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183

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

**ORAL COMPENDIUM OF
GOOGLE CANADA CORPORATION AND GOOGLE LLC**

VOL 1 of 4

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A. Google's Outline of Oral Argument

Google's Outline of Oral Argument

- In order to succeed on this Motion, Google must persuade the Tribunal of two things:
 - *first*, that the financial sanctions authorized by s. 79(3.1) of the *Competition Act* (the “**Impugned Provision**”) constitute a “true penal consequence” as that concept has been defined in the jurisprudence; and
 - *second*, that Google’s rights under ss. 7, 8 or 11 of the *Charter*, or under s. 2(e) of the *Bill of Rights*, have been or will be violated.
- If the Tribunal accepts Google’s submissions on these issues, the burden shifts to the Commissioner to demonstrate that these breaches of Google’s *Charter* rights can be saved under s. 1.
- Finally, if the Tribunal concludes that Google’s rights have been violated in a manner that cannot be excused or justified under s. 1, it must decide which remedies should be imposed.

Issue 1: The True Penal Consequences Test

- The law requires the Tribunal to interpret the *Charter* and *Bill of Rights* in a flexible, purposive, non-technical and non-categorical manner that ensures a robust protection of the rights in question. In doing so, the Tribunal must focus on the substance of the rights and legislative provisions at issue, rather than on labels ascribed by Parliament.
- The true penal consequences test is satisfied if: (i) the current proceeding is “penal in nature”; *or* (ii) the maximum sanction that could be imposed under the Impugned Provision is “punitive” in nature, either in purpose or in effect.
- Google submits that these sanctions are punitive *both* in purpose *and* in effect based on an assessment of all four of the key indicators the Supreme Court has identified:
 - *First*, the magnitude of the sanctions is unprecedented and clearly disproportionate (*both* in purpose *and* in effect) to any valid regulatory goal:
 - The evidence of Professor Hylton, a leading scholar on optimal antitrust

penalties, establishes that the financial penalties available under the Impugned Provision exceed what is necessary to secure compliance with the *Act*, result in inefficient overdeterrence and are punitive in nature;

- *Second*, the evidence of Mr. Younger, one of the world’s leading experts in the area of reputational harm, establishes that the imposition by the Tribunal under the Impugned Provision of an extraordinary financial sanction, coupled with findings of abusive misconduct, would give rise to reputational harm akin to the stigma that accompanies the levying of a criminal fine;
 - *Third*, sanctions under the Impugned Provision are assessed and imposed in accordance with a number of the same principles that govern criminal sentencing; and
 - *Fourth*, any payment in respect of a sanction under the Impugned Provision would be paid into the government’s general-purpose Consolidated Revenue Fund.
- In applying the true penal consequence test, the Tribunal must focus on the maximum penalty *potentially* available under the Impugned Provision:
 - The Commissioner is legally incorrect in asserting that the test should only be applied when this proceeding has finally run its course and the Tribunal has made findings of liability and sanctioned Google; and
 - The same flaw undermines the Commissioner’s assertion that no true penal sanction will be imposed because the Tribunal can be trusted to exercise its sanctioning discretion in a constitutionally compliant manner.
 - The Commissioner’s reliance on s. 79(3.3) is unavailing. Although that clause addresses the “purpose” of sanctions under the Impugned Provision, it does not address and cannot preclude the imposition of a sanction having a punitive *effect*.

Issue 2: Breaches of Google’s Rights

- The Commissioner has not disputed that if the Tribunal finds that the Impugned Provision authorizes a true penal consequence, Google’s rights under ss. 7 and 11 of the *Charter* and s.

2(e) of the *Bill of Rights* have been and will be violated. In any event, that finding is inescapable having regard to, among other things, mandatory organizational features of the Tribunal that violate governing principles of fundamental justice as well as the standard of proof applied by the Tribunal in determining abuse of dominance proceedings.

- Moreover, if the Tribunal rules that sanctions under the Impugned Provision constitute true penal consequences, the Commissioner's compelled production of documents from Google under s. 11 of the *Act* and the Rules of the Tribunal have violated and will continue to violate Google's s. 8 rights under the *Charter*, pursuant to a straightforward application of the Supreme Court's Decision in *R v. Jarvis*.

Issue 3: Section 1 of the *Charter*

- The Commissioner has essentially conceded that none of the violations of Google's rights can be saved under s. 1 of the *Charter*. He has adduced no evidence to satisfy his burden under s. 1, and has advanced no arguments that even attempt to justify the Impugned Provision under the well-established *Oakes* test.

Issue 4: Remedies

- The Tribunal has an important duty under s. 52 of the *Constitution* to declare the Impugned Provision unconstitutional to the extent of its inconsistency with the *Charter*. The Tribunal should also adopt the least intrusive additional measures that preserve as much of the statutory scheme as reasonably possible. Here, those purposes are best achieved by severing the Impugned Provision from s. 79.
- The Tribunal should also stay these proceedings under s. 24(1) of the *Charter*. The Commissioner successfully lobbied for the enactment of significant new penalties with the intention of deploying them against Google, while doing so in a way that denied Google its constitutional rights. That conduct should not be rewarded.
- In the alternative to a stay, the Tribunal should apply s. 24(2) of the *Charter* to exclude all evidence the Commissioner has obtained from Google in violation of its rights.

B. Legislation



CANADA

CONSOLIDATION

CODIFICATION

THE CONSTITUTION ACTS
1867 to 1982

LOIS CONSTITUTIONNELLES
DE 1867 à 1982

Current to January 1, 2024

À jour au 1^{er} janvier 2024

CONSTITUTION ACT, 1982⁽⁸¹⁾

PART I

Canadian Charter of Rights and Freedoms

Whereas Canada is founded upon principles that recognize the supremacy of God and the rule of law:

Guarantee of Rights and Freedoms

Rights and freedoms in Canada

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.

Fundamental Freedoms

Fundamental freedoms

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.

Democratic Rights

Democratic rights of citizens

3 Every citizen of Canada has the right to vote in an election of members of the House of Commons or of a legislative assembly and to be qualified for membership therein.

Maximum duration of legislative bodies

4 (1) No House of Commons and no legislative assembly shall continue for longer than five years from the date fixed for the return of the writs of a general election of its members.⁽⁸²⁾

LOI CONSTITUTIONNELLE DE 1982⁽⁸¹⁾

PARTIE I

Charte canadienne des droits et libertés

Attendu que le Canada est fondé sur des principes qui reconnaissent la suprématie de Dieu et la primauté du droit :

Garantie des droits et libertés

Droits et libertés au Canada

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

Libertés fondamentales

Libertés fondamentales

2 Chacun a les libertés fondamentales suivantes :

- a) liberté de conscience et de religion;
- b) liberté de pensée, de croyance, d'opinion et d'expression, y compris la liberté de la presse et des autres moyens de communication;
- c) liberté de réunion pacifique;
- d) liberté d'association.

Droits démocratiques

Droits démocratiques des citoyens

3 Tout citoyen canadien a le droit de vote et est éligible aux élections législatives fédérales ou provinciales.

Mandat maximal des assemblées

4 (1) Le mandat maximal de la Chambre des communes et des assemblées législatives est de cinq ans à compter de la date fixée pour le retour des brefs relatifs aux élections générales correspondantes.⁽⁸²⁾

Legal Rights

Life, liberty and security of person

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.

Search or seizure

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

Detention or imprisonment

9 Everyone has the right not to be arbitrarily detained or imprisoned.

Arrest or detention

10 Everyone has the right on arrest or detention

- (a) to be informed promptly of the reasons therefor;
- (b) to retain and instruct counsel without delay and to be informed of that right; and
- (c) to have the validity of the detention determined by way of *habeas corpus* and to be released if the detention is not lawful.

Proceedings in criminal and penal matters

11 Any person charged with an offence has the right

- (a) to be informed without unreasonable delay of the specific offence;
- (b) to be tried within a reasonable time;
- (c) not to be compelled to be a witness in proceedings against that person in respect of the offence;
- (d) to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal;
- (e) not to be denied reasonable bail without just cause;
- (f) except in the case of an offence under military law tried before a military tribunal, to the benefit of trial by jury where the maximum punishment for the offence is imprisonment for five years or a more severe punishment;
- (g) not to be found guilty on account of any act or omission unless, at the time of the act or omission, it

Garanties juridiques

Vie, liberté et sécurité

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.

Fouilles, perquisitions ou saisies

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

Détention ou emprisonnement

9 Chacun a droit à la protection contre la détention ou l'emprisonnement arbitraires.

Arrestation ou détention

10 Chacun a le droit, en cas d'arrestation ou de détention :

- a) d'être informé dans les plus brefs délais des motifs de son arrestation ou de sa détention;
- b) d'avoir recours sans délai à l'assistance d'un avocat et d'être informé de ce droit;
- c) de faire contrôler, par *habeas corpus*, la légalité de sa détention et d'obtenir, le cas échéant, sa libération.

Affaires criminelles et pénales

11 Tout inculpé a le droit :

- a) d'être informé sans délai anormal de l'infraction précise qu'on lui reproche;
- b) d'être jugé dans un délai raisonnable;
- c) de ne pas être contraint de témoigner contre lui-même dans toute poursuite intentée contre lui pour l'infraction qu'on lui reproche;
- d) 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 procès public et équitable;
- e) de ne pas être privé sans juste cause d'une mise en liberté assortie d'un cautionnement raisonnable;
- f) sauf s'il s'agit d'une infraction relevant de la justice militaire, de bénéficier d'un procès avec jury lorsque la peine maximale prévue pour l'infraction dont il est accusé est un emprisonnement de cinq ans ou une peine plus grave;

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.

