant would have to go on answering with sales statistics. This could not but compromise the respondent's chances for employment. Or if the former employer finally saw the light and, out of remorse, became inclined to write a letter considerably more complimentary and flattering than the one dictated by the adjudicator, he could not do so.

48 The absurdity which results from the adjudicator's second order is sufficient to warrant its reversal, in my view. It is disproportionate and unreasonable from a practical point of view. Then it has to be unreasonable from an administrative law point of view and I have difficulty in conceiving how it could be reasonable within the meaning of s. 1 of the *Charter*.

49 This being said, I agree that the adjudicator was legitimately concerned by the risk that the former employer undermine the effect of the letter of recommendation. While I believe that the prohibition he issued to foreclose that possibility is disproportionate and unreasonable, I think that other legitimate means might have been devised towards the same end. The adjudicator could, for

instance, have ordered the former employer to write in the letter that he had been instructed by the adjudicator to tell prospective employers that they would be well advised to read the adjudicator's decision. I do not believe that such a neutral order would be punitive, but it might alert prospective employers to the animosity displayed by the former employer towards the respondent.

IV — Conclusions

50 One last point before I reach my conclusions properly so called.

51 I would not like it to be thought that I condone the highly reprehensible conduct of the appellant. But under the *Charter*, freedom of opinion and freedom of expression are guaranteed to "everyone", employers and employees alike, irrespective of their labour practices and of their bargaining power.

52 I would allow the appeal, set aside the judgment of the Federal Court of Appeal as well as the first and second order of the adjudicator quoted in these reasons for judgment, and refer the matter back to the adjudicator so that these orders be replaced by an order or orders compatible with these reasons.

53 I would give an affirmative answer to the first constitutional question and a negative answer to the second constitutional question.

54 I would not make any order as to costs.

Lamer J.:

55 An adjudicator appointed by the Minister of Labour pursuant to [s. 61.5\(6\) of the Canada Labour Code](#) made an order in favour of an employee based on [s. 61.5\(9\) of the Code](#). The employer challenged the said order but its appeal was dismissed by the Federal Court of Appeal. With leave of this Court, the employer is now appealing here from this judgment of the Federal Court of Appeal. The outcome of this appeal involves determining whether, under [s. 61.5\(9\) of the Canada Labour Code](#), as it read at the time of his decision, the adjudicator had the power to make the order at issue.

I — Facts

56 Respondent had been employed by appellant as a "radio time salesman" for 3 1/2 years when he was dismissed on the ground that his performance was inadequate. It is not in dispute that when he was dismissed respondent received all monies to which he was entitled under his employment contract.

57 However, respondent filed a complaint with an inspector alleging that he had been unjustly dismissed. As the parties were unable to settle this complaint and respondent asked that it be

referred to an adjudicator, the Minister of Labour appointed an adjudicator to hear and decide the matter in accordance with the Code.

58 After hearing the evidence and the submissions of the parties, the adjudicator made an order directing the employer to pay respondent as compensation the sum of \$46,628.96 with interest at the rate of 12 per cent and to pay his counsel the sum of \$2,500 to reimburse him for the legal costs incurred. The said order further imposed on the employer an obligation to give respondent a letter of recommendation certifying that he had been employed by station Q107 from June 1980 to January 20, 1984, and that an adjudicator had found he was unjustly dismissed and indicating the sales quotas he had been set and the amount of sales he actually made during this period. It should be noted that the order made specifically indicates the amounts to be shown as sales quotas and as sales actually made. Finally, the order directed appellant to answer requests for information about respondent only by sending this letter of recommendation.

59 This order reads as follows:

In the matter of compensation, I am satisfied that had he not been dismissed, the sales and commissions of the complainant would have at least equalled those of 1983. After taking into consideration the fact that he worked until January 20, 1984, and received certain commissions (at reduced levels) thereafter, my order is that he be paid forthwith the equivalent of 75 per cent of his 1983 earnings of \$62,171.95, being the sum of \$46,628.96.

I further order that interest be paid at the rate of 12 per cent per annum, divided by two, on the said amount from January 20 to November 20, 1984. Thereafter interest will be payable on any unpaid balance at the rate of 12 per cent per annum, which is not to be divided by two.

I say nothing of the U.I.C. payments received by the complainant, which is a matter to be resolved between the complainant and the Commission.

I further order payment of legal costs in the amount of \$2,500.00 to the complainant's solicitor and counsel, Mr. Morris Cooper.

Further orders are necessary, resembling the order made by Adjudicator Adams in the *Roberts* case, but in greater detail.

Under the power given me by paragraph (c) in [subsection \(9\) of Section 61.5](#), I further order:

That the employer give the complainant a letter of recommendation, with a copy to this adjudicator, certifying that:

- (1) Mr. Ron Davidson was employed by Station Q107 from June, 1980 to January 20, 1984, as a radio time salesman;
- (2) That his sales 'budget' or quota for 1981 was \$248,000, of which he achieved 97.3 per cent;

(3) That his sales 'budget' or quota for 1982 was \$343,500, of which he achieved 100.3 per cent;

(4) That his sales 'budget' or quota for 1983 was \$402,200, of which he achieved 114.2 per cent;

(5) That following termination in January, 1984, an adjudicator (appointed by the Minister of Labour) after hearing the evidence and representations of both parties, held that the termination had been an unjust dismissal.

I further order that any communication to Q107, its management or staff, whether received by letter, telephone or otherwise, from any person or company inquiring about Mr. Ron Davidson's employment at Q107, shall be answered exclusively by sending or delivering a copy of the said letter of recommendation.

60 Appellant is challenging in this Court only the parts of the order relating to (1) the sending of a letter of recommendation and (2) the prohibition on answering a request for information in any other way than by sending this letter.

II — Judgments of Lower Courts

61 Appellant challenged this order by filing an application with the Federal Court of Appeal to set it aside. However, the Federal Court of Appeal, made up of Urie and Mahoney JJ. with Marceau J. dissenting, dismissed this application to set aside.

62 In his reasons, Mahoney J. first said that the purpose of [s. 61.5\(9\)\(c\)](#) and the fact that it would be difficult or even impossible to find remedies similar to the remedies expressly authorized in paras. (a) and (b) meant that the presence of the word "like" in the English version of [s. 61.5\(9\)\(c\)](#) was not intended to restrict the powers conferred on the adjudicator. In his opinion, this paragraph simply expressed a kind of ejusdem generis rule which did not have the effect of limiting the scope of the powers conferred.

63 Ordering the employer to give respondent a letter of recommendation was in his opinion an equitable remedy designed to remedy the consequences of the dismissal, not to punish the employer. This letter, he thought, only stated objective facts that were not in dispute and so simply required the employer to tell the truth.

64 However, he agreed with appellant's argument that the part of the decision ordering the employer to issue a letter of recommendation imposed limitations on its freedom of expression guaranteed by the *Canadian Charter of Rights and Freedoms*. In his view, however, such a limitation was justified under s. 1 of that *Charter*. He stressed that the limitation on freedom of

expression was prescribed by law, since it was the Act which authorized the adjudicator to make such an order.

65 Urie J., for his part, agreed with the reasons stated by his brother Judge Mahoney. However, he indicated that he was not sure that the ejusdem generis rule applied in any way to the interpretation of s. 61.5(9)(c).

66 Finally, Marceau J. wrote his own reasons, which differ from the majority reasons in certain respects. First, he expressed agreement with Mahoney J. as to the way in which s. 61.5(9)(c) should be construed, but expressed some reservations regarding application of the ejusdem generis rule. He noted that the powers conferred on the adjudicator were already clearly limited by the fact that the orders he was empowered to make under para. (c) must be aimed at remedying or counteracting the consequences of the dismissal.

67 In his view, the remedies ordered in the case at Bar were of two types, positive and negative. The part of the order directing the employer to furnish respondent and any person seeking information about him with a letter of recommendation having a specified content was, in his opinion, an order that could be characterized as positive. It directed the employer to do something and sought to remedy the consequences of the dismissal found to be unjust: accordingly, it was authorized by s. 61.5(9)(c). The part of the order which also prohibited the employer from answering any request for information about respondent other than by issuing this letter might for its part be characterized as negative, since it prohibited the employer from doing something. Such an order, in his view, was not aimed at remedying the consequences of the dismissal and so was not authorized by the said paragraph.

68 He also considered that this part of the order infringed the freedom of thought, belief, opinion and expression guaranteed appellant by s. 2(b) of the *Canadian Charter of Rights and Freedoms*. He said he did not think it possible to say that the limitation was prescribed by law, since the extent of the limitation was not indicated by the legislation in question. He added, however, that in any case in his opinion these freedoms were not subject to reasonable limits that could be demonstrably justified in a free and democratic society. He therefore concluded that the application to set aside should be allowed and the matter referred back to the adjudicator concerned for him to determine what remedies it would be appropriate to impose in order to counteract the effects of the dismissal.

III — Legislation

69 The following legislation is relevant to this appeal:

Canada Labour Code

70

61.5. ...

(9) Where an adjudicator decides pursuant to subsection (8) that a person has been unjustly dismissed, he may, by order, require the employer who dismissed him to

(a) pay the person compensation not exceeding the amount of money that is equivalent to the remuneration that would, but for the dismissal, have been paid by the employer to the person;

(b) reinstate the person in his employ; and

(c) do any other like thing that it is equitable to require the employer to do in order to remedy or counteract any consequence of the dismissal.

Canadian Charter of Rights and Freedoms

71

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

2. Everyone has the following fundamental freedoms:

(a) freedom of conscience and religion;

(b) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication;

(c) freedom of peaceful assembly; and

(d) freedom of association

32. (1) This *Charter* applies

(a) to the Parliament and government of Canada in respect of all matters within the authority of Parliament including all matters relating to the Yukon Territory and Northwest Territories; and

(b) to the legislature and government of each province in respect of all matters within the authority of the legislature of each province.

IV — Analysis

72 To begin with, appellant argued that the adjudicator had no power to make these parts of the order since the orders he is authorized to make under s. 61.5(9)(c) must be of the same kind

as the orders expressly mentioned in s. 61.5(9)(a) and (b), in view of the word "like" that appears in the English version.

73 As can readily be seen, the English and French versions of s. 61.5(9)(c) are different. Section 61.5(9)(c) of the English version confers a general power on the adjudicator as follows:

61.5. ...

(9) Where an adjudicator decides pursuant to subsection (8) that a person has been unjustly dismissed, he may, by order, require the employer who dismissed him to

.....

(c) do any other *like* thing that it is equitable to require the employer to do in order to remedy or counteract any consequence of the dismissal.

(My emphasis.)

74 The French version, for its part, does not contain any word or expression equivalent to the word "like" used in the English version. The general power conferred on the adjudicator is conferred in the following language:

61.5.