Treatment or punishment

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

Self-crimination

13 A witness who testifies in any proceedings has the right not to have any incriminating evidence so given used to incriminate that witness in any other proceedings, except in a prosecution for perjury or for the giving of contradictory evidence.

Interpreter

14 A party or witness in any proceedings who does not understand or speak the language in which the proceedings are conducted or who is deaf has the right to the assistance of an interpreter.

Equality Rights

Equality before and under law and equal protection and benefit of law

15 (1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

Affirmative action programs

(2) Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or

g) de ne pas être déclaré coupable en raison d'une action ou d'une omission qui, au moment où elle est survenue, ne constituait pas une infraction d'après le droit interne du Canada ou le droit international et n'avait pas de caractère criminel d'après les principes généraux de droit reconnus par l'ensemble des nations;

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.

Cruauté

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

Témoignage incriminant

13 Chacun a droit à ce qu'aucun témoignage incriminant qu'il donne ne soit utilisé pour l'incriminer dans d'autres procédures, sauf lors de poursuites pour parjure ou pour témoignages contradictoires.

Interprète

14 La partie ou le témoin qui ne peuvent suivre les procédures, soit parce qu'ils ne comprennent pas ou ne parlent pas la langue employée, soit parce qu'ils sont atteints de surdité, ont droit à l'assistance d'un interprète.

Droits à l'égalité

Égalité devant la loi, égalité de bénéfice et protection égale de la loi

15 (1) La loi ne fait acception de personne et s'applique également à tous, et tous ont droit à la même protection et au même bénéfice de la loi, indépendamment de toute discrimination, notamment des discriminations fondées sur la race, l'origine nationale ou ethnique, la couleur, la religion, le sexe, l'âge ou les déficiences mentales ou physiques.

Programmes de promotion sociale

(2) Le paragraphe (1) n'a pas pour effet d'interdire les lois, programmes ou activités destinés à améliorer la situation d'individus ou de groupes défavorisés, notamment du fait de leur race, de leur origine nationale ou ethnique, de leur couleur, de leur religion, de leur sexe,

Enforcement

Enforcement of guaranteed rights and freedoms

24 (1) Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.

Exclusion of evidence bringing administration of justice into disrepute

(2) Where, in proceedings under subsection (1), a court concludes that evidence was obtained in a manner that infringed or denied any rights or freedoms guaranteed by this Charter, the evidence shall be excluded if it is established that, having regard to all the circumstances, the admission of it in the proceedings would bring the administration of justice into disrepute.

General

Aboriginal rights and freedoms not affected by Charter

25 The guarantee in this Charter of certain rights and freedoms shall not be construed so as to abrogate or derogate from any aboriginal, treaty or other rights or freedoms that pertain to the aboriginal peoples of Canada including

(a) any rights or freedoms that have been recognized by the Royal Proclamation of October 7, 1763; and

(b) any rights or freedoms that now exist by way of land claims agreements or may be so acquired.⁽⁹⁵⁾

Other rights and freedoms not affected by Charter

26 The guarantee in this Charter of certain rights and freedoms shall not be construed as denying the existence of any other rights or freedoms that exist in Canada.

Multicultural heritage

27 This Charter shall be interpreted in a manner consistent with the preservation and enhancement of the multicultural heritage of Canadians.

Rights guaranteed equally to both sexes

28 Notwithstanding anything in this Charter, the rights and freedoms referred to in it are guaranteed equally to male and female persons.

Rights respecting certain schools preserved

29 Nothing in this Charter abrogates or derogates from any rights or privileges guaranteed by or under the

Recours

Recours en cas d'atteinte aux droits et libertés

24 (1) Toute personne, victime de violation ou de négation des droits ou libertés qui lui sont garantis par la présente charte, peut s'adresser à un tribunal compétent pour obtenir la réparation que le tribunal estime convenable et juste eu égard aux circonstances.

Irrecevabilité d'éléments de preuve qui risqueraient de déconsidérer l'administration de la justice

(2) Lorsque, dans une instance visée au paragraphe (1), le tribunal a conclu que des éléments de preuve ont été obtenus dans des conditions qui portent atteinte aux droits ou libertés garantis par la présente charte, ces éléments de preuve sont écartés s'il est établi, eu égard aux circonstances, que leur utilisation est susceptible de déconsidérer l'administration de la justice.

Dispositions générales

Maintien des droits et libertés des autochtones

25 Le fait que la présente charte garantit certains droits et libertés ne porte pas atteinte aux droits ou libertés — ancestraux, issus de traités ou autres — des peuples autochtones du Canada, notamment :

a) aux droits ou libertés reconnus par la proclamation royale du 7 octobre 1763;

b) aux droits ou libertés existants issus d'accords sur des revendications territoriales ou ceux susceptibles d'être ainsi acquis.⁽⁹⁵⁾

Maintien des autres droits et libertés

26 Le fait que la présente charte garantit certains droits et libertés ne constitue pas une négation des autres droits ou libertés qui existent au Canada.

Maintien du patrimoine culturel

27 Toute interprétation de la présente charte doit concorder avec l'objectif de promouvoir le maintien et la valorisation du patrimoine multiculturel des Canadiens.

Égalité de garantie des droits pour les deux sexes

28 Indépendamment des autres dispositions de la présente charte, les droits et libertés qui y sont mentionnés sont garantis également aux personnes des deux sexes.

Maintien des droits relatifs à certaines écoles

29 Les dispositions de la présente charte ne portent pas atteinte aux droits ou privilèges garantis en vertu de la

Amendments without Senate resolution

47 (1) An amendment to the Constitution of Canada made by proclamation under section 38, 41, 42 or 43 may be made without a resolution of the Senate authorizing the issue of the proclamation if, within one hundred and eighty days after the adoption by the House of Commons of a resolution authorizing its issue, the Senate has not adopted such a resolution and if, at any time after the expiration of that period, the House of Commons again adopts the resolution.

Computation of period

(2) Any period when Parliament is prorogued or dissolved shall not be counted in computing the one hundred and eighty day period referred to in subsection (1).

Advice to issue proclamation

48 The Queen's Privy Council for Canada shall advise the Governor General to issue a proclamation under this Part forthwith on the adoption of the resolutions required for an amendment made by proclamation under this Part.

Constitutional conference

49 A constitutional conference composed of the Prime Minister of Canada and the first ministers of the provinces shall be convened by the Prime Minister of Canada within fifteen years after this Part comes into force to review the provisions of this Part.⁽¹⁰³⁾

PART VI**Amendment to the Constitution Act, 1867**

50 ⁽¹⁰⁴⁾

51 ⁽¹⁰⁵⁾

PART VII**General****Primacy of Constitution of Canada**

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

Constitution of Canada

(2) The Constitution of Canada includes

Modification sans résolution du Sénat

47 (1) Dans les cas visés à l'article 38, 41, 42 ou 43, il peut être passé outre au défaut d'autorisation du Sénat si celui-ci n'a pas adopté de résolution dans un délai de cent quatre-vingts jours suivant l'adoption de celle de la Chambre des communes et si cette dernière, après l'expiration du délai, adopte une nouvelle résolution dans le même sens.

Computation du délai

(2) Dans la computation du délai visé au paragraphe (1), ne sont pas comptées les périodes pendant lesquelles le Parlement est prorogé ou dissous.

Demande de proclamation

48 Le Conseil privé de la Reine pour le Canada demande au gouverneur général de prendre, conformément à la présente partie, une proclamation dès l'adoption des résolutions prévues par cette partie pour une modification par proclamation.

Conférence constitutionnelle

49 Dans les quinze ans suivant l'entrée en vigueur de la présente partie, le premier ministre du Canada convoque une conférence constitutionnelle réunissant les premiers ministres provinciaux et lui-même, en vue du réexamen des dispositions de cette partie.⁽¹⁰³⁾

PARTIE VI**Modification de la Loi constitutionnelle de 1867**

50 ⁽¹⁰⁴⁾

51 ⁽¹⁰⁵⁾

PARTIE VII**Dispositions générales****Primauté de la Constitution du Canada**

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

Constitution du Canada

(2) La Constitution du Canada comprend :

- (a) the *Canada Act 1982*, including this Act;
- (b) the Acts and orders referred to in the schedule; and
- (c) any amendment to any Act or order referred to in paragraph (a) or (b).

Amendments to Constitution of Canada

(3) Amendments to the Constitution of Canada shall be made only in accordance with the authority contained in the Constitution of Canada.

Repeals and new names

53 (1) The enactments referred to in Column I of the schedule are hereby repealed or amended to the extent indicated in Column II thereof and, unless repealed, shall continue as law in Canada under the names set out in Column III thereof.

Consequential amendments

(2) Every enactment, except the *Canada Act 1982*, that refers to an enactment referred to in the schedule by the name in Column I thereof is hereby amended by substituting for that name the corresponding name in Column III thereof, and any British North America Act not referred to in the schedule may be cited as the *Constitution Act* followed by the year and number, if any, of its enactment.

Repeal and consequential amendments

54 Part IV is repealed on the day that is one year after this Part comes into force and this section may be repealed and this Act renumbered, consequentially upon the repeal of Part IV and this section, by proclamation issued by the Governor General under the Great Seal of Canada.⁽¹⁰⁶⁾

54.1 Repealed.⁽¹⁰⁷⁾

French version of Constitution of Canada

55 A French version of the portions of the Constitution of Canada referred to in the schedule shall be prepared by the Minister of Justice of Canada as expeditiously as possible and, when any portion thereof sufficient to warrant action being taken has been so prepared, it shall be put forward for enactment by proclamation issued by the Governor General under the Great Seal of Canada pursuant to the procedure then applicable to an amendment of the same provisions of the Constitution of Canada.⁽¹⁰⁸⁾

- a) la *Loi de 1982 sur le Canada*, y compris la présente loi;
- b) les textes législatifs et les décrets figurant à l'annexe;
- c) les modifications des textes législatifs et des décrets mentionnés aux alinéas a) ou b).

Modification

(3) La Constitution du Canada ne peut être modifiée que conformément aux pouvoirs conférés par elle.

Abrogation et nouveaux titres

53 (1) Les textes législatifs et les décrets énumérés à la colonne I de l'annexe sont abrogés ou modifiés dans la mesure indiquée à la colonne II. Sauf abrogation, ils restent en vigueur en tant que lois du Canada sous les titres mentionnés à la colonne III.

Modifications corrélatives

(2) Tout texte législatif ou réglementaire, sauf la *Loi de 1982 sur le Canada*, qui fait mention d'un texte législatif ou décret figurant à l'annexe par le titre indiqué à la colonne I est modifié par substitution à ce titre du titre correspondant mentionné à la colonne III; tout Acte de l'Amérique du Nord britannique non mentionné à l'annexe peut être cité sous le titre de *Loi constitutionnelle* suivi de l'indication de l'année de son adoption et éventuellement de son numéro.

Abrogation et modifications qui en découlent

54 La partie IV est abrogée un an après l'entrée en vigueur de la présente partie et le gouverneur général peut, par proclamation sous le grand sceau du Canada, abroger le présent article et apporter en conséquence de cette double abrogation les aménagements qui s'imposent à la présente loi.⁽¹⁰⁶⁾

54.1 Abrogé.⁽¹⁰⁷⁾

Version française de certains textes constitutionnels

55 Le ministre de la Justice du Canada est chargé de rédiger, dans les meilleurs délais, la version française des parties de la Constitution du Canada qui figurent à l'annexe; toute partie suffisamment importante est, dès qu'elle est prête, déposée pour adoption par proclamation du gouverneur général sous le grand sceau du Canada, conformément à la procédure applicable à l'époque à la modification des dispositions constitutionnelles qu'elle contient.⁽¹⁰⁸⁾



CANADA

CONSOLIDATION

CODIFICATION

Canadian Bill of Rights

Déclaration canadienne des droits

S.C. 1960, c. 44

S.C. 1960, ch. 44

Current to September 1, 2025

À jour au 1 septembre 2025



S.C. 1960, c. 44

An Act for the Recognition and Protection of Human Rights and Fundamental Freedoms*[Assented to 10th August 1960]***Preamble**

The Parliament of Canada, affirming that the Canadian Nation is founded upon principles that acknowledge the supremacy of God, the dignity and worth of the human person and the position of the family in a society of free men and free institutions;

Affirming also that men and institutions remain free only when freedom is founded upon respect for moral and spiritual values and the rule of law;

And being desirous of enshrining these principles and the human rights and fundamental freedoms derived from them, in a Bill of Rights which shall reflect the respect of Parliament for its constitutional authority and which shall ensure the protection of these rights and freedoms in Canada:

Therefore Her Majesty, by and with the advice and consent of the Senate and House of Commons of Canada, enacts as follows:

PART I**Bill of Rights****Recognition and declaration of rights and freedoms**

1 It is hereby recognized and declared that in Canada there have existed and shall continue to exist without discrimination by reason of race, national origin, colour, religion or sex, the following human rights and fundamental freedoms, namely,

S.C. 1960, ch. 44

Loi ayant pour objets la reconnaissance et la protection des droits de l'homme et des libertés fondamentales*[Sanctionnée le 10 août 1960]***Préambule**

Le Parlement du Canada proclame que la nation canadienne repose sur des principes qui reconnaissent la suprématie de Dieu, la dignité et la valeur de la personne humaine ainsi que le rôle de la famille dans une société d'hommes libres et d'institutions libres;

Il proclame en outre que les hommes et les institutions ne demeurent libres que dans la mesure où la liberté s'inspire du respect des valeurs morales et spirituelles et du règne du droit;

Et afin d'explicitier ces principes ainsi que les droits de l'homme et les libertés fondamentales qui en découlent, dans une Déclaration de droits qui respecte la compétence législative du Parlement du Canada et qui assure à sa population la protection de ces droits et de ces libertés,

En conséquence, Sa Majesté, sur l'avis et du consentement du Sénat et de la Chambre des communes du Canada, décrète :

PARTIE I**Déclaration des droits****Reconnaissance et déclaration des droits et libertés**

1 Il est par les présentes reconnu et déclaré que les droits de l'homme et les libertés fondamentales ci-après énoncés ont existé et continueront à exister pour tout individu au Canada quels que soient sa race, son origine nationale, sa couleur, sa religion ou son sexe :

(a) the right of the individual to life, liberty, security of the person and enjoyment of property, and the right not to be deprived thereof except by due process of law;

(b) the right of the individual to equality before the law and the protection of the law;

(c) freedom of religion;

(d) freedom of speech;

(e) freedom of assembly and association; and

(f) freedom of the press.

Construction of law

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

(a) authorize or effect the arbitrary detention, imprisonment or exile of any person;

(b) impose or authorize the imposition of cruel and unusual treatment or punishment;

(c) deprive a person who has been arrested or detained

(i) of the right to be informed promptly of the reason for his arrest or detention,

(ii) of the right to retain and instruct counsel without delay, or

(iii) of the remedy by way of *habeas corpus* for the determination of the validity of his detention and for his release if the detention is not lawful;

(d) authorize a court, tribunal, commission, board or other authority to compel a person to give evidence if he is denied counsel, protection against self incrimination or other constitutional safeguards;

(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;

(f) deprive a person charged with a criminal offence of the right to be presumed innocent until proved guilty according to law in a fair and public hearing by an

a) le droit de l'individu à la vie, à la liberté, à la sécurité de la personne ainsi qu'à la jouissance de ses biens, et le droit de ne s'en voir privé que par l'application régulière de la loi;

b) le droit de l'individu à l'égalité devant la loi et à la protection de la loi;

c) la liberté de religion;

d) la liberté de parole;

e) la liberté de réunion et d'association;

f) la liberté de la presse.

Interprétation de la législation

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

a) autorisant ou prononçant la détention, l'emprisonnement ou l'exil arbitraires de qui que ce soit;

b) infligeant des peines ou traitements cruels et inusités, ou comme en autorisant l'imposition;

c) privant une personne arrêtée ou détenue

(i) du droit d'être promptement informée des motifs de son arrestation ou de sa détention,

(ii) du droit de retenir et constituer un avocat sans délai, ou

(iii) du recours par voie d'*habeas corpus* pour qu'il soit jugé de la validité de sa détention et que sa libération soit ordonnée si la détention n'est pas légale;

d) autorisant une cour, un tribunal, une commission, un office, un conseil ou une autre autorité à contraindre une personne à témoigner si on lui refuse le secours d'un avocat, la protection contre son propre témoignage ou l'exercice de toute garantie d'ordre constitutionnel;

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;

independent and impartial tribunal, or of the right to reasonable bail without just cause; or

(g) deprive a person of the right to the assistance of an interpreter in any proceedings in which he is involved or in which he is a party or a witness, before a court, commission, board or other tribunal, if he does not understand or speak the language in which such proceedings are conducted.

Duties of Minister of Justice

3 (1) Subject to subsection (2), the Minister of Justice shall, in accordance with such regulations as may be prescribed by the Governor in Council, examine every regulation transmitted to the Clerk of the Privy Council for registration pursuant to the *Statutory Instruments Act* and every Bill introduced in or presented to the House of Commons by a Minister of the Crown, in order to ascertain whether any of the provisions thereof are inconsistent with the purposes and provisions of this Part and he shall report any such inconsistency to the House of Commons at the first convenient opportunity.

Exception

(2) A regulation need not be examined in accordance with subsection (1) if prior to being made it was examined as a proposed regulation in accordance with section 3 of the *Statutory Instruments Act* to ensure that it was not inconsistent with the purposes and provisions of this Part.

1960, c. 44, s. 3; 1970-71-72, c. 38, s. 29; 1985, c. 26, s. 105; 1992, c. 1, s. 144(F).

Short title

4 The provisions of this Part shall be known as the *Canadian Bill of Rights*.

Part II

Savings

5 (1) Nothing in Part I shall be construed to abrogate or abridge any human right or fundamental freedom not enumerated therein that may have existed in Canada at the commencement of this Act.

"Law of Canada" defined

(2) The expression "law of Canada" in Part I means an Act of the Parliament of Canada enacted before or after

f) privant une personne accusée d'un acte criminel du droit à la présomption d'innocence jusqu'à ce que la preuve de sa culpabilité ait été établie en conformité de la loi, après une audition impartiale et publique de sa cause par un tribunal indépendant et non préjugé, ou la privant sans juste cause du droit à un cautionnement raisonnable; ou

g) privant une personne du droit à l'assistance d'un interprète dans des procédures où elle est mise en cause ou est partie ou témoin, devant une cour, une commission, un office, un conseil ou autre tribunal, si elle ne comprend ou ne parle pas la langue dans laquelle se déroulent ces procédures.