(9) Lorsque l'arbitre décide conformément au paragraphe (8) que le congédiement d'une personne a été injuste, il peut, par ordonnance, requérir l'employeur

.....

(c) de faire toute autre chose qu'il juge équitable d'ordonner afin de contrebalancer les effets du congédiement ou d'y remédier.

75 First of all, therefore, these two versions have to be reconciled if possible. To do this, an attempt must be made to get from the two versions of the provision the meaning common to them both and ascertain whether this appears to be consistent with the purpose and general scheme of the Code.

76 In the case at Bar, I consider, like the Federal Court of Appeal Judges, that the presence of the word "like" in para. (c) of the English version was not intended to limit the powers conferred on the adjudicator by allowing him to make only orders similar to the orders expressly mentioned in paras. (a) and (b) of that subsection, and does not have that effect. Interpreting this provision in this way would mean applying the *eiusdem generis* rule. I think it is impossible to apply this rule in the case at Bar since one of the conditions essential for its application has not been met. The specific terms (here the orders referred to in paras. (a) and (b)) which precede the general term (the power conferred on the adjudicator in para. (c) to make any order that is equitable) must have a common characteristic, a common genus. As Maxwell writes in P. St. J. Langan, ed. *Maxwell on the Interpretation of Statutes*, 12th ed. (London: Sweet & Maxwell, 1969) at 299:

Unless there is a genus or class or category, there is no room for any application of the *ejusdem generis* doctrine.

77 Professor P.-A. Côté also notes this requirement when he writes in his work titled *The Interpretation of Legislation in Canada*, trans. K. Lippel (Cowansville, Qué.: Éditions Yvon Blais, 1984) at 245:

As a third condition, the specific terms must have a significant common denominator to be considered within one given category. If this is lacking, *ejusdem generis* does not apply.

78 In the case at Bar, I do not see what characteristic could be described as common to a compensation order and a reinstatement order.

79 The only "denominator" which seems to me common to these two orders in the context of [s. 61.5\(9\)](#) is the fact that these orders are both intended to remedy or counteract the consequences of the dismissal found by the adjudicator to be unjust. However, para. (c) expressly provides that an order made under that paragraph must be designed to remedy or counteract any consequence of the dismissal. This "common denominator" cannot therefore assist in the application of the *ejusdem generis* rule, since the legislator has already expressly provided that the orders the adjudicator is empowered to make must have this characteristic. Even if I were to admit that the English version should prevail over the French version, which I do not admit, I would still consider that this provision is ambiguous and that the most rational way of interpreting it is to say that the presence of the word "like" in this version does not have the effect of limiting the general power conferred on the adjudicator. This interpretation is in any case much more consistent with the general scheme of the Code, and in particular with the purpose of Division V.7, which is to give non-unionized employees a means of challenging a dismissal they feel to be unjust and at the same time to equip the adjudicator with the powers necessary to remedy the consequences of such a dismissal. [Section 61.5](#) is clearly a remedial provision and must accordingly be given a broad interpretation. The consequence of interpreting para. (c) in the manner suggested by appellant would be to limit considerably the type of order the adjudicator could make. It would in fact be very difficult to find remedies *like* the remedies mentioned in paras. (a) and (b). The extent of the compensation that can be ordered has been carefully limited by the legislator and there is not really any similarity between reinstatement and any other measure. I believe that, on the contrary, by enacting [s. 61.5\(9\)\(c\)](#), the legislator intended to vest in the adjudicator powers that would be sufficiently wide and flexible for him to adequately perform the duties entrusted to him, in each of the cases that come before him. I therefore consider that the meaning to be given to both versions is what clearly appears on the face of the French version and that accordingly the type of order the adjudicator can make should not be limited to orders like those expressly authorized in paras. (a) and (b).

80 Appellant further argued that the adjudicator exceeded his jurisdiction since there is no connection between the order made in the case at Bar, the dismissal and the consequences of that dismissal. I cannot entirely agree with him in this regard. The part of the order dealing with the sending of a letter of recommendation is, in my view, clearly meant to counteract the consequences of the dismissal found to be unjust by the adjudicator. This part of the order is designed to prevent the employer's decision to dismiss respondent from having negative consequences for the latter's chances of finding new employment. The letter of recommendation is intended to correct the impression given by the fact of the dismissal, by clearly indicating that the dismissal was found by an adjudicator to be unjust and by clearly setting out certain "objective" facts relating to respondent's performance. The situation is therefore very different from that which existed in *National Bank of Can. v. Retail Clerks' International Union*.

81 In that case, the Canada Labour Relations Board had found that the National Bank of Canada, which had closed a unionized branch and incorporated it in a non-unionized branch, had taken its decision for anti-union reasons and had therefore infringed s. 184(1)(a) and (3)(a) of the *Canada Labour Code*. These provisions prohibit an employer, inter alia, from interfering with the formation or administration of a trade union and from suspending, transferring or laying off an employee on the ground that he is a member of a trade union. The Canada Labour Relations Board had therefore ordered the Bank to do a number of things. Among these were that it create a trust fund to further the objectives of the Code among all its employees and send the employees a letter telling them this fund had been created. The order specifically indicated what the wording of this letter should be and prohibited the employer from adding or deleting anything in its wording. Chouinard J., with whose reasons the other members of this Court concurred, said that in his opinion the part of the order prescribing the creation of a trust fund should be set aside since there was no relationship between this remedy and the alleged act and its consequences. He thought that the announcement of the creation of the fund was the key feature of the letter the employer was required to send, and concluded that this part of the order should suffer the same fate as that reserved for the part of the order dealing with the creation of the fund. Beetz J., for his part, added that in his opinion both the creation of the fund and the letter were open to the interpretation that they resulted from an initiative taken by the National Bank of Canada, reflecting the views of the Bank and in particular its approval of the *Canada Labour Code* and its objectives. He stated that in his opinion this part of the order was contrary to the democratic traditions of this country and so could not have been authorized by the Parliament of Canada.

82 In the case at Bar, the letter the employer is required to give respondent is of a different nature from the letter the National Bank of Canada was required to send in that case. It expresses no opinions and simply sets out facts which, as counsel for the appellant admitted at the hearing, and it is important to note this, are not in dispute. Ordering an employer to give a former employee a letter of recommendation containing only objective facts that are not in dispute does not seem to me to be as such unreasonable. Such an order may be completely justified in certain circumstances,

and in the case at Bar there is nothing to indicate that the adjudicator was pursuing an improper objective or acting in bad faith or in a discriminatory manner. As this order was not unreasonable, it is not the function of this Court to examine its appropriateness or to substitute its own opinion for that of the person making the order, unless of course the decision impinges on a right protected by the *Canadian Charter of Rights and Freedoms*.

83 Accordingly, I am not prepared to say at this stage that the nature of this part of the order is such that the adjudicator necessarily exceeded his jurisdiction in making it. Quite apart from the constitutional argument that this order infringes the freedom of expression guaranteed by the *Canadian Charter of Rights and Freedoms*, therefore, I consider that the adjudicator had the power to make this part of the order at issue here. The only limitation placed by s. 61.5(9) on the type of order the adjudicator can make is that any order must be designed to "remedy or counteract any consequence of the dismissal." In my view, this part of the order is clearly intended for that purpose.

84 However, I take a different view of the part of the order that prohibits the employer from answering a request for information about respondent other than by sending this letter of recommendation. Although this part of the order is probably meant to remedy or counteract the consequences of the dismissal, I believe that the issuing of this letter in such a context could be interpreted as meaning that appellant has no comments to make regarding the work done by respondent other than those mentioned in the letter. In such circumstances, it could thus be construed as expressing, at least by implication, appellant's opinion in this regard. Although requiring someone to write a letter is not unreasonable as such, the requirement becomes wholly unreasonable when the circumstances are such that the letter may be seen as reflecting their opinions when that is not necessarily the case. This part of the order does not prohibit the employer from stating facts found to be incorrect at the hearing, which might have been reasonable and justified: it prohibits the employer from making comments of any kind. In my view the effect of this part of the order, by thus prohibiting the employer from adding any comments whatever, is to create circumstances in which the letter of recommendation could be seen as the expression of appellant's opinions. As my brother Beetz J. so admirably phrased it in *National Bank of Canada* at p. 296 [[1984] 1 S.C.R.]:

This type of penalty is totalitarian and as such alien to the tradition of free nations like Canada, even for the repression of the most serious crimes.

85 Parliament cannot have intended to authorize such an unreasonable use of the discretion conferred by it. A discretion is never absolute, regardless of the terms in which it is conferred. This is a long-established principle. H.W.R. Wade, in his text titled *Administrative Law*, 4th ed. (Oxford: Clarendon Press, 1977) says the following at p. 336:

For more than three centuries it has been accepted that discretionary power conferred upon public authorities is not absolute, even within its apparent boundaries, but is subject to general

legal limitations. These limitations are expressed in a variety of different ways, as by saying that discretion must be exercised *reasonably* and in good faith, that relevant considerations only must be taken into account, that there must be no malversation of any kind, or that the decision must not be arbitrary or capricious.

(My emphasis.)

86 This limitation on the exercise of administrative discretion has been clearly recognized in our law, by *C.U.P.E., Local 963 v. N.B. Liquor Corp.* [1979] 2 S.C.R. 22725 N.B.R. (2d) 23751 A.P.R. 23779 C.L.L.C. 14,20926 N.R. 34197 D.L.R. (3d) 417, N.B.L.L.C. 24259, and *Blanchard v. Control Data Can. Ltd.*, [1984] 2 S.C.R. 476, 14 Admin. L.R. 133, 84 C.L.L.C. 14,070, 55 N.R. 194, 14 D.L.R. (4th) 289 inter alia. Whether it is the interpretation of legislation that is unreasonable or the order made in my view matters no more than the question of whether the error is one of law or of fact. An administrative tribunal exercising discretion can never do so unreasonably. To reiterate what I said earlier in *Blanchard* [[1984] 2 S.C.R., at 494-495]:

An administrative tribunal has the necessary jurisdiction to make a mistake, and even a serious one, but not to be unreasonable. The unreasonable finding is no less fatal to jurisdiction because the finding is one of fact rather than law. An unreasonable finding is what justifies intervention by the courts.

Not only is the distinction between error of law and of fact superfluous in light of an unreasonable finding or conclusion, but the reference to error itself is as well. Indeed, though all errors do not lead to unreasonable findings, every unreasonable finding results from an error (whether of law, fact, or a combination of the two), which is unreasonable.

In conclusion, an unreasonable finding, whatever its origin, affects the jurisdiction of the tribunal.