Devoirs du ministre de la Justice

3 (1) Sous réserve du paragraphe (2), le ministre de la Justice doit, en conformité de règlements prescrits par le gouverneur en conseil, examiner tout règlement transmis au greffier du Conseil privé pour enregistrement, en application de la *Loi sur les textes réglementaires*, ainsi que tout projet ou proposition de loi soumis ou présentés à la Chambre des communes par un ministre fédéral en vue de rechercher si l'une quelconque de ses dispositions est incompatible avec les fins et dispositions de la présente Partie, et il doit signaler toute semblable incompatibilité à la Chambre des communes dès qu'il en a l'occasion.

Exception

(2) Il n'est pas nécessaire de procéder à l'examen prévu par le paragraphe (1) si le projet de règlement a fait l'objet de l'examen prévu à l'article 3 de la *Loi sur les textes réglementaires* et destiné à vérifier sa compatibilité avec les fins et les dispositions de la présente partie.

1960, ch. 44, art. 3; 1970-71-72, ch. 38, art. 29; 1985, ch. 26, art. 105; 1992, ch. 1, art. 144(F).

Titre abrégé

4 Les dispositions de la présente Partie doivent être connues sous la désignation : *Déclaration canadienne des droits*.

Partie II

Clause de sauvegarde

5 (1) Aucune disposition de la Partie I ne doit s'interpréter de manière à supprimer ou restreindre l'exercice d'un droit de l'homme ou d'une liberté fondamentale non énumérés dans ladite Partie et qui peuvent avoir existé au Canada lors de la mise en vigueur de la présente loi.

Définition : « loi du Canada »

(2) L'expression « loi du Canada », à la Partie I, désigne une loi du Parlement du Canada, édictée avant ou après

the coming into force of this Act, any order, rule or regulation thereunder, and any law in force in Canada or in any part of Canada at the commencement of this Act that is subject to be repealed, abolished or altered by the Parliament of Canada.

Jurisdiction of Parliament

(3) The provisions of Part I shall be construed as extending only to matters coming within the legislative authority of the Parliament of Canada.

la mise en vigueur de la présente loi, ou toute ordonnance, règle ou règlement établi sous son régime, et toute loi exécutoire au Canada ou dans une partie du Canada lors de l'entrée en application de la présente loi, qui est susceptible d'abrogation, d'abolition ou de modification par le Parlement du Canada.

Juridiction du Parlement

(3) Les dispositions de la Partie I doivent s'interpréter comme ne visant que les matières qui sont de la compétence législative du Parlement du Canada.



CANADA

CONSOLIDATION

CODIFICATION

Interpretation Act

Loi d'interprétation

R.S.C., 1985, c. I-21

L.R.C. (1985), ch. I-21

Current to September 1, 2025

À jour au 1 septembre 2025

Last amended on November 27, 2024

Dernière modification le 27 novembre 2024

Enactments Remedial

Enactments deemed remedial

12 Every enactment is deemed remedial, and shall be given such fair, large and liberal construction and interpretation as best ensures the attainment of its objects.

R.S., c. I-23, s. 11.

Preambles and Marginal Notes

Preamble

13 The preamble of an enactment shall be read as a part of the enactment intended to assist in explaining its purpose and object.

R.S., c. I-23, s. 12.

Marginal notes and historical references

14 Marginal notes and references to former enactments that appear after the end of a section or other division in an enactment form no part of the enactment, but are inserted for convenience of reference only.

R.S., c. I-23, s. 13.

Application of Interpretation Provisions

Application of definitions and interpretation rules

15 (1) Definitions or rules of interpretation in an enactment apply to all the provisions of the enactment, including the provisions that contain those definitions or rules of interpretation.

Interpretation sections subject to exceptions

(2) Where an enactment contains an interpretation section or provision, it shall be read and construed

(a) as being applicable only if a contrary intention does not appear; and

(b) as being applicable to all other enactments relating to the same subject-matter unless a contrary intention appears.

R.S., c. I-23, s. 14.

Words in regulations

16 Where an enactment confers power to make regulations, expressions used in the regulations have the same respective meanings as in the enactment conferring the power.

R.S., c. I-23, s. 15.

Solution de droit

Principe et interprétation

12 Tout texte est censé apporter une solution de droit et s'interprète de la manière la plus équitable et la plus large qui soit compatible avec la réalisation de son objet.

S.R., ch. I-23, art. 11.

Préambules et notes marginales

Préambule

13 Le préambule fait partie du texte et en constitue l'exposé des motifs.

S.R., ch. I-23, art. 12.

Notes marginales

14 Les notes marginales ainsi que les mentions de textes antérieurs apparaissant à la fin des articles ou autres éléments du texte ne font pas partie de celui-ci, n'y figurant qu'à titre de repère ou d'information.

S.R., ch. I-23, art. 13.

Dispositions interprétatives

Application

15 (1) Les définitions ou les règles d'interprétation d'un texte s'appliquent tant aux dispositions où elles figurent qu'au reste du texte.

Restriction

(2) Les dispositions définitoires ou interprétatives d'un texte :

a) n'ont d'application qu'à défaut d'indication contraire;

b) s'appliquent, sauf indication contraire, aux autres textes portant sur un domaine identique.

S.R., ch. I-23, art. 14.

Terminologie des règlements

16 Les termes figurant dans les règlements d'application d'un texte ont le même sens que dans celui-ci.

S.R., ch. I-23, art. 15.

Amendment or repeal at same session

(2) An Act may be amended or repealed by an Act passed in the same session of Parliament.

Amendment part of enactment

(3) An amending enactment, as far as consistent with the tenor thereof, shall be construed as part of the enactment that it amends.

R.S., c. I-23, s. 34.

Effect of repeal

43 Where an enactment is repealed in whole or in part, the repeal does not

(a) revive any enactment or anything not in force or existing at the time when the repeal takes effect,

(b) affect the previous operation of the enactment so repealed or anything duly done or suffered thereunder,

(c) affect any right, privilege, obligation or liability acquired, accrued, accruing or incurred under the enactment so repealed,

(d) affect any offence committed against or contravention of the provisions of the enactment so repealed, or any punishment, penalty or forfeiture incurred under the enactment so repealed, or

(e) affect any investigation, legal proceeding or remedy in respect of any right, privilege, obligation or liability referred to in paragraph (c) or in respect of any punishment, penalty or forfeiture referred to in paragraph (d),

and an investigation, legal proceeding or remedy as described in paragraph (e) may be instituted, continued or enforced, and the punishment, penalty or forfeiture may be imposed as if the enactment had not been so repealed.

R.S., c. I-23, s. 35.

Repeal and substitution

44 Where an enactment, in this section called the “former enactment”, is repealed and another enactment, in this section called the “new enactment”, is substituted therefor,

(a) every person acting under the former enactment shall continue to act, as if appointed under the new enactment, until another person is appointed in the stead of that person;

(b) every bond and security given by a person appointed under the former enactment remains in force, and all books, papers, forms and things made or used

Interaction en cours de session

(2) Une loi peut être modifiée ou abrogée par une autre loi adoptée au cours de la même session du Parlement.

Incorporation des modifications

(3) Le texte modificatif, dans la mesure compatible avec sa teneur, fait partie du texte modifié.

S.R., ch. I-23, art. 34.

Effet de l’abrogation

43 L’abrogation, en tout ou en partie, n’a pas pour conséquence :

a) de rétablir des textes ou autres règles de droit non en vigueur lors de sa prise d’effet;

b) de porter atteinte à l’application antérieure du texte abrogé ou aux mesures régulièrement prises sous son régime;

c) de porter atteinte aux droits ou avantages acquis, aux obligations contractées ou aux responsabilités encourues sous le régime du texte abrogé;

d) d’empêcher la poursuite des infractions au texte abrogé ou l’application des sanctions — peines, pénalités ou confiscations — encourues aux termes de celui-ci;

e) d’influer sur les enquêtes, procédures judiciaires ou recours relatifs aux droits, obligations, avantages, responsabilités ou sanctions mentionnés aux alinéas c) et d).

Les enquêtes, procédures ou recours visés à l’alinéa e) peuvent être engagés et se poursuivre, et les sanctions infligées, comme si le texte n’avait pas été abrogé.

S.R., ch. I-23, art. 35.

Abrogation et remplacement

44 En cas d’abrogation et de remplacement, les règles suivantes s’appliquent :

a) les titulaires des postes pourvus sous le régime du texte antérieur restent en place comme s’ils avaient été nommés sous celui du nouveau texte, jusqu’à la nomination de leurs successeurs;

b) les cautions ou autres garanties fournies par le titulaire d’un poste pourvu sous le régime du texte antérieur gardent leur validité, l’application des mesures prises et l’utilisation des livres, imprimés ou autres documents employés conformément à ce texte se

under the former enactment shall continue to be used as before the repeal in so far as they are consistent with the new enactment;

(c) every proceeding taken under the former enactment shall be taken up and continued under and in conformity with the new enactment in so far as it may be done consistently with the new enactment;

(d) the procedure established by the new enactment shall be followed as far as it can be adapted thereto

(i) in the recovery or enforcement of fines, penalties and forfeitures imposed under the former enactment,

(ii) in the enforcement of rights, existing or accruing under the former enactment, and

(iii) in a proceeding in relation to matters that have happened before the repeal;

(e) when any punishment, penalty or forfeiture is reduced or mitigated by the new enactment, the punishment, penalty or forfeiture if imposed or adjudged after the repeal shall be reduced or mitigated accordingly;

(f) except to the extent that the provisions of the new enactment are not in substance the same as those of the former enactment, the new enactment shall not be held to operate as new law, but shall be construed and have effect as a consolidation and as declaratory of the law as contained in the former enactment;

(g) all regulations made under the repealed enactment remain in force and are deemed to have been made under the new enactment, in so far as they are not inconsistent with the new enactment, until they are repealed or others made in their stead; and

(h) any reference in an unrepealed enactment to the former enactment shall, with respect to a subsequent transaction, matter or thing, be read and construed as a reference to the provisions of the new enactment relating to the same subject-matter as the former enactment, but where there are no provisions in the new enactment relating to the same subject-matter, the former enactment shall be read as unrepealed in so far as is necessary to maintain or give effect to the unrepealed enactment.

R.S., c. I-23, s. 36.

Repeal does not imply enactment was in force

45 (1) The repeal of an enactment in whole or in part shall not be deemed to be or to involve a declaration that

poursuivant, sauf incompatibilité avec le nouveau texte, comme avant l'abrogation;

c) les procédures engagées sous le régime du texte antérieur se poursuivent conformément au nouveau texte, dans la mesure de leur compatibilité avec celui-ci;

d) la procédure établie par le nouveau texte doit être suivie, dans la mesure où l'adaptation en est possible :

(i) pour le recouvrement des amendes ou pénalités et l'exécution des confiscations imposées sous le régime du texte antérieur,

(ii) pour l'exercice des droits acquis sous le régime du texte antérieur,

(iii) dans toute affaire se rapportant à des faits survenus avant l'abrogation;

e) les sanctions dont l'allégement est prévu par le nouveau texte sont, après l'abrogation, réduites en conséquence;

f) sauf dans la mesure où les deux textes diffèrent au fond, le nouveau texte n'est pas réputé de droit nouveau, sa teneur étant censée constituer une refonte et une clarification des règles de droit du texte antérieur;

g) les règlements d'application du texte antérieur demeurent en vigueur et sont réputés pris en application du nouveau texte, dans la mesure de leur compatibilité avec celui-ci, jusqu'à abrogation ou remplacement;

h) le renvoi, dans un autre texte, au texte abrogé, à propos de faits ultérieurs, équivaut à un renvoi aux dispositions correspondantes du nouveau texte; toutefois, à défaut de telles dispositions, le texte abrogé est considéré comme étant encore en vigueur dans la mesure nécessaire pour donner effet à l'autre texte.

S.R., ch. I-23, art. 36.

Absence de présomption d'entrée en vigueur

45 (1) L'abrogation, en tout ou en partie, d'un texte ne constitue pas ni n'implique une déclaration portant que



CANADA

CONSOLIDATION

CODIFICATION

Competition Act

Loi sur la concurrence

R.S.C., 1985, c. C-34

L.R.C. (1985), ch. C-34

Current to September 1, 2025

À jour au 1 septembre 2025

Last amended on June 20, 2025

Dernière modification le 20 juin 2025



R.S.C., 1985, c. C-34

L.R.C., 1985, ch. C-34

An Act to provide for the general regulation of trade and commerce in respect of conspiracies, trade practices and mergers affecting competition

Loi portant réglementation générale du commerce en matière de complots, de pratiques commerciales et de fusionnements qui touchent à la concurrence

Short Title

Titre abrégé

Short title

1 This Act may be cited as the *Competition Act*.

R.S., 1985, c. C-34, s. 1; R.S., 1985, c. 19 (2nd Supp.), s. 19.

Titre abrégé

1 *Loi sur la concurrence.*

L.R. (1985), ch. C-34, art. 1; L.R. (1985), ch. 19 (2^e suppl.), art. 19.

PART I

PARTIE I

Purpose and Interpretation

Objet et définitions

Purpose

Objet

Purpose of Act

1.1 The purpose of this Act is 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.

R.S., 1985, c. 19 (2nd Supp.), s. 19.

Objet

1.1 La présente loi a pour objet de préserver et de favoriser la concurrence au Canada dans le but de stimuler l'adaptabilité et l'efficacité de l'économie canadienne, d'améliorer les chances de participation canadienne aux marchés mondiaux tout en tenant simultanément compte du rôle de la concurrence étrangère au Canada, d'assurer à la petite et à la moyenne entreprise une chance honnête de participer à l'économie canadienne, de même que dans le but d'assurer aux consommateurs des prix compétitifs et un choix dans les produits.

L.R. (1985), ch. 19 (2^e suppl.), art. 19.

Interpretation

Définitions

Definitions

2 (1) In this Act,

article means real and personal property of every description including

(a) money,

Définitions

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

article Biens meubles et immeubles de toute nature, y compris :

(iii) the alleged offence

and the names of the persons believed to be concerned therein and privy thereto; and

(c) a concise statement of the evidence supporting their opinion.

R.S., 1985, c. C-34, s. 9; R.S., 1985, c. 19 (2nd Supp.), s. 22; 1999, c. 2, ss. 6, 37.

Inquiry by Commissioner

10 (1) The Commissioner shall

(a) on application made under section 9,

(b) whenever the Commissioner has reason to believe that

(i) a person has contravened an order made pursuant to section 32, 33 or 34, or Part VII.1 or Part VIII,

(ii) grounds exist for the making of an order under Part VII.1 or Part VIII, or

(iii) an offence under Part VI or VII has been or is about to be committed, or

(c) whenever directed by the Minister to inquire whether any of the circumstances described in subparagraphs (b)(i) to (iii) exists,

cause an inquiry to be made into all such matters as the Commissioner considers necessary to inquire into with the view of determining the facts.

Information on inquiry

(2) The Commissioner shall, on the written request of any person whose conduct is being inquired into under this Act or any person who applies for an inquiry under section 9, inform that person or cause that person to be informed as to the progress of the inquiry.

Inquiries to be in private

(3) All inquiries under this section shall be conducted in private.

R.S., 1985, c. C-34, s. 10; R.S., 1985, c. 19 (2nd Supp.), s. 23; 1999, c. 2, ss. 7, 37, c. 31, s. 45.

Market or industry inquiry

10.1 (1) The Commissioner may, after consulting the Minister, conduct an inquiry into the state of competition in a market or industry if the Commissioner is of the opinion that it is in the public interest to do so.

et les noms des personnes qu'on croit y être intéressées et complices;

c) un résumé des éléments de preuve à l'appui de leur opinion.

L.R. (1985), ch. C-34, art. 9; L.R. (1985), ch. 19 (2^e suppl.), art. 22; 1999, ch. 2, art. 6 et 37.

Enquête par le commissaire

10 (1) Le commissaire fait étudier, dans l'un ou l'autre des cas suivants, toutes questions qui, d'après lui, nécessitent une enquête en vue de déterminer les faits :

a) sur demande faite en vertu de l'article 9;

b) chaque fois qu'il a des raisons de croire :

(i) soit qu'une personne a contrevenu à une ordonnance rendue en application des articles 32, 33 ou 34, ou des parties VII.1 ou VIII,

(ii) soit qu'il existe des motifs justifiant une ordonnance en vertu des parties VII.1 ou VIII,

(iii) soit qu'une infraction visée à la partie VI ou VII a été perpétrée ou est sur le point de l'être;

c) chaque fois que le ministre lui ordonne de déterminer au moyen d'une enquête si l'un des faits visés aux sous-alinéas b)(i) à (iii) existe.

Renseignements concernant les enquêtes

(2) À la demande écrite d'une personne dont les activités font l'objet d'une enquête en application de la présente loi ou d'une personne qui a demandé une enquête conformément à l'article 9, le commissaire instruit ou fait instruire cette personne de l'état du déroulement de l'enquête.

Enquêtes en privé

(3) Les enquêtes visées au présent article sont conduites en privé.

L.R. (1985), ch. C-34, art. 10; L.R. (1985), ch. 19 (2^e suppl.), art. 23; 1999, ch. 2, art. 7 et 37, ch. 31, art. 45.

Enquête sur un marché ou une industrie

10.1 (1) Le commissaire peut, après consultation du ministre, mener une enquête pour examiner l'état de concurrence dans un marché ou une industrie, s'il estime qu'il serait dans l'intérêt public de le faire.

Direction to conduct inquiry

(2) The Minister may direct the Commissioner to conduct an inquiry into the state of competition in a market or industry if the Minister is of the opinion that it is in the public interest that such an inquiry be conducted. Before making the direction, the Minister must consult the Commissioner to determine whether the inquiry would be feasible, including with regard to its cost.

Proposed terms of reference

(3) If, after the consultation referred to in subsection (1) or (2), it is decided to proceed with the inquiry, the Commissioner must prepare proposed terms of reference for the inquiry and publish them on a publicly available website and invite the public to provide comments during a period of not less than 15 days.

Final terms of reference

(4) After having taken into account any comments received from the public, the Commissioner must submit to the Minister for approval the Commissioner's final terms of reference and, if they are approved, the Commissioner must publish them on a publicly available website.

Duration of inquiry

(5) The inquiry commences on the day on which the final terms of reference are published and the Commissioner must complete the inquiry and publish a report of the Commissioner's findings on a publicly available website before the expiry of the period specified by the Minister, which period, subject to subsection (6), is not to exceed 18 months.

Extension

(6) The Minister may extend the specified period for periods of up to three months.

Sending draft to certain persons

(7) Before the report is published, the Commissioner must send to every person who was required to do anything under an order made under subsection 11(1) a complete or partial draft of the report and inform the person that they may, within three working days after the day on which it was sent, provide the Commissioner with the person's concerns regarding factual inaccuracies or confidential information that should not be disclosed in the final report.

2023, c. 31, s. 3.