87 In the case at Bar, I consider that the adjudicator was not authorized by s. 61.5(9)(c) to order the employer not to answer a request for information about respondent, except by sending the letter of recommendation containing the aforementioned wording, since such an order is patently unreasonable. Though the adjudicator clearly had jurisdiction to make an order he felt to be equitable and proper, he lost this jurisdiction when he made a patently unreasonable decision.

88 Appellant further argued that s. 61.5(9)(c) did not empower the adjudicator to make such an order, since that paragraph does not clearly state that the adjudicator can use a remedy that differs from the remedies usually available under the ordinary rules of common law in such circumstances. The principle underlying this argument is that, in the absence of a clear provision to the contrary, the legislator should not be assumed to have intended to alter the pre-existing ordinary rules of common law. There is no need for me to rule on the merits of this principle, since I consider that in the case at Bar, by enacting para. (c), the legislator clearly indicated his intent to confer wider

powers on the adjudicator than those he usually has under the ordinary rules of common law in such circumstances.

89 It now remains to assess in light of the *Canadian Charter of Rights and Freedoms* the part of the order we have found to be not unreasonable in terms of the rules of administrative law. The fact that the part of the order relating to sending the letter of recommendation is not unreasonable from an administrative law standpoint does not mean that it is necessarily consistent with the *Charter*.

90 The fact that the *Charter* applies to the order made by the adjudicator in the case at Bar is not, in my opinion, open to question. The adjudicator is a statutory creature: he is appointed pursuant to a legislative provision and derives *all* his powers from the statute. As the Constitution is the supreme law of Canada and any law that is inconsistent with its provisions is, to the extent of the inconsistency, of no force or effect, it is impossible to interpret legislation conferring discretion as conferring a power to infringe the *Charter*, unless, of course, that power is expressly conferred or necessarily implied. Such an interpretation would require us to declare the legislation to be of no force or effect, unless it could be justified under s. 1. Although this Court must not add anything to legislation or delete anything from it in order to make it consistent with the *Charter*, there is no doubt in my mind that it should also not interpret legislation that is open to more than one interpretation so as to make it inconsistent with the *Charter* and hence of no force or effect. Legislation conferring an imprecise discretion must therefore be interpreted as not allowing the *Charter* rights to be infringed. Accordingly, an adjudicator exercising delegated powers does not have the power to make an order that would result in an infringement of the *Charter*, and he exceeds his jurisdiction if he does so. This idea was very well expressed by Prof. Peter Hogg when he wrote in his text titled *Constitutional Law of Canada*, 2d ed. (Toronto: Carswell, 1985) at 671:

The references in s. 32 to the 'Parliament' and a 'legislature' make clear that the Charter operates as a limitation on the powers of those legislative bodies. Any statute enacted by either Parliament or a Legislature which is inconsistent with the Charter will be outside the power of (*ultra vires*) the enacting body and will be invalid. It follows that any body exercising statutory authority, for example, the Governor in Council or Lieutenant Governor in Council, ministers, officials, municipalities, school boards, universities, administrative tribunals and police officers, is also bound by the Charter. Action taken under statutory authority is valid only if it is within the scope of that authority. Since neither Parliament nor a Legislature can itself pass a law in breach of the Charter, neither body can authorize action which would be in breach of the Charter. Thus, the limitations on statutory authority which are imposed by the Charter will flow down the chain of statutory authority and apply to regulations, by-laws, orders, decisions and all other action (whether legislative, administrative or judicial) which depends for its validity on statutory authority.

91 Section 61.5(9)(c) must therefore be interpreted as conferring on the adjudicator a power to require the employer to do any other thing that it is equitable to require the employer to do in

order to remedy or counteract any consequence of the dismissal, provided however that such an order, if it limits a protected right or freedom, only does so within reasonable limits that can be demonstrably justified in a free and democratic society. It is only if the limitation on a right or freedom is not kept within reasonable and justifiable limits that one can speak of an infringement of the *Charter*. The *Charter* does not provide an absolute guarantee of the rights and freedoms mentioned in it. What it guarantees is the right to have such rights and freedoms subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society. There is thus no reason not to ascribe to Parliament an intent to limit a right or freedom mentioned in the *Charter* or to allow a protected right or freedom to be limited when the language used by Parliament suggests this.

92 It would be useful, in my view, to describe the steps that must be taken to determine the validity of an order made by an administrative tribunal, which are as follows.

93 First, there are two important principles that must be borne in mind:

1. An administrative tribunal may not exceed the jurisdiction it has by statute; and
2. It must be presumed that legislation conferring an imprecise discretion does not confer the power to infringe the *Charter* unless that power is conferred expressly or by necessary implication.

94 The application of these two principles to the exercise of a discretion leads to one of the following two situations:

1. The disputed order was made pursuant to legislation which confers, either expressly or by necessary implication, the power to infringe a protected right.
 - (a) It is then necessary to subject the *legislation* to the test set out in s. 1 by ascertaining whether it constitutes a reasonable limit that can be demonstrably justified in a free and democratic society.
2. The legislation pursuant to which the administrative tribunal made the disputed order confers an imprecise discretion and does not confer, either expressly or by necessary implication, the power to limit the rights guaranteed by the *Charter*.
 - (a) It is then necessary to subject the *order* made to the test set out in s. 1 by ascertaining whether it constitutes a reasonable limit that can be demonstrably justified in a free and democratic society.
 - (b) If it is not thus justified, the administrative tribunal has necessarily exceeded its jurisdiction.

(c) If it is thus justified, on the other hand, then the administrative tribunal has acted within its jurisdiction.

95 There is no doubt in the case at Bar that the part of the order dealing with the issuing of a letter of recommendation places, in my opinion, a limitation on freedom of expression. There is no denying that freedom of expression necessarily entails the right to say nothing or the right not to say certain things. Silence is in itself a form of expression which in some circumstances can express something more clearly than words could do. The order directing appellant to give respondent a letter containing certain objective facts in my opinion unquestionably limits appellant's freedom of expression.

96 However, this limitation is prescribed by law and can therefore be justified under [s. 1](#). The adjudicator derives all his powers from statute and can only do what he is allowed by statute to do. It is the legislative provision conferring discretion which limits the right or freedom, since it is what authorizes the holder of such discretion to make an order the effect of which is to place limits on the rights and freedoms mentioned in the *Charter*. The order made by the adjudicator is only an exercise of the discretion conferred on him by statute.

97 To determine whether this limitation is reasonable and can be demonstrably justified in a free and democratic society, therefore, one must examine whether the use made of the discretion has the effect of keeping the limitation within reasonable limits that can be demonstrably justified in a free and democratic society. If the answer is yes, we must conclude that the adjudicator had the power to make such an order since he was authorized to make an order reasonably and justifiably limiting a right or freedom mentioned in the *Charter*. If on the contrary the answer is no, then one has to conclude that the adjudicator exceeded his jurisdiction since Parliament has not delegated to him a power to infringe the *Charter*. If he has exceeded his jurisdiction, his decision is of no force or effect.

98 The test that must be applied in such an assessment has been largely defined by my brother Dickson C.J. in [R. v. Oakes](#). According to that test, the objective to be served by the disputed measures must first be sufficiently important to warrant limiting a right or freedom protected by the *Charter*. Second, the party seeking to maintain the limitation must show that the means selected to attain this objective are reasonable and justifiable. To do this, it will be necessary to apply a form of proportionality test involving three separate components: the disputed measures must be fair and not arbitrary, carefully designed to achieve the objective in question and rationally connected to that objective. The means chosen must also be such as to impair the right or freedom as little as possible, and finally, its effects must be proportional to the objective sought.

99 I consider that the objective sought by the order made in the case at Bar is sufficiently important to justify some limitation on freedom of expression. The purpose of the order is clearly, as required by the Code and as I indicated above, to counteract, or at least to remedy,

the consequences of the dismissal found by the adjudicator to be unjust. In my opinion, such an objective is sufficiently important to warrant a limitation on a right or freedom mentioned in the *Charter*. I think it is important for the legislator to provide certain mechanisms to restore equilibrium in the relations between an employer and his employee, so that the latter will not be subject to arbitrary action by the former. These observations should not be taken as meaning that in my view all employers necessarily try to abuse their position. However, it cannot be denied that some employees are in an especially vulnerable position in relation to their employers and that the forces involved are usually not equal. Accordingly, I think that mechanisms designed to remedy or counteract the consequences of an unlawful action taken by an employer are justified in such a context. It should also be noted that in these circumstances the limitation on rights or freedoms is not in fact made until after the act committed by the employer has been found by an adjudicator to be unlawful, and only in order to remedy the consequences of that act found to be unlawful.

100 An order directing the employer to give respondent a letter of recommendation containing objective facts also seems to me to be reasonable and justifiable in these circumstances. It has the three characteristics necessary to meet the proportionality test. As I mentioned earlier, the purpose of the letter of recommendation is to correct the impression given by the fact of the dismissal, by clearly indicating that the dismissal was found by an adjudicator to be unjust, and by clearly indicating certain "objective" facts that are not in dispute regarding the respondent's performance. A reinstatement order is not always desirable and a compensation order is not always adequate to remedy the consequences of an unjust dismissal. It is possible in some cases for a dismissal to have very negative consequences on the former employee's chances of finding new employment. It seems to me, therefore, that there will be times when such an order is the only means of attaining the objective sought, that of counteracting or remedying the consequences of the dismissal. It is certainly very rationally connected to the latter, since in certain cases it is the only way of effectively remedying the consequences of the dismissal. It is also limited to requiring that the employer state "objective" facts which, in the case at Bar, are not in dispute and do not require the employer to express any opinion, since the part of the order regarding the prohibition on answering a request for information about respondent other than by issuing this letter has been found to be unreasonable, and accordingly outside the jurisdiction conferred on the adjudicator. The employer may thus, if this part found to be unreasonable is removed, indicate for example that he was directed to write the letter and that it therefore does not necessarily contain all his views about the work done by respondent. Taking these circumstances into account, I do not see any way of attaining this objective in the case at Bar without impairing the employer's freedom of expression. Finally, I consider that the consequences of the order are proportional to the objective sought. As I have already said, the latter is important in our society. The limitation on freedom of expression is not what could be described as very serious. It does not abolish that freedom, but simply limits its exercise by requiring the employer to write something determined in advance. This limitation on freedom of expression mentioned in the *Charter* is thus in my opinion kept within reasonable limits that can be demonstrably justified in a free and democratic society. In making this part of the order, therefore, the adjudicator did not infringe the *Charter* and acted within his jurisdiction.

101 As this appeal is covered by s. 52(d) of the *Federal Court Act*, R.S.C. 1970, 2d Supp., c. 10, I would refer the matter back to the adjudicator in question for him to make an order consistent with this judgment.