Order for oral examination, production or written return

11 (1) If, on the *ex parte* application of the Commissioner or his or her authorized representative, a judge of

Ordre de mener une enquête

(2) Le ministre peut ordonner au commissaire d'examiner, au moyen d'une enquête, l'état de concurrence dans un marché ou une industrie, s'il estime qu'il serait dans l'intérêt public de le faire. Avant d'ordonner l'enquête, le ministre consulte le commissaire afin de vérifier si elle est réalisable, notamment au regard des coûts qu'elle entraînerait.

Projet de mandat

(3) Si, après la consultation visée aux paragraphes (1) ou (2), il est décidé que l'enquête sera menée, le commissaire élabore un projet de mandat pour la conduite de l'enquête, le publie sur un site Web accessible au public et invite les membres du public à présenter leurs observations dans un délai d'au moins quinze jours.

Mandat final

(4) Après avoir tenu compte des observations du public, le commissaire soumet au ministre le mandat final pour approbation et, s'il est approuvé, le publie sur un site Web accessible au public.

Durée de l'enquête

(5) L'enquête débute à la date de la publication visée au paragraphe (4) et le commissaire dispose du délai spécifié par le ministre, lequel ne peut, sous réserve du paragraphe (6), excéder dix-huit mois, pour mener son enquête et publier un rapport de ses conclusions sur un site Web accessible au public.

Prolongation

(6) Le ministre peut prolonger le délai spécifié pour des périodes maximales de trois mois.

Envoi d'une ébauche à certaines personnes

(7) Avant la publication du rapport, le commissaire envoie à toute personne visée par une ordonnance rendue au titre du paragraphe 11(1) une ébauche — complète ou non — du rapport et l'avise qu'elle dispose de trois jours ouvrables après la date d'envoi pour lui faire part de ses préoccupations concernant des inexactitudes factuelles ou des renseignements confidentiels qui ne devraient pas être divulgués dans le rapport final.

2023, ch. 31, art. 3.

Ordonnance exigeant une déposition orale ou une déclaration écrite

11 (1) Sur demande *ex parte* du commissaire ou de son représentant autorisé, un juge d'une cour supérieure ou

a superior or county court is satisfied by information on oath or solemn affirmation that an inquiry is being made under section 10 or 10.1 and that a person has or is likely to have information that is relevant to the inquiry, the judge may order the person to

(a) attend as specified in the order and be examined on oath or solemn affirmation by the Commissioner or the authorized representative of the Commissioner on any matter that is relevant to the inquiry before a person, in this section and sections 12 to 14 referred to as a “presiding officer”, designated in the order;

(b) produce to the Commissioner or the authorized representative of the Commissioner within a time and at a place specified in the order, a record, a copy of a record certified by affidavit to be a true copy, or any other thing, specified in the order; or

(c) make and deliver to the Commissioner or the authorized representative of the Commissioner, within a time specified in the order, a written return under oath or solemn affirmation showing in detail such information as is by the order required.

Records or information in possession of affiliate

(2) If the person against whom an order is sought under paragraph (1)(b) or (c) in relation to an inquiry is a corporation and the judge to whom the application is made under subsection (1) is satisfied by information on oath or solemn affirmation that an affiliate of the corporation, whether the affiliate is located in Canada or outside Canada, has or is likely to have records or information relevant to the inquiry, the judge may order the corporation to

(a) produce the records; or

(b) make and deliver a written return of the information.

No person excused from complying with order

(3) No person shall be excused from complying with an order under subsection (1) or (2) on the ground that the testimony, record or other thing or return required of the person may tend to criminate the person or subject him to any proceeding or penalty, but no testimony given by an individual pursuant to an order made under paragraph (1)(a), or return made by an individual pursuant to an order made under paragraph (1)(c), shall be used or received against that individual in any criminal

d’une cour de comté peut, lorsqu’il est convaincu d’après une dénonciation faite sous serment ou affirmation solennelle qu’une enquête est menée en application des articles 10 ou 10.1 et qu’une personne détient ou détient vraisemblablement des renseignements pertinents à l’enquête en question, ordonner à cette personne :

a) de comparaître, selon ce que prévoit l’ordonnance de sorte que, sous serment ou affirmation solennelle, elle puisse, concernant toute question pertinente à l’enquête, être interrogée par le commissaire ou son représentant autorisé devant une personne désignée dans l’ordonnance et qui, pour l’application du présent article et des articles 12 à 14, est appelée « fonctionnaire d’instruction »;

b) de produire auprès du commissaire ou de son représentant autorisé, dans le délai et au lieu que prévoit l’ordonnance, les documents — originaux ou copies certifiées conformes par affidavit — ou les autres choses dont l’ordonnance fait mention;

c) de préparer et de donner au commissaire ou à son représentant autorisé, dans le délai que prévoit l’ordonnance, une déclaration écrite faite sous serment ou affirmation solennelle et énonçant en détail les renseignements exigés par l’ordonnance.

Documents ou renseignements en possession d’une affiliée

(2) Lorsque, en rapport avec une enquête, la personne contre qui une ordonnance est demandée en application des alinéas (1)b) ou c) est une personne morale et que le juge à qui la demande est faite aux termes du paragraphe (1) est convaincu, d’après une dénonciation faite sous serment ou affirmation solennelle, qu’une affiliée de cette personne morale a ou a vraisemblablement des documents ou des renseignements qui sont pertinents à l’enquête, il peut, sans égard au fait que l’affiliée soit située au Canada ou ailleurs, ordonner à la personne morale :

a) de produire les documents en question;

b) de préparer et de donner une déclaration écrite énonçant les renseignements.

Nul n’est dispensé de se conformer à l’ordonnance

(3) Nul n’est dispensé de se conformer à une ordonnance visée au paragraphe (1) ou (2) au motif que le témoignage oral, le document, l’autre chose ou la déclaration qu’on exige de lui peut tendre à l’incriminer ou à l’exposer à quelque procédure ou pénalité, mais un témoignage oral qu’un individu a rendu conformément à une ordonnance prononcée en application de l’alinéa (1)a) ou une déclaration qu’il a faite en conformité avec une ordonnance prononcée en application de l’alinéa (1)c) ne peut être utilisé

proceedings thereafter instituted against him, other than a prosecution under section 132 or 136 of the *Criminal Code*.

Effect of order

(4) An order made under this section has effect anywhere in Canada.

Person outside Canada

(5) An order may be made under subsection (1) against a person outside Canada who carries on business in Canada or sells products into Canada.

R.S., 1985, c. C-34, s. 11; R.S., 1985, c. 19 (2nd Supp.), s. 24; 1999, c. 2, s. 37; 2002, c. 8, s. 126, c. 16, s. 1; 2022, c. 10, s. 256; 2023, c. 31, s. 4.

Witness competent and compellable

12 (1) Any person summoned to attend pursuant to paragraph 11(1)(a) is competent and may be compelled to give evidence.

Fees

(2) Every person summoned to attend pursuant to paragraph 11(1)(a) is entitled to the like fees and allowances for so doing as if summoned to attend before a superior court of the province in which the person is summoned to attend.

Representation by counsel

(3) A presiding officer shall permit a person who is being examined pursuant to an order under paragraph 11(1)(a) and any person whose conduct is being inquired into to be represented by counsel.

Attendance of person whose conduct is being inquired into

(4) Any person whose conduct is being inquired into at an examination pursuant to an order under paragraph 11(1)(a) and that person's counsel are entitled to attend the examination unless the Commissioner or the authorized representative of the Commissioner, or the person being examined or his employer, establishes to the satisfaction of the presiding officer that the presence of the person whose conduct is being inquired into would

(a) be prejudicial to the effective conduct of the examination or the inquiry; or

(b) result in the disclosure of confidential commercial information that relates to the business of the person being examined or his employer.

R.S., 1985, c. C-34, s. 12; R.S., 1985, c. 19 (2nd Supp.), s. 24; 1999, c. 2, s. 37.

ou admis contre celui-ci dans le cadre de poursuites criminelles intentées contre lui par la suite sauf en ce qui concerne une poursuite prévue à l'article 132 ou 136 du *Code criminel*.

Effet de l'ordonnance

(4) Une ordonnance rendue en application du présent article a effet partout au Canada.

Personne hors du Canada

(5) Une ordonnance peut être rendue en vertu du paragraphe (1) contre une personne hors du Canada qui exploite une entreprise au Canada ou qui vend des produits en direction du Canada.

L.R. (1985), ch. C-34, art. 11; L.R. (1985), ch. 19 (2^e suppl.), art. 24; 1999, ch. 2, art. 37; 2002, ch. 8, art. 126, ch. 16, art. 1; 2022, ch. 10, art. 256; 2023, ch. 31, art. 4.

Personnes habiles à rendre témoignage

12 (1) Toute personne assignée sous le régime de l'alinéa 11(1)a) est habile à agir comme témoin et peut être contrainte à rendre témoignage.

Honoraires

(2) Toute personne assignée aux fins de l'alinéa 11(1)a) a droit aux mêmes honoraires et allocations pour ce faire que si elle avait été assignée à comparaître devant une cour supérieure de la province où elle doit comparaître aux termes de l'assignation.

Représentation par avocat

(3) Un fonctionnaire d'instruction doit permettre que soit représentée par avocat toute personne interrogée aux termes d'une ordonnance rendue en application de l'alinéa 11(1)a) de même que toute personne dont la conduite fait l'objet d'une enquête.