102 Accordingly, I would allow the appeal at Bar, reverse the judgment of the Federal Court of Appeal, invalidate the order made by the adjudicator and refer the matter back to him so he may make a new order consistent with the instant judgment, the whole with costs.

Appeal dismissed

Footnotes

* Le Dain J. took no part in the judgment.

**Federal Court
of Appeal****Cour d'appel
fédérale**

Please see in particular paras. 8, 54,
80

Date: 20110525

Docket: A-242-10

Citation: 2011 FCA 176

**CORAM: NADON J.A.
DAWSON J.A.
TRUDEL J.A.**

BETWEEN:

**UNITED STATES STEEL CORPORATION
and U.S. STEEL CANADA INC.**

Appellants

and

THE ATTORNEY GENERAL OF CANADA

Respondents

Heard at Ottawa, Ontario, on December 7, 2010.

Judgment delivered at Ottawa, Ontario, on May 25, 2011.

REASONS FOR JUDGMENT BY:

NADON J.A.

CONCURRED IN BY:

**DAWSON J.A.
TRUDEL J.A.**

Federal Court
of Appeal



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REASONS FOR JUDGMENT

NADON J.A.

[1] The *Investment Canada Act*, R.S. 1985, c. 28 (1st Suppl.) (the “Act”) allows the Minister of Industry (the “Minister”) to review and approve applications from foreign investors who wish to obtain control of major Canadian corporations. Section 39 of the Act allows the Minister to demand that a foreign investor in control of a Canadian corporation comply with the Act and with any undertaking made during the application stage. If the Minister is not satisfied with the investor’s actions or response, he can apply under section 40 to a superior court which can grant several forms of relief.

[2] On July 17, 2009, the Minister commenced an application in the Federal Court pursuant to section 40 of the *Act* with respect to two written undertakings, namely, the production and employment undertakings given by the respondents United States Steel Corporation and U.S. Steel Canada Inc. (collectively “U.S. Steel”) in connection with the acquisition of Stelco Inc. (“Stelco”).

[3] On October 8, 2009, U.S. Steel filed a Notice of Motion challenging the constitutional validity of sections 39 and 40 of the *Act*. More particularly, U.S. Steel says that the impugned provisions violate their right to a fair hearing in accordance with principles of fundamental justice, contrary to subsection 2(e) of the *Canadian Bill of Rights*, S.C. 1960, c.44 (the “*Bill of Rights*”) and that they violate the principle of presumption of innocence and the right to a fair hearing, contrary to subsection 11(d) of the *Canadian Charter of Rights and Freedoms*, the *Constitution Act* being Schedule B to the *Canada Act 1982 (U.K.)*, 1982, c.11 (the “*Charter*”).

[4] In a judgment dated June 14, 2010, 2010 FC 642, Hansen J. (the “Judge”) of the Federal Court dismissed U.S. Steel’s challenge in its entirety. This is an appeal from that decision.

Facts and Procedural History

[5] In September 2007, U.S. Steel intended to invest in and acquire control of Stelco’s Hamilton-based business. To this end, it submitted an application for ministerial approval and provided 31 undertakings to the Minister, two of which related to employment and production levels. On October 29, 2007, the Minister approved the acquisition.

[6] On May 5, 2009, the Minister advised U.S. Steel that it was in contravention of the employment and production undertakings. As a result, the Minister demanded, under section 39 of the Act, that U.S. Steel cease the contraventions, remedy the default and either demonstrate there were no contraventions or justify the contraventions.

[7] U.S. Steel responded by sending a lengthy letter to the Minister which explained the difficulties it was facing due to the unexpected economic downturn.

[8] The Minister, being dissatisfied with U.S. Steel's response, informed it on July 15, 2009, that he would be bringing proceedings under section 40 of the Act, seeking an order directing compliance with the undertakings and imposing a penalty of \$10,000 per day per breach, running from November 1, 2008, until such time as U.S. Steel had complied with the undertakings.

[9] As I indicated earlier, the Minister filed his Notice of Application on July 17, 2009.

Paragraphs 3 and 4 of the application read as follows:

3. Directing the Respondents to forthwith comply with the relevant undertakings:
 - a. by increasing steel production at the Canadian Business, as defined in this Application, such that:
 - i. in the period from November 1, 2007 to October 31, 2009, steel production at the Canadian Business is greater than or equal to a total of 8,690,000 tons (2 x 4,345,000); and
 - ii. in the period from November 1, 2009 to October 31, 2010, steel production at the Canadian Business is greater than or equal to 4,345,000 net tons; and
 - b. by taking all such steps as are necessary to ensure that over the Term of the undertakings, as defined in this Application, the Respondents

maintain an average level of employment at the Canadian Business of 3,105 employees on a full time equivalent.

4. Imposing on US Steel and US Steel Canada, jointly and severally, a penalty of \$10,000 per day, per breach of the relevant undertakings, calculated from November 1, 2008 or from such other dates as this Court may determine, until the Respondents have complied with the relevant undertakings and such order as this Court may issue;

[10] In response to the Minister's Notice of Application, U.S. Steel filed an application with the Federal Court seeking to have sections 39 and 40 of the *Act* declared of no force or effect.

Legislation

[11] Before turning to the Judge's decision, I will set out the relevant legislation. Section 39 of the *Act* allows the Minister to send a demand to a non-Canadian investor requiring compliance with the *Act* or the investor's undertakings, or else a justification for non-compliance:

39. (1) Where the Minister believes that a non-Canadian, contrary to this Act,

(a) has failed to give a notice under section 12 or file an application under section 17,

(a.1) has failed to provide any prescribed information or any information that has been requested by the Minister or Director,

(b) has implemented an investment the implementation of which is prohibited by section 16, 24, 25.2 or 25.3,

(c) has implemented an investment on terms and conditions that vary materially from those contained in an application filed under section 17 or

39. (1) Le ministre peut faire émettre une mise en demeure à l'intention d'un non Canadien qui, selon lui, a, contrairement à la présente loi, selon le cas :

a) fait défaut de déposer l'avis mentionné à l'article 12 ou la demande d'examen mentionnée à l'article 17;

a.1) omis de fournir les renseignements prévus par règlement ou ceux exigés par le ministre ou le directeur;

b) effectué un investissement en contravention avec les articles 16, 24, 25.2 ou 25.3;

c) effectué un investissement selon des modalités qui sont substantiellement différentes de celles que contenait la demande d'examen déposée en

from any information or evidence provided under this Act in relation to the investment,

(d) has failed to divest himself of control of a Canadian business as required by section 24,

(d.1) has failed to comply with an undertaking given to Her Majesty in right of Canada

in accordance with an order made under section 25.4,

(d.2) has failed to comply with an order made under section 25.4,

(e) has failed to comply with a written undertaking given to Her Majesty in right of Canada relating to an investment that the Minister is satisfied or is deemed to be satisfied is likely to be of net benefit to Canada,

(f) has failed to comply with any other provision of this Act or with the regulations, or

(g) has entered into any transaction or arrangement primarily for a purpose related to this Act, the Minister may send a demand to the non- Canadian, requiring the non-Canadian, forthwith or within such period as is specified in the demand, to cease the contravention, to remedy the default, to show cause why there is no contravention of the Act or regulations or, in the case of undertakings, to justify any non-compliance therewith.

(2) If the Minister believes that a person or an entity has, contrary to this Act, failed to comply with a requirement to provide information

conformité avec l'article 17 ou des autres renseignements ou éléments de preuve fournis en conformité avec la présente loi à l'égard de l'investissement;

d) fait défaut de se départir du contrôle d'une entreprise canadienne comme l'exige l'article 24;

d.1) omis de se conformer à tout engagement pris envers Sa Majesté du chef du Canada conformément au décret pris en vertu de l'article 25.4;

d.2) omis de se conformer au décret pris en vertu de l'article 25.4;

e) fait défaut de se conformer à l'engagement écrit envers Sa Majesté du chef du Canada qu'il a pris à l'égard de l'investissement au sujet duquel le ministre est d'avis ou est réputé être d'avis qu'il sera vraisemblablement à l'avantage net du Canada;

f) fait défaut de se conformer à une autre disposition de la présente loi ou des règlements;

g) procédé à une opération ou à un arrangement dans un but lié à la présente loi. La mise en demeure exige du non-Canadien, de mettre fin, immédiatement ou à l'intérieur du délai qu'elle précise, à la contravention, de se conformer à la loi ou aux règlements, ou de démontrer qu'ils n'ont pas été violés ou, dans le cas d'un engagement, de justifier le défaut.

(2) S'il estime qu'une personne ou une unité a, contrairement à la présente loi, omis de se conformer soit à une demande de renseignements faite en

under subsection 25.2(3) or 25.3(5) or failed to comply with subsection 25.4(3), the Minister may send a demand to the person or entity requiring that they immediately, or within any period that may be specified in the demand, cease the contravention, remedy the default or show cause why there is no contravention of the Act.

(3) A demand under subsection (1) or (2) shall indicate the nature of the proceedings that may be taken under this Act against the non-Canadian or other person or entity to which it is sent in the event that the non-Canadian, person or entity fails to comply with the demand.

[Emphasis added]

vertu des paragraphes 25.2(3) ou 25.3(5), soit au paragraphe 25.4(3), le ministre peut envoyer une mise en demeure exigeant de la personne ou de l'unité que, sans délai ou dans le délai imparti, elle mette fin à la contravention, elle se conforme à la présente loi ou elle démontre que celle-ci n'a pas été violée.

(3) La mise en demeure fait état de la nature des poursuites judiciaires qui peuvent être instituées en vertu de la présente loi contre le non-Canadien, la personne ou l'unité à qui elle est adressée s'il omet de s'y conformer.

[Non souligné dans l'original]

[12] Section 40 of the Act allows the Minister to bring an application to a superior court if a section 39 demand is not complied with:

40. (1) If a non-Canadian or any other person or entity fails to comply with a demand under section 39, an application on behalf of the Minister may be made to a superior court for an order under subsection (2) or (2.1).

(2) If, at the conclusion of the hearing on an application referred to in subsection (1), the superior court decides that the Minister was justified in sending a demand to the non-Canadian or other person or entity under section 39 and that the non-Canadian or other person or entity has failed to comply with the demand, the court may make any order or orders as, in its opinion, the circumstances

40. (1) Une demande d'ordonnance judiciaire peut être présentée au nom du ministre à une cour supérieure si le non-Canadien, la personne ou l'unité ne se conforme pas à la mise en demeure reçue en application de l'article 39.

(2) Après audition de la demande visée au paragraphe (1), la cour supérieure qui décide que le ministre a agi à bon droit et constate le défaut du non-Canadien, de la personne ou de l'unité peut rendre l'ordonnance que justifient les circonstances; elle peut notamment rendre une ou plusieurs des ordonnances suivantes :

require, including, without limiting the generality of the foregoing, an order

(a) directing the non-Canadian to divest themselves of control of the Canadian business, or to divest themselves of their investment in the entity, on any terms and conditions that the court considers just and reasonable;

(b) enjoining the non-Canadian from taking any action specified in the order in relation to the investment that might prejudice the ability of a superior court, on a subsequent application for an order under paragraph (a), to effectively accomplish the end of such an order;

(c) directing the non-Canadian to comply with a written undertaking given to Her Majesty in right of Canada in relation to an investment that the Minister is satisfied or is deemed to be satisfied is likely to be of net benefit to Canada;

(c.1) directing the non-Canadian to comply with a written undertaking given to Her Majesty in right of Canada in accordance with an order made under section 25.4;

(d) against the non-Canadian imposing a penalty not exceeding ten thousand dollars for each day the non-Canadian is in contravention of this Act or any provision thereof;

(e) directing the revocation, or suspension for any period specified in the order, of any rights attached to any voting interests acquired by the non-Canadian or of any right to control any such rights;

a) ordonnance enjoignant au non-Canadien de se départir soit du contrôle de l'entreprise canadienne, soit de son investissement dans l'unité, selon les modalités que la cour estime justes et raisonnables;

b) ordonnance enjoignant au non-Canadien de ne pas prendre les mesures mentionnées dans l'ordonnance à l'égard de l'investissement qui pourraient empêcher une cour supérieure, dans le cadre d'une autre demande pour une ordonnance visée à l'alinéa a), de rendre une ordonnance efficace;

c) ordonnance enjoignant au non-Canadien de se conformer à l'engagement écrit envers Sa Majesté du chef du Canada pris à l'égard d'un investissement au sujet duquel le ministre est d'avis ou est réputé être d'avis qu'il sera vraisemblablement à l'avantage net du Canada;

c.1) ordonnance enjoignant au non-Canadien de se conformer à l'engagement écrit pris envers Sa Majesté du chef du Canada conformément au décret pris en vertu de l'article 25.4;

d) ordonnance infligeant au non-Canadien une pénalité maximale de dix mille dollars pour chacun des jours au cours desquels se commet ou se continue la contravention;

e) ordonnance de révocation ou de suspension, pour une période qu'elle précise, des droits afférents aux intérêts avec droit de vote qu'a acquis le non-Canadien ou du droit de contrôle de ces droits;

(f) directing the disposition by any non-Canadian of any voting interests acquired by the non-Canadian or of any assets acquired by the non-Canadian that are or were used in carrying on a Canadian business; or

(g) directing the non-Canadian or other person or entity to provide information requested by the Minister or Director.

(2.1) If, at the conclusion of the hearing on an application referred to in subsection (1), the superior court decides that the Minister was justified in sending a demand to a person or an entity under section 39 and that the person or entity has failed to comply with it, the court may make any order or orders that, in its opinion, the circumstances require, including, without limiting the generality of the foregoing, an order against the person or entity imposing a penalty not exceeding \$10,000 for each day on which the person or entity is in contravention of this Act or any of its provisions.

(3) A penalty imposed by an order made under paragraph (2)(d) or subsection (2.1) is a debt due to Her Majesty in right of Canada and is recoverable as such in a superior court.

(4) Everyone who fails or refuses to comply with an order made by a superior court under subsection (2) or (2.1) that is directed to them may be cited and punished by the court that made the order, as for other contempts of that court.

f) ordonnance enjoignant au non-Canadien de se départir des intérêts avec droit de vote qu'il a acquis ou des actifs qu'il a acquis et qui sont ou ont été utilisés dans l'exploitation de l'entreprise canadienne;

g) ordonnance enjoignant au non-Canadien, à la personne ou à l'unité de fournir les renseignements exigés par le ministre ou le directeur.

(2.1) Après audition de la demande visée au paragraphe (1), la cour supérieure qui décide que le ministre a agi à bon droit et constate le défaut de conformité peut rendre l'ordonnance que justifient, à son avis, les circonstances, et notamment infliger à la personne ou à l'unité en défaut une pénalité maximale de 10 000 \$ pour chacun des jours au cours desquels se commet ou se continue la contravention.

(3) Les pénalités infligées en vertu de l'alinéa (2)d) ou du paragraphe (2.1) sont des créances de Sa Majesté du chef du Canada dont le recouvrement peut être poursuivi à ce titre devant une cour supérieure.

(4) Quiconque refuse ou omet de se conformer aux ordonnances visées aux paragraphes (2) ou (2.1) peut être puni pour outrage au tribunal par la cour qui a rendu l'ordonnance.

(5) For greater certainty, all rights of appeal provided by law apply in the case of any decision or order made by a superior court under this section, as in the case of other decisions or orders made by that court.

(5) Il demeure entendu que tous les droits d'appel que prévoit la loi s'appliquent aux ordonnances visées au présent article comme s'il s'agissait d'une ordonnance ordinaire rendue par la cour.

(6) In this section, "superior court" has the same meaning as in subsection 35(1) of the *Interpretation Act* but does not include the Supreme Court of Canada, the Federal Court of Appeal or the Tax Court of Canada.

(6) Au présent article, « cour supérieure » a le sens que lui donne le paragraphe 35(1) de la *Loi d'interprétation* mais ne vise pas la Cour suprême du Canada, la Cour d'appel fédérale et la Cour canadienne de l'impôt.

[Emphasis added]

[Non souligné dans l'original]

[13] Subsection 11(d) of the Charter reads as follows:

11. Any person charged with an offence has the right:

11. Tout inculpé a le droit:

...

(e) to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal;

...

e) d'être présumé innocent tant qu'il n'est pas déclaré coupable, conformément à la loi, par un tribunal indépendant et impartial à l'issue d'un

[14] Subsection 2(e) of the Bill of Rights reads as follows:

2. Every law of Canada shall, unless it is expressly declared by an Act of the Parliament of Canada that it shall operate notwithstanding the *Canadian Bill of Rights*, be so construed and applied as not to abrogate, abridge or infringe or to authorize the abrogation, abridgment or infringement of any of the rights or freedoms herein recognized and declared, and in particular, no law of Canada shall be construed or applied so as to

2. Toute loi du Canada, à moins qu'une loi du Parlement du Canada ne déclare expressément qu'elle s'appliquera nonobstant la *Déclaration canadienne des droits*, doit s'interpréter et s'appliquer de manière à ne pas supprimer, restreindre ou enfreindre l'un quelconque des droits ou des libertés reconnus et déclarés aux présentes, ni à en autoriser la suppression, la diminution ou la transgression, et en particulier, nulle loi du Canada ne doit s'interpréter ni s'appliquer comme

...

(e) deprive a person of the right to a fair hearing in accordance with the principles of fundamental justice for the determination of his rights and obligations;

...

e) privant une personne du droit à une audition impartiale de sa cause, selon les principes de justice fondamentale, pour la définition de ses droits et obligations;

Decision of the Federal Court

[15] After an overview of the facts, the relevant statutory provisions and the appellants' submissions, the Judge turned to the question of whether subsection 11(d) of the *Charter* applied to section 40 of the *Act*.

[16] The Judge proceeded to apply the two-category test set out by the Supreme Court of Canada in *R. v. Wigglesworth*, [1987] 2 S.C.R. 541 [*Wigglesworth*], to the effect that if a matter falls within one of two categories, subsection 11(d) applies. The first category asks whether a matter is by its very nature a criminal proceeding, whereas the second asks whether the provision in question allows the imposition of true penal consequences.

[17] Turning to the first category, the Judge looked at the purpose of section 40, the purpose of the sanction and the process leading to the sanction, which led her to write at paragraph 40 of her Reasons:

[40] The central feature of the legislation is the determination that the proposed investment "is likely to be of net benefit to Canada". This determination is based on the strength of the investor's information, representations and undertakings in relation to the broad economic factors found in section 20. If the investment is not carried out in accordance with the basis upon which it was approved, in particular, if the undertakings are not honoured, there is a risk that the ultimate objective of the legislation will be undermined... ,

adding at paragraph 41:

[41] Read in the context of sections 39 and 39.1 and having regard to the legislative objectives and the types of orders available under section 40, the objective of a section 40 proceeding is to enforce compliance with the provisions of the *Act* and any undertakings that may have been given in support of the application for approval.

[18] With regard to the purpose of the sanction found in section 40, the Judge was of the view that its purpose was "... to encourage and promote timely compliance and to enforce compliance with any undertakings and provisions of the legislation" (Judge's Reasons, para. 42).

[19] The Judge went on to say that despite the public aspect of section 40, its subject matter was largely private since it related to private business transactions in that the provision allowed the government to call to account private entities that had breached their commitments. In her view, legislative history reinforced the idea that section 40 was not criminal in nature.

[20] Consequently, on the first *Wigglesworth* category, the Judge concluded that a section 40 proceeding was not a criminal proceeding.

[21] The Judge then turned to the question of whether section 40 could be fitted into the second *Wigglesworth* category, that is, whether it imposed true penal consequences.

[22] In the Judge's view, that enquiry had "...to proceed beyond the magnitude of the fine to determine whether it is being imposed for the purpose of redressing the harm done to society or for a particular private purpose" (Judge's Reasons, para. 54). For this view, the Judge relied on the

Supreme Court's decision in *Martineau v. M.N.R.*, [2004] 3 S.C.R. 737, 192 C.C.C. (3d) 129 [*Martineau*] and that of the Queen's Bench of Alberta in *Lavallee v. Alberta (Securities Commission)*, 2009 ABQB 17, affirmed 2010 ABCA 48 [*Lavallée*].

[23] The Judge found no merit in U.S. Steel's argument that magnitude of the fine alone could indicate true penal consequences. In her view, magnitude of the fine could not be assessed in isolation. At paragraph 58 of her Reasons, she stated that "[w]ithout context, it cannot be said that a dollar value alone, can lead to no other inference but that the penalty is being imposed to punish", adding that it was important to bear in mind that the provision gave the court discretion to determine the magnitude of the penalty (Judge's Reasons, para. 59).

[24] In the Judge's view, it was crucial that a legislated monetary penalty be of sufficient scope and magnitude so as to address the full range of reviewable instruments and to deter non-compliance, adding that the penalty should not simply constitute a cost of doing business (Judge's Reasons, para. 58).