Présence de la personne dont la conduite fait l'objet d'une enquête lors des interrogatoires

(4) La personne dont la conduite fait l'objet d'une enquête lors d'un interrogatoire prévu à l'alinéa 11(1)a) et son avocat peuvent assister à cet interrogatoire à moins que le commissaire, le représentant autorisé de ce dernier, la personne interrogée ou l'employeur de cette dernière ne convainque le fonctionnaire d'instruction que la présence de la personne dont la conduite fait l'objet d'une enquête :

a) entraverait le bon déroulement de l'interrogatoire ou de l'enquête;

investigation of offences under any Act of Parliament, also apply, with any modifications that the circumstances require,

- (a) to an investigation in relation to a contravention of an order made under section 32, 33 or 34 or Part VII.1 or VIII; or
- (b) to an investigation in relation to whether grounds exist for the making of an order under Part VII.1 or VIII.

Clarification

(2) The provisions of the *Criminal Code* referred to in subsection (1) apply whether or not an inquiry has been commenced under section 10.

2014, c. 31, s. 29.

Warrant for entry of premises

15 (1) If, on the *ex parte* application of the Commissioner or his or her authorized representative, a judge of a superior or county court is satisfied by information on oath or solemn affirmation

- (a) that there are reasonable grounds to believe that
 - (i) a person has contravened an order made pursuant to section 32, 33 or 34, or Part VII.1 or VIII,
 - (ii) grounds exist for the making of an order under Part VII.1 or VIII, or
 - (iii) an offence under Part VI or VII has been or is about to be committed, and
- (b) that there are reasonable grounds to believe that there is, on any premises, any record or other thing that will afford evidence with respect to the circumstances referred to in subparagraph (a)(i), (ii) or (iii), as the case may be,

the judge may issue a warrant under his hand authorizing the Commissioner or any other person named in the warrant to

- (c) enter the premises, subject to such conditions as may be specified in the warrant, and
- (d) search the premises for any such record or other thing and copy it or seize it for examination or copying.

relative à une infraction à une loi fédérale, s'appliquent aussi, avec les adaptations nécessaires, à l'une ou l'autre des enquêtes suivantes :

- a) celle relative à la contravention à une ordonnance rendue en vertu des articles 32, 33 ou 34 ou des parties VII.1 ou VIII;
- b) celle relative à l'existence de motifs justifiant que soit rendue une ordonnance en vertu des parties VII.1 ou VIII.

Précision

(2) Les dispositions du *Code criminel* s'appliquent que l'enquête visée à l'article 10 ait commencé ou non.

2014, ch. 31, art. 29.

Mandat de perquisition

15 (1) À la demande *ex parte* du commissaire ou de son représentant autorisé et si, d'après une dénonciation faite sous serment ou affirmation solennelle, un juge d'une cour supérieure ou d'une cour de comté est convaincu :

- a) qu'il existe des motifs raisonnables de croire :
 - (i) soit qu'une personne a contrevenu à une ordonnance rendue en application des articles 32, 33 ou 34, ou des parties VII.1 ou VIII,
 - (ii) soit qu'il y a des motifs justifiant que soit rendue une ordonnance aux termes des parties VII.1 ou VIII,
 - (iii) soit qu'une infraction prévue à la partie VI ou VII a été perpétrée ou est sur le point de l'être;
- b) qu'il y a des motifs raisonnables de croire qu'il existe, en un local quelconque, un document ou une autre chose qui fournira une preuve en ce qui concerne les circonstances visées aux sous-alinéas a)(i), (ii) ou (iii), selon le cas,

celui-ci peut délivrer sous son seing un mandat autorisant le commissaire ou toute autre personne qui y est nommée à :

- c) pénétrer dans le local, sous réserve des conditions que peut fixer le mandat;
- d) perquisitionner dans le local en vue soit d'obtenir ce document ou cette autre chose et d'en prendre copie, soit de l'emporter pour en faire l'examen ou en prendre des copies.

Contents of warrant

(2) A warrant issued under this section shall identify the matter in respect of which it is issued, the premises to be searched and the record or other thing, or the class of records or other things, to be searched for.

Execution of search warrant

(3) A warrant issued under this section shall be executed between six o'clock in the forenoon and nine o'clock in the afternoon, unless the judge issuing it, by the warrant, authorizes execution of it at another time.

Idem

(4) A warrant issued under this section may be executed anywhere in Canada.

Duty of persons in control of premises

(5) Every person who is in possession or control of any premises or record or other thing in respect of which a warrant is issued under subsection (1) shall, on presentation of the warrant, permit the Commissioner or other person named in the warrant to enter the premises, search the premises and examine the record or other thing and to copy it or seize it.

Where admission or access refused

(6) Where the Commissioner or any other person, in executing a warrant issued under subsection (1), is refused access to any premises, record or other thing or where the Commissioner believes on reasonable grounds that access will be refused, the judge who issued the warrant or a judge of the same court, on the *ex parte* application of the Commissioner, may by order direct a peace officer to take such steps as the judge considers necessary to give the Commissioner or other person access.

Where warrant not necessary

(7) The Commissioner or the authorized representative of the Commissioner may exercise any of the powers set out in paragraph (1)(c) or (d) without a warrant if the conditions set out in paragraphs (1)(a) and (b) exist but by reason of exigent circumstances it would not be practical to obtain the warrant.

Contenu du mandat

(2) Un mandat délivré en application du présent article fait état de l'affaire à l'égard de laquelle il est délivré et il indique les locaux qui doivent faire l'objet de la perquisition de même que le document, la chose ou la catégorie de documents ou de choses qui doit faire l'objet d'une recherche.

Exécution du mandat

(3) Un mandat délivré en application du présent article ne peut être exécuté qu'entre six heures du matin et neuf heures du soir à moins que, aux termes de ce mandat, le juge qui le délivre en autorise l'exécution à un autre moment.

Idem

(4) Un mandat délivré en application du présent article peut être exécuté partout au Canada.

Devoir de la personne ayant la charge du local

(5) Quiconque est en possession ou a le contrôle d'un local, d'un document ou d'une autre chose que vise un mandat délivré aux termes du paragraphe (1) doit, sur présentation de ce mandat, permettre au commissaire ou à toute autre personne nommée dans le mandat de pénétrer dans ce local, d'y perquisitionner, d'y examiner le document ou la chose, d'en prendre copie ou de l'emporter.

Entrée ou accès refusés

(6) Lorsque, dans le cadre de l'exécution d'un mandat délivré aux termes du paragraphe (1), le commissaire ou toute autre personne se voit refuser l'accès à un local, à un document ou à une autre chose, ou encore lorsque le commissaire a des motifs raisonnables de croire que l'accès en question lui sera refusé, le juge qui a délivré le mandat ou un juge de la même cour peut, sur demande *ex parte* du commissaire, ordonner à un agent de la paix de prendre les mesures que ce juge estime nécessaires pour donner au commissaire ou à cette autre personne l'accès en question.

Perquisition sans mandat

(7) Le commissaire ou son représentant autorisé peut exercer sans mandat les pouvoirs visés à l'alinéa (1)c) ou d) lorsque l'urgence de la situation rend difficilement réalisable l'obtention du mandat, sous réserve que les conditions visées aux alinéas a) et b) soient réunies.

Exigent circumstances

(8) For the purposes of subsection (7), exigent circumstances include circumstances in which the delay necessary to obtain a warrant under subsection (1) would result in the loss or destruction of evidence.

R.S., 1985, c. C-34, s. 15; R.S., 1985, c. 19 (2nd Supp.), s. 24; 1999, c. 2, ss. 8, 37; 2002, c. 8, s. 128.

Operation of computer system

16 (1) A person who is authorized pursuant to subsection 15(1) to search premises for a record may use or cause to be used any computer system on the premises to search any data contained in or available to the computer system, may reproduce the record or cause it to be reproduced from the data in the form of a printout or other intelligible output and may seize the printout or other output for examination or copying.

Duty of person in control of computer system

(2) Every person who is in possession or control of any premises in respect of which a warrant is issued under subsection 15(1) shall, on presentation of the warrant, permit any person named in the warrant to use or cause to be used any computer system or part thereof on the premises to search any data contained in or available to the computer system for data from which a record that that person is authorized to search for may be produced, to obtain a physical copy thereof and to seize it.

Order restricting operation of computer system

(3) A judge who issued a warrant under subsection 15(1) or a judge of the same court may, on application by the Commissioner or any person who is in possession or control of a computer system or a part thereof on any premises in respect of which the warrant was issued, make an order

(a) specifying the individuals who may operate the computer system and fixing the times when they may do so; and

(b) setting out any other terms and conditions on which the computer system may be operated.

Notice by person in possession or control

(4) No order may be made under subsection (3) on application by a person who is in possession or control of a computer system or part thereof unless that person has

Situation d'urgence

(8) Pour l'application du paragraphe (7), il y a notamment urgence dans les cas où le délai d'obtention du mandat prévu au paragraphe (1) entraînerait la perte ou la destruction d'éléments de preuve.

L.R. (1985), ch. C-34, art. 15; L.R. (1985), ch. 19 (2^e suppl.), art. 24; 1999, ch. 2, art. 8 et 37; 2002, ch. 8, art. 128.

Usage d'un système informatique

16 (1) Une personne qui est, en vertu du paragraphe 15(1), autorisée à perquisitionner dans un local pour y chercher un document peut soit utiliser ou faire utiliser tout ordinateur se trouvant dans le local en question dans le but de faire la recherche de données se trouvant dans l'ordinateur, ou pouvant lui être fournies, soit, à partir de ces données, reproduire ou faire reproduire le document sous forme d'imprimé ou d'une autre sortie de données intelligible, soit en outre emporter cet imprimé ou cette sortie de données pour les examiner ou en prendre copie.