[25] The Judge then indicated that she was satisfied that the purpose of the fine imposed by section 40 was not to redress harm caused to society. The mere fact that the fine was payable to Her Majesty in Right of Canada did not point to a public purpose, nor did the fact that the penalty did not aim to compensate for any particular harm. On the second *Wigglesworth* category, the Judge concluded as follows at paragraph 67:

[67] In the absence of any of the usual indicia, on what basis can it be determined whether the monetary penalty by its magnitude is being imposed for the purpose of redressing the

harm done to society. In the context of ICA, the court should have regard to the objectives of the legislation, the legislative scheme including the nature of the monitoring process and the availability of the opportunity to voluntarily comply or remedy a default, the critical role the investor's undertakings play in the attainment of the legislative objectives, the nature of the transaction subject to review, the relationship between the investor and the government, the conduct being sanctioned is not morally blameworthy conduct and the structuring of the monetary penalty. Having regard to these factors, I conclude that the monetary penalty is not a true penal consequence. Instead, the purpose of the monetary penalty is to promote and ensure the attainment of the legislative objectives.

[26] The Judge then turned to U.S. Steel's arguments directed at subsection 2(e) of the *Bill of Rights*. In her view, the key question was "... whether section 40 violates the right to a fair hearing in accordance with the principles of fundamental justice" (Judge's Reasons, para. 69).

[27] U.S. Steel's argument was that the *Act* improperly allowed for the divestiture of property without affording the right to know the case one had to meet and that it did not properly set out either the requested elements of a failure to comply or the available defences. In making this argument, U.S. Steel relied on its submission that the words "principles of fundamental justice" found in subsection 2(e) of the *Bill of Rights* covered more than the common law principles of natural justice.

[28] After a careful review of the relevant case law, the Judge rejected U.S. Steel's argument. At paragraph 79, she wrote as follows:

[79] Accordingly, it can be seen that a fair hearing in accordance with the principles of fundamental justice in the context of subsection 2(e) of the *Bill of Rights* is synonymous with the concept of natural justice and procedural fairness. It remains to be determined what the requirements of natural justice are in these circumstances.

[29] The Judge then turned to the identification of the relevant principles of natural justice. She was of the opinion that U.S. Steel's expansive view of subsection 2(e) rights focused unduly on the magnitude of the financial penalty, adding that the requirements of natural justice were not as stringent as argued by U.S. Steel. At paragraph 84 of her Reasons, she wrote as follows:

[84] There is no doubt that the importance of the decision to the affected party is a significant factor. However, a distinction must be drawn between those decisions that implicate the life, liberty, and security of the person involved and those, as in the present case, having only an economic impact. As well, the magnitude of the penalty and the forced divestiture have to be viewed in the context of the legislative scheme. Although when viewed in isolation the monetary penalty may appear to be very large, as stated earlier, having regard to the financial thresholds that trigger ministerial review and approval, the penalties under the ICA have to be sufficiently significant to be effective given the size of the investments under the Act. Further, although the possibility of forced divestiture appears to be ominous and a serious intrusion on the right to the enjoyment of property, having regard to the objectives of the legislation and the broad discretion a court has in structuring a divestiture, it does not rise to the level of those decisions in which the life, liberty and security of the person are at stake. It is purely an economic outcome. It is also important to note that a section 40 proceeding arises in a regulatory context. As well, the parties seeking ministerial approval are sophisticated, well represented, economic actors who are given an opportunity of voluntary compliance before the application at issue is undertaken.

[30] With regard to U.S. Steel's main argument that it did not and could not adequately determine the case that it had to meet, the Judge was of the view that that concern was not justified in that the *Federal Court Rules*, SOR/98-106, which dealt with the conduct of applications, clearly allowed U.S. Steel to know the case it had to meet. At paragraphs 87 to 90 of her Reasons, she explained in clear terms why she was of that view.

[31] Finally, the Judge declined to deal with U.S. Steel's argument that section 40 was void for vagueness because of her view that that concept did not apply where only procedural rights were at

issue, adding that U.S. Steel had abandoned its argument that subsection 2(e) provided protection of substantive rights.

[32] For those reasons, the Judge concluded that section 40 of the *Act* did not infringe subsection 11(d) of the *Charter* or subsection 2(e) of the *Bill of Rights* and, as a result, she dismissed U.S. Steel's motion.

U.S. Steel's Position

[33] U.S. Steel submits that the Minister has not given it any explanation for the rejection of its May 20, 2009 response in which it sought to justify its failure to fulfill the two undertakings at issue on the grounds of the prevailing severe economic situation. U.S. Steel argues that sections 39 and 40 of the *Act* create a punitive regime to which subsection 11(d) of the *Charter* applies because the statutory regime "fails to accord an Investor disclosure of the case to meet, fails to provide fair notice of the prescribed conduct and allows guilt to be found on a mere balance of probability" (U.S. Steel Memorandum of Fact and Law, para. 19).

[34] U.S. Steel further argues that the availability of contempt proceedings to enforce section 40 sanctions demonstrates that those sanctions have a penal character: the monetary penalty is a fine. The fact that a contempt power is rarely included in other administrative regimes indicates that the statutory regime is of a different character. Moreover, the regime is directed to public ends and is enforced in superior courts which can impose retributive penalties, rather than in regulatory tribunals which can only impose penalties aimed at inducing compliance. Furthermore, U.S. Steel

argues that the fines imposed under section 40 do not relate to any loss or extent of the breach involved. Thus, the fines do not aim to promote compliance, but rather to punish. Consequently, in U.S. Steel's submission, subsection 11(d) of the *Charter* is engaged.

[35] Moreover, U.S. Steel submits that, in the circumstances of this case, subsection 11(d) is infringed. The *Act* imposes no duty on the Minister to disclose relevant information and is also impermissibly vague on what can constitute a "justification" for violations. Furthermore, proceedings that can impose punitive fines of the size provided for in the *Act* should be subject to proof beyond a reasonable doubt, but they are not.

[36] U.S. Steel further argues that these subsection 11(d) violations fail the test enunciated by the Supreme Court of Canada in *R. v. Oakes*, [1986] 1 S.C.R. 103, because the removal of procedural rights is not rationally connected to the objectives of the *Act* and does not minimally impair the infringements of the subsection 11(d) interests at issue.

[37] U.S. Steel also submits that sections 39 and 40 of the *Act* violate subsection 2(e) of the *Bill of Rights*. It argues that the principles of fundamental justice under subsection 2(e) are not coterminous with the rules of natural justice and procedural fairness because these rules are not freestanding. Their aim is to reflect legislative intent and they can be circumscribed by statute, whereas the *Bill of Rights* principles of fundamental justice are not subject to Parliamentary will and so they should be interpreted more expansively than the rules of natural justice and procedural fairness. Moreover, they should apply robustly to property rights.

[38] U.S. Steel further argues that in the present matter, the principles of fundamental justice are infringed because section 40 does not adequately afford an investor a right to disclosure. Moreover, “the legislature’s failure to clearly delineate the boundaries of the offence, or of any offence that an Investor may have, result in a provision that is so vague as to effectively deprive an Investor of the right to fair notice of the case it has to meet” (U.S. Steel’s Memorandum of Fact and Law, para. 97).

Issues

[39] The issues for determination in this appeal are the following:

1. What is the applicable standard of review?
2. Do sections 39 and 40 of the *Act* violate subsection 11(d) of the *Charter*?
3. Do sections 39 and 40 of the *Act* violate subsection 2(e) of the *Bill of Rights*?

Analysis

1. Standard of review:

[40] In my view, there can be no doubt that the standard of review applicable to the issues raised by the appeal is that of correctness (see: *Housen v. Nikolaisen*, [2002] 2 S.C.R. 235, para. 8).

2. Are sections 39 and 40 of the Act in violation of subsection 11(d) of the Charter?

[41] Section 11(d) of the *Charter* guarantees that an accused natural or legal person will benefit from a panoply of protections. However, for an accused natural or legal person to enjoy these protections, that person must be “charged with an offence”. In *Wigglesworth*, Wilson J. explained

the meaning of that expression, stating that a matter might fall within section 11 in two ways. At page 559 of her Reasons, she wrote:

... a matter could fall within s. 11 either because by its very nature it is a criminal proceeding or because a conviction in respect of the offence may lead to a true penal consequence. I believe that a matter could fall within s. 11 under either branch.

[42] Thus, proceedings that can result in imprisonment can fall within section 11, as can proceedings that lead to lesser penalties such as monetary penalties (*Wigglesworth*, page 559).

[43] As I have already indicated, the Judge found that sections 39 and 40 of the *Act* did not fit within either of the two categories. In my view, the Judge made no error in concluding as she did. My reasons for this view are as follows.

a. Are proceedings under sections 39 and 40 by their very nature criminal?

[44] In *Wigglesworth*, Wilson J. explained at page 560 what she meant by the words “by its very nature a criminal proceeding”:

In my view, if a particular matter is of a public nature, intended to promote public order and welfare within a public sphere of activity, then that matter is the kind of matter which falls within s. 11. It falls within the section because of the kind of matter it is. This is to be distinguished from private, domestic or disciplinary matters which are regulatory, protective or corrective and which are primarily intended to maintain discipline, professional integrity and professional standards or to regulate conduct within a limited private sphere of activity:...

[45] Pursuing her explanation, Wilson J. added at page 560 that “[p]roceedings of an administrative nature instituted for the protection of the public in accordance with the policy of a

statute are also not the sort of ‘offence’ proceedings to which s. 11 is applicable” (see also *Lavallée* at para. 21 for a recent expression of the same idea).

[46] In writing for the Supreme Court in *Martineau*, Fish J. enunciated at paragraph 24 of his Reasons three factors which ought to be considered when determining whether a proceeding is criminal by its very nature:

[24] To determine the nature of the proceeding, the case law must be reviewed in light of the following criteria: (1) the objectives of the [statute and relevant provisions]... thereof; (2) the purpose of the sanction; and (3) the process leading to imposition of the sanction.

[47] With respect to the first *Martineau* factor, U.S. Steel argues that the Act “... is manifestly concerned with promoting the public good in the realm of foreign investment and punishing contraventions accordingly” (U.S. Steel Memorandum of Fact and Law, para. 40). While it is true that both Wilson J. in *Wigglesworth* (page 560) and Fish J. in *Martineau* (para. 21) made the point that proceedings which are criminal by their very nature will have public purposes, it cannot be automatically concluded that a public purpose necessarily leads to a criminal proceeding. This is made clear by Fish J., at paragraph 22 of his Reasons in *Martineau*, where he states that administrative proceedings “... instituted for the protection of the public in accordance with the policy of a statute are not penal in nature”.

[48] Consequently, proceedings having a public purpose can be penal or not. Hence, certain proceedings with publicly beneficial purposes will automatically fall within section 11, such as proceedings brought under the *Criminal Code* (*Wigglesworth*, page 560) Other proceedings,

however, with publicly beneficial purposes will almost always fall outside the realm of section 11, such as proceedings brought under provincial securities acts (*Lavallée*, para.21).

[49] Thus, it seems clear that the mere existence of a public purpose cannot *per se* be determinant. Courts must go further and ask what sort of public purpose is the legislation addressing? There will not be much doubt that a public purpose pertaining to dishonesty, fraud or immorality will usually lead to a penal characterization by the court. However, a public purpose that pertains to financial regulations will generally fall on the administrative/non-penal side of the spectrum.

[50] The purpose of the *Act* at issue in this appeal is found at section 2 thereof which reads:

2. Recognizing that increased capital and technology benefits Canada, and recognizing the importance of protecting national security, the purposes of this Act are to provide for the review of significant investments in Canada by non-Canadians in a manner that encourages investment, economic growth and employment opportunities in Canada and to provide for the review of investments in Canada by non-Canadians that could be injurious to national security.

2. Étant donné les avantages que retire le Canada d'une augmentation du capital et de l'essor de la technologie et compte tenu de l'importance de préserver la sécurité nationale, la présente loi vise à instituer un mécanisme d'examen des investissements importants effectués au Canada par des non-Canadiens de manière à encourager les investissements au Canada et à contribuer à la croissance de l'économie et à la création d'emplois, de même qu'un mécanisme d'examen des investissements effectués au Canada par des non-Canadiens et susceptibles de porter atteinte à la sécurité nationale.

[51] There is no suggestion that national security is an issue in this case, thus leaving as the relevant purpose that of encouraging economic growth and employment opportunities in Canada.

This purpose drives the *Act*'s application process for foreign investors, and informs the factors which the Minister must consider when approving or rejecting an application (the *Act*, s. 20).

[52] As the Judge correctly points out at paragraph 41 of her Reasons, sections 39 and 40 aim to maintain compliance with the *Act* and with undertakings made under it. It therefore follows that the proceedings by the Minister under the provisions at issue have the ultimate aim of stimulating economic development and employment opportunities, much like the *Act* as a whole. Thus, in my view, the first *Martineau* factor points away from the proceedings being of a penal nature.

[53] Moreover, as the respondent points out, section 40 proceedings are never entirely public in their aim or purpose. When they relate to undertakings that a foreign investor has made to the Minister, they take on, at least in part, the character of enforcement of a private agreement. Of course, the underlying undertakings are themselves related to public economic purposes, but this partially private nature of section 40 proceedings further suggests against section 11 applicability.

[54] The second *Martineau* factor looks at the purpose of the sanction. Subsection 40(2) of the *Act* gives various powers to a court hearing a section 40 application. One of them – the one mostly at issue in this appeal – is found in paragraph 40(2)(d) which imposes a penalty not exceeding \$10,000 against a non-Canadian for each day that the non-Canadian's actions or omissions contravene the *Act* or any provision thereof. In the Judge's view, the purpose of this sanction was "to encourage and promote timely compliance with any undertakings and provisions of the legislation" (Judge's Reasons, para. 42).

[55] I can find no fault with the Judge's view. The fact that the penalty is imposed for each day of non-compliance suggests that the goal of the penalty is to enforce compliance. A foreign investor knows that it will continue to incur penalties unless it complies with the Minister's demands.

[56] The monetary penalty's context also suggests that it is aimed at a public purpose. It is embedded among other powers that a court has after having heard a section 40 application. These powers include ordering a foreign investor to divest itself of the enterprise (para. 40(2)(a) of the *Act*); ordering the compliance with an undertaking "in relation to an investment that the Minister is satisfied or is deemed to be satisfied is likely to be of net benefit to Canada" (para. 40(2)(c)); and revoking voting rights in the corporation (para. 40(2)(f)). These powers are not directed to retributive aims. Rather, they are directed at preventing harm to Canadian economic interests by forcing compliance or taking away the power of a foreign investor whose actions or omissions jeopardize the goals of the *Act*.

[57] In my view, the determination of the purpose of the paragraph 40(2)(d) sanction should be ascertained by situating the sanction in the wider remedial scheme of which it forms a part. The purpose of the sanction is, as the Judge found, "...to encourage and promote timely compliance and to enforce compliance with any undertakings and provisions of the legislation" (Judge's Reasons, para. 42). In *Martineau*, Fish J. dealt with a sanction that did not aim to "redress a wrong done to society", but rather to "produce a deterrent effect" in order to preserve the viability of an administrative scheme (*Martineau*, paras. 33 to 39). In Fish J.'s view, this suggested against section

11 applicability and, in my respectful view, this same view should apply to the sanction at issue in this appeal.

[58] The third *Martineau* factor looks at the “process leading to imposition of the sanction”. U.S. Steel argues that the fact that a section 40 application is brought before a court rather than before a tribunal gives the application a penal character. While it is true that courts have the power to impose penal sanctions, I see no basis to conclude that courts cannot impose sanctions of an administrative nature. Consequently, this factor should not weigh much in the balance.

[59] Of greater significance, however, is the fact that section 40 sanctions lack the indicia of penal proceedings. In this, they resemble more the sanction that Fish J. dealt with in *Martineau* and which he described as follows at paragraph 45:

[45] This process thus has little in common with penal proceedings. No one is charged in the context of an ascertained forfeiture. No information is laid against anyone. No one is arrested. No one is summoned to appear before a court of criminal jurisdiction. No criminal record will result from the proceedings. At worst, once the administrative proceeding is complete and all appeals are exhausted, if the notice of ascertained forfeiture is upheld and the person liable to pay still refuses to do so, he or she risks being forced to pay by way of a civil action.

[60] Like the sanction in *Martineau*, the section 40 sanction herein does not involve the laying of charges, arrest powers, courts of criminal jurisdiction or a criminal record. Consequently, this suggests against the applicability of subsection 11(d).

[61] The principal difference between the sanction in *Martineau* and the sanction herein is the one that goes to the heart of U.S. Steel’s submissions, i.e. the availability of contempt proceedings

under subsection 40(4). U.S. Steel points to the general unavailability of contempt orders to enforce civil judgments, which can be enforced only under rule 425 of the *Federal Courts Rules*. In its view, the availability of contempt orders shows that section 40 monetary penalties are penal fines.

[62] U.S. Steel commences its argument by noting that paragraph 40(2)(d) of the *Act* allows the court deciding a section 40 proceeding to impose a monetary penalty and that subsection 40(4) allows the court to punish non-compliance of its orders through contempt of court proceedings. Contempt of court proceedings, of course, can result in imprisonment. Together these provisions suggest, in U.S. Steel's view, that the *Act* allows a court to punish non-payment of a fine with imprisonment. Thus, the use of contempt proceedings suggests that the penalties imposed under the *Act* are criminal rather than civil in nature.

[63] I cannot subscribe to this argument. While U.S. Steel is correct to say that a person cannot be imprisoned for a civil debt for, as Justice Binnie held in *R. v. Wu*, [2003] 3 S.C.R. 530 at paragraph 2, “[d]ebtors' prison for impoverished people is a Dickensian concept that in civilized countries has largely been abolished”, the *Act* does not provide for the possibility of U.S. Steel or any of its executives being sent to debtors' prison for the failure to pay a penalty imposed upon it. A person who is ordered by a court to pay money to another cannot be imprisoned for contempt if he or she is unable to pay the debt because imprisonment for debt has been abolished: *Vidéotron Ltée v. Industries Microlec Produits Électroniques*, [1992] 2 S.C.R. 1065 at 1078. However, a person who is ordered by a court to pay money can be imprisoned for contempt if he or she shows “a

certain degree of intention to evade his or her obligations”: *Ibid.* That is, if he or she is unwilling to pay the debt despite having the ability to pay.

[64] Thus, U.S. Steel would only face the possibility of contempt proceedings if it is able but unwilling to pay the penalty imposed upon it under the *Act*. Such a proceeding does not undermine the abolishment of debtors’ prison because in that case, U.S. Steel would not be subject to imprisonment for its debt *per se*, but rather for refusing to pay the debt in spite of its ability to pay it.

[65] Moreover, as the Judge says at paragraph 66 of her Reasons, any contempt proceedings brought against U.S. Steel would be separate proceedings subject to the *Federal Court Rules* and, in those circumstances, U.S. Steel would benefit from full *Charter* protection.

[66] In response to this point of view, U.S. Steel argues that the mere availability of punishment by contempt for an unpaid penalty gives the section 40 proceedings a criminal nature. I cannot agree. As the Judge found at paragraph 66 of her Reasons, contempt proceedings are separate from section 40 proceedings. Thus, while contempt proceedings may have a criminal nature, section 40 proceedings remain civil in nature.

[67] Accepting U.S. Steel’s argument would lead to a perverse result. Any civil trial can produce a monetary judgment which may be enforceable by way of court order to pay. Any court order which is not complied with may result in contempt proceedings. Any contempt proceedings can result in imprisonment. Thus, in U.S. Steel’s logic, the availability of contempt would make of

every civil trial a proceeding which is criminal in nature *per Wigglesworth* and thus entitle every civil defendant to full *Charter* protection. Such a conclusion is, in my respectful opinion, entirely contrary to the wording of subsection 11(d) of the *Charter* which gives its protection only to those “charged with an offence”.

[68] Furthermore, all contempt proceedings attract *Charter* protection: *Pro Swing Inc. v. Elta Golf Inc.* [2006] 2 S.C.R. 612 at paragraphs 34 and 35. As a result, there is no possibility of U.S. Steel being cited for contempt without it being afforded *Charter* protection.

[69] U.S. Steel’s argument is also inconsistent with the text of the *Act*. Subsection 40(4) reads: “[e]veryone who fails or refuses to comply with an order made by a superior court under subsection (2) or (2.1) that is directed to them may be cited and punished by the court that made the order, as for other contempts of that court” [emphasis added]. Subsection 40(3) reads: “[a] penalty imposed by an order made under paragraph (2)(d) or subsection (2.1) is a debt due to Her Majesty in right of Canada and is recoverable as such in a superior court” [emphasis added].

[70] The *Act*’s language is notable for three reasons. First, section 40(4) refers to both subsection 40(2) and subsection 40(2.1), so that it covers a broad variety of orders. Second, as a result of this broadness, the language of the *Act* is more general than it might otherwise be. Subsection 40(4) suggests that a person can breach a court order in two different ways: “failing” and “refusing”. The language of “refusing” includes an element of intention, while the language of “failing” does not require proof of intention to disobey, merely the act of disobeying. Third, the language of the *Act*

does not suggest that each and every order listed in subsections 40(2) and 40(2.1) must be punishable both for intentional and unintentional non-compliance. Subsection 40(3) suggests that any money resulting from a penalty imposed under paragraph 40(2)(d) or subsection 40(2.1) is a debt recoverable as such in a superior court. The language of “debt” suggests the penalty has a civil as opposed to a criminal nature.

[71] Similarly, subsection 40(4) says a court may punish a person “as for other contempts of that court”. I read this phrase to mean that contempts found under subsection 40(4) may be punished in the same way as other contempts are punished in the court hearing the proceedings. What is the way in which a person may be punished for contempt in Federal Court? The aforementioned jurisprudence shows that the non-payment of a civil debt cannot be punished by imprisonment, unless it is shown that the debtor had the means of paying the debt and intentionally refused to do so.

[72] Thus, a monetary penalty imposed under either paragraph 40(2)(d) or subsection 40(2.1) may be punished through contempt of court, but only if the penalized person “refuses” to pay the penalty – that is, if the person is able to pay, but intentionally decides not to. A monetary penalty under those sections cannot be punished through contempt if the penalized person “fails” to pay the penalty – that is, the person is simply unable to pay. Thus, the language of the *Act* supports the conclusion that section 40 proceedings are not criminal.

[73] I must therefore conclude that the third *Martineau* factor also points away from section 40 proceedings being penal and away from subsection 11(d) applicability. Consequently, section 40 proceedings are not criminal by their very nature and as a result, do not fit within the first *Wigglesworth* category.

b. Do proceedings brought under section 40 lead to true penal consequences?

[74] As I have already made clear, even if section 40 proceedings are not criminal by their very nature, section 11 of the *Charter* will still apply to them if they lead to “true penal consequences” (*Wigglesworth* at p. 559). With respect to monetary penalties, sheer magnitude is not determinative. The case law has consistently drawn a distinction between penalties that aim to punish or denounce (penal) and penalties that aim to deter (non-penal). *Committee for the Equal Treatment of Asbestos Minority Shareholders v. Ontario (Securities Commission)*, [2001] 2 S.C.R. 132 [*Asbestos Minority Shareholders*] and *Cartaway Resources Corp. (Re)*, [2004] 1 S.C.R. 672 [*Cartaway*], establish that, in general, administrative penalties do not aim to punish. Rather, they aim to deter. Summarizing these authorities, Groberman J.A. of the British Columbia Court of Appeal wrote in *Thow v. B.C. (Securities Commission)*, [2009] B.C.J. No. 211 (Q.L.) at paragraph 30, that these cases establish that “[a]dministrative sanctions and penalties, in contradiction to criminal ones, are, as Iacobucci J. went on to observe at paragraph 45 of [*Asbestos Minority Shareholders*], ‘preventive in nature and prospective in orientation’”.

[75] On the relationship between magnitude and purpose, Fish J. wrote in *Martineau* at paragraph 60:

60. It remains to be determined whether the payment of \$315,458 demanded pursuant to s. 124 of the *CA* [*Customs Act*] constitutes a fine that, by its magnitude, is imposed for the purpose of redressing a wrong done to society at large, as opposed to the purpose of maintaining the effectiveness of customs requirements.

[Emphasis in original]

[76] The important thing is purpose. Magnitude might be an indicator of purpose, but there are other indicators as well. One of these is the final destination of the fine. The fact that a fine is being paid into the Consolidated Revenue Fund points towards a penal sanction (*Wigglesworth*, p. 561). This is the case with a paragraph 42(2)(d) fine.

[77] However, other indicators point in the opposite direction. First, no stigma attaches to a regulatory penalty such as is provided for in the *Act* (*Martineau*, para. 64). Second, the large potential size of the fine does not necessarily point to a punitive character. As the Judge pointed out in her Reasons at paragraph 58, large penalties are required to deter major corporations. Recently, in *Lavallée*, the Alberta Court of Appeal remarked at paragraph 23 that a large pecuniary penalty “reflects a legislative intent to ensure that the penalties are not simply considered another cost of doing business”. That the financial penalty is intended to deter is demonstrated by the fact that it rises with each passing day of non-compliance. When the contravention stops, the fine stops accumulating, so foreign investors have every incentive to comply with the *Act* and their undertakings.

[78] Moreover, that the fine can be imposed retrospectively to account for past contraventions is not necessarily an indicator of penal purpose (*Lavallée*, para. 25). *Cartaway* was not a case about section 11, but it did clarify that “it is reasonable to view general deterrence as an appropriate, and perhaps necessary, consideration in making orders on a both protective and preventative basis (para. 61). Imposing fines retrospectively is an attempt to meet the goal of general deterrence. If foreign investors know that they will face penalties for contraventions after those contraventions have taken place, they will think twice about not complying. If retrospective fines were not available, investors could act however they pleased until faced with a court-ordered prospective penalty. The *Act* would have no “teeth” and the administrative scheme would be weak. The penalty’s potential size is therefore not indicative of penal purpose.

[79] U.S. Steel’s principal submission with regard to the second *Wigglesworth* category is that the *Act* provides no criteria by which to assess monetary penalties. These penalties will not be directly related to the consequences of breach, unlike the penalties discussed for example in *Martineau*. Essentially, U.S. Steel assumes that the lack of criteria for setting fines means that “a monetary penalty assessed under the *Act* will inevitably be punitive” (U.S. Steel Memorandum of Fact and Law, paras. 55-60 / Emphasis added). With respect, I fail to see why this should be the case. Indeed, *Wigglesworth* implies that it should be the opposite. At page 561 of her Reasons in *Wigglesworth*, Wilson wrote as follows:

It is my view that if a body or an official has an unlimited power to fine, and if it does not afford the rights enumerated under s. 11, it cannot impose fines designed to redress the harm done to society at large. Instead, it is restricted to the power to impose fines in order to achieve the particular private purpose...

[80] A statutory power to impose fines that comes along with little statutory guidance will not be subject to section 11 as long as it is exercised in a way so as to achieve proper administrative aims. If, as U.S. Steel contends, the procedure provided for in section 40 does not meet the standard of subsection 11(d) of the *Charter*, this simply means that the Court is limited in the goals it can consider in imposing monetary fines. It can only consider goals that are constitutionally appropriate for the sanctioning regime. This, in my view, accords with the principle that we should not assume before the fact that judges will exercise their discretion in an unconstitutional way (see: *R. v. Shoker*, [2006] 3 S.C.R. 399, para. 39). The deterrence goals of the *Act* will necessarily be front and centre. The fact that such an approach to setting penalties accords well with the goals of the *Act* and of the sanction further suggests that an approach to setting penalties that is focused on deterrence is appropriate.

[81] I therefore conclude that the penalties provided for under paragraph 20(2)(d) of the *Act* are best understood, and will necessarily be exercised, as being part of “... proceedings of an administrative – private, internal or disciplinary – nature instituted for the protection of the public in accordance with the policy of a statute...” (*Martineau*, para. 22). These penalties do not lead to true penal consequences and, thus, subsection 11(d) of the *Charter* is not engaged.

3. Do sections 39 and 40 violate subsection 2(e) of the Bill of Rights?

[82] The subject of the subsection 2(e) analysis is the hearing under section 40 and not the Minister’s actions under section 39. The latter do not constitute a hearing under subsection 2(e) and

they do not make any determination of rights or obligations as that section requires. The parties are agreed on that, but there the agreement ends.

[83] U.S. Steel submits that the principles of fundamental justice differ from the rules of natural justice or procedural fairness, pointing out that unlike the rules of natural justice, subsection 2(e) works *ex ante* to determine whether federal laws set out adequate procedures. Moreover, subsection 2(e) allows a court to override or not apply such laws. This assertion is, of course, correct, but the argument says nothing about content. U.S. Steel is vague about what subsection 2(e) adds to the general common law principle that a party should know the case he or she has to meet. I have considered *R. v. Duke*, [1972] S.C.R. 917 [*Duke*], and *Bell Canada v. Canadian Telephone Employees Association*, [2003] 1 S.C.R. 884, and agree entirely with the Judge's view that these cases suggest "or at least assume without deciding" that subsection 2(e)'s principles of fundamental justice do not go any further than demanding that "the tribunal which adjudicates upon a party's rights just act fairly, in good faith, without bias and in a judicial temper, and must give to him the opportunity adequately to state his case" (*Duke*, p. 923).

[84] Nor does U.S. Steel present any argument that would suggest that the *Federal Court Rules*, which deal with the conduct of applications, would be inadequate to satisfy the requirements of subsection 2(e). In its arguments on right to disclosure, U.S. Steel focuses on the fact that section 40 does not provide for any – or for any procedural protections for that matter. But this ignores the fact that providing procedural protections is not the purpose of the *Act*. It is, instead, the purpose of the *Federal Courts Rules* which the Judge correctly points out provide for a notice of application, list of

documentary evidence to be used at a hearing, the filing of affidavits and documentary exhibits, pre-hearing cross-examinations and the disclosure of evidence (Judge's Reasons, paras. 87 to 89).

[85] With respect for the contrary view, I cannot see how these *Rules* can be found to be inadequate to satisfy an investor's right to understand the Minister's case. I would add that, in any event, the record provides little assistance to U.S. Steel's argument that it will be unable to understand the Minister's case.

[86] U.S. Steel also asserts that sections 39 and 40 are so vague that they do not allow an investor to know what constitutes complying with any demands or justifying non-compliance. The Judge dismissed this "void for vagueness" argument as going not to procedural due process, but to substantive due process. The argument, therefore, fell outside the ambit of subsection 2(e).

[87] It seems to me that the notion of vagueness cannot be totally dissociated from procedural rights, since knowing the case one has to meet must entail understanding what one has to prove to win. However, the Judge was correct to cite in support of her view *R. v. Nova Scotia Pharmaceutical Society*, [1992] 2 S.C.R. 606, as considering vagueness to be a substantive doctrine. In that case, Gonthier J. called the right to know the scope of the law "a substantive aspect to fair notice" (para. 46). In my view, this is sufficient to dispose of this aspect of U.S. Steel's subsection 2(e) arguments.

Disposition

[88] I therefore conclude that the Judge made no reviewable error which would allow us to intervene. For these reasons, I would dismiss the appeal with costs.

“M. Nadon”

J.A.

“I agree.

Eleanor R. Dawson J.A.”

“I agree.

Johanne Trudel J.A.”

FEDERAL COURT OF APPEAL**NAMES OF COUNSEL AND SOLICITORS OF RECORD**

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TRUDEL J.A.

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APPEARANCES:

Michael Barrack	FOR THE APPELLANTS
Marie Henein	FOR THE APPELLANTS
Matthew Gourlay	
John Syme	FOR THE RESPONDENT
Jeffrey G. Johnston	
Max Binnie	
Jessica DiZazzo	

SOLICITORS OF RECORD:

Thornton Grout Finnigan LLP	FOR THE APPELLANTS
Toronto, ON	
Henein & Associates	FOR THE APPELLANTS
Toronto, ON	
Myles J. Kirvan	FOR THE RESPONDENT
Deputy Attorney General of Canada	