Obligation de la personne ayant la possession d'un ordinateur

(2) La personne qui est en possession ou qui a le contrôle d'un local à l'égard duquel un mandat a été délivré en application du paragraphe 15(1) doit, sur présentation du mandat, permettre à toute personne nommée au mandat d'utiliser ou de faire utiliser l'ensemble ou une partie seulement d'un ordinateur se trouvant dans le local en question de sorte que toute donnée se trouvant dans l'ordinateur ou pouvant lui être fournie puisse faire l'objet d'une recherche dans le but de trouver des données à partir desquelles peut être produit un document que la personne nommée au mandat est autorisée à rechercher, de même qu'elle doit permettre à cette dernière d'en obtenir une copie physique et de l'emporter.

Ordonnance limitant l'usage des ordinateurs

(3) Le juge qui a délivré le mandat visé au paragraphe 15(1) ou un juge de la même cour peut, à la demande du commissaire ou de tout personne qui est en possession ou a le contrôle, en tout ou en partie, d'un ordinateur se trouvant dans un local à l'égard duquel le mandat a été délivré, rendre une ordonnance :

a) identifiant les individus qui peuvent faire usage de cet ordinateur et fixant les périodes durant lesquelles ils sont autorisés à le faire;

b) précisant les autres conditions et modalités selon lesquelles a lieu l'utilisation de cet ordinateur.

Avis de la personne qui a le contrôle, etc.

(4) Une ordonnance ne peut pas être rendue en application du paragraphe (3) à la demande d'une personne qui est en possession ou a le contrôle de l'ensemble ou d'une

- (i) a day on which the conduct was engaged in, or
- (ii) the day on which any criminal proceedings relating thereto were finally disposed of,

whichever is the later; and

(b) in the case of an action based on the failure of any person to comply with an order of the Tribunal or another court, after two years from

- (i) a day on which the order of the Tribunal or court was contravened, or
- (ii) the day on which any criminal proceedings relating thereto were finally disposed of,

whichever is the later.

R.S., 1985, c. C-34, s. 36; R.S., 1985, c. 1 (4th Suppl.), s. 11.

PART V

[Repealed, R.S., 1985, c. 19 (2nd Suppl.), s. 29]

PART VI

Offences in Relation to Competition

Conspiracies, agreements or arrangements between competitors

45 (1) Every person commits an offence who, with a competitor of that person with respect to a product, conspires, agrees or arranges

- (a) to fix, maintain, increase or control the price for the supply of the product;
- (b) to allocate sales, territories, customers or markets for the production or supply of the product; or
- (c) to fix, maintain, control, prevent, lessen or eliminate the production or supply of the product.

Conspiracies, agreements or arrangements regarding employment

(1.1) Every person who is an employer commits an offence who, with another employer who is not affiliated with that person, conspires, agrees or arranges

partie VI, dans les deux ans qui suivent la dernière des dates suivantes :

- (i) soit la date du comportement en question,
 - (ii) soit la date où il est statué de façon définitive sur la poursuite;
- b)** dans le cas de celles qui sont fondées sur le défaut d'une personne d'obtempérer à une ordonnance du Tribunal ou d'un autre tribunal, dans les deux ans qui suivent la dernière des dates suivantes :
- (i) soit la date où a eu lieu la contravention à l'ordonnance du Tribunal ou de l'autre tribunal,
 - (ii) soit la date où il est statué de façon définitive sur la poursuite.

L.R. (1985), ch. C-34, art. 36; L.R. (1985), ch. 1 (4^e suppl.), art. 11.

PARTIE V

[Abrogée, L.R. (1985), ch. 19 (2^e suppl.), art. 29]

PARTIE VI

Infractions relatives à la concurrence

Complot, accord ou arrangement entre concurrents

45 (1) Commet une infraction quiconque, avec une personne qui est son concurrent à l'égard d'un produit, complotte ou conclut un accord ou un arrangement :

- a)** soit pour fixer, maintenir, augmenter ou contrôler le prix de la fourniture du produit;
- b)** soit pour attribuer des ventes, des territoires, des clients ou des marchés pour la production ou la fourniture du produit;
- c)** soit pour fixer, maintenir, contrôler, empêcher, réduire ou éliminer la production ou la fourniture du produit.

Complot, accord ou arrangement en matière d'emploi

(1.1) Commet une infraction une personne qui est un employeur qui, avec un employeur qui ne lui est pas affilié, complotte ou conclut un accord ou un arrangement :

(a) to fix, maintain, decrease or control salaries, wages or terms and conditions of employment; or

(b) to not solicit or hire each other's employees.

Penalty

(2) Every person who commits an offence under subsection (1) or (1.1) is guilty of an indictable offence and liable on conviction to imprisonment for a term not exceeding 14 years or to a fine in the discretion of the court, or to both.

Evidence of conspiracy, agreement or arrangement

(3) In a prosecution under subsection (1) or (1.1), the court may infer the existence of a conspiracy, agreement or arrangement from circumstantial evidence, with or without direct evidence of communication between or among the alleged parties to it, but, for greater certainty, the conspiracy, agreement or arrangement must be proved beyond a reasonable doubt.

Defence

(4) No person shall be convicted of an offence under subsection (1) or (1.1) in respect of a conspiracy, agreement or arrangement that would otherwise contravene that subsection if

(a) that person establishes, on a balance of probabilities, that

(i) it is ancillary to a broader or separate agreement or arrangement that includes the same parties, and

(ii) it is directly related to, and reasonably necessary for giving effect to, the objective of that broader or separate agreement or arrangement; and

(b) the broader or separate agreement or arrangement, considered alone, does not contravene that subsection.

Defence

(5) No person shall be convicted of an offence under subsection (1) in respect of a conspiracy, agreement or arrangement that relates only to the export of products from Canada, unless the conspiracy, agreement or arrangement

(a) has resulted in or is likely to result in a reduction or limitation of the real value of exports of a product;

a) pour fixer, maintenir, réduire ou contrôler les salaires, les traitements ou les conditions d'emploi;

b) pour ne pas solliciter ou embaucher les employés de l'autre employeur.

Peine

(2) Quiconque commet l'infraction prévue aux paragraphes (1) ou (1.1) est coupable d'un acte criminel et encourt un emprisonnement maximal de quatorze ans et une amende dont le montant est fixé par le tribunal, ou l'une de ces peines.

Preuve du complot, de l'accord ou de l'arrangement

(3) Dans les poursuites intentées en vertu des paragraphes (1) ou (1.1), le tribunal peut déduire l'existence du complot, de l'accord ou de l'arrangement en se basant sur une preuve circonstancielle, avec ou sans preuve directe de communication entre les présumées parties au complot, à l'accord ou à l'arrangement, mais il demeure entendu que le complot, l'accord ou l'arrangement doit être prouvé hors de tout doute raisonnable

Défense

(4) Nul ne peut être déclaré coupable d'une infraction prévue aux paragraphes (1) ou (1.1) à l'égard d'un complot, d'un accord ou d'un arrangement qui aurait par ailleurs contrevenu à ce paragraphe si, à la fois :

a) il établit, selon la prépondérance des probabilités :

(i) que le complot, l'accord ou l'arrangement, selon le cas, est accessoire à un accord ou à un arrangement plus large ou distinct qui inclut les mêmes parties,

(ii) qu'il est directement lié à l'objectif de l'accord ou de l'arrangement plus large ou distinct et est raisonnablement nécessaire à la réalisation de cet objectif;

b) l'accord ou l'arrangement plus large ou distinct, considéré individuellement, ne contrevient pas au même paragraphe.

Défense

(5) Nul ne peut être déclaré coupable d'une infraction prévue au paragraphe (1) si le complot, l'accord ou l'arrangement se rattache exclusivement à l'exportation de produits du Canada, sauf dans les cas suivants :

a) le complot, l'accord ou l'arrangement a eu pour résultat ou aura vraisemblablement pour résultat de réduire ou de limiter la valeur réelle des exportations d'un produit;

Application made under section 76, 79, 90.1 or 92

45.1 No proceedings may be commenced under subsection 45(1) or (1.1) against a person on the basis of facts that are the same or substantially the same as the facts on the basis of which an order against that person is sought by the Commissioner under section 76, 79, 90.1 or 92.

R.S., 1985, c. 19 (2nd Suppl.), s. 31; 2009, c. 2, s. 410; 2024, c. 15, s. 232.

Foreign directives

46 (1) Any corporation, wherever incorporated, that carries on business in Canada and that implements, in whole or in part in Canada, a directive, instruction, intimidation of policy or other communication to the corporation or any person from a person in a country other than Canada who is in a position to direct or influence the policies of the corporation, which communication is for the purpose of giving effect to a conspiracy, combination, agreement or arrangement entered into outside Canada that, if entered into in Canada, would have been in contravention of section 45, is, whether or not any director or officer of the corporation in Canada has knowledge of the conspiracy, combination, agreement or arrangement, guilty of an indictable offence and liable on conviction to a fine in the discretion of the court.

Limitation

(2) No proceedings may be commenced under this section against a particular company where an application has been made by the Commissioner under section 83 for an order against that company or any other person based on the same or substantially the same facts as would be alleged in proceedings under this section.

R.S., 1985, c. C-34, s. 46; R.S., 1985, c. 19 (2nd Suppl.), s. 32; 1999, c. 2, s. 37.

Definition of *bid-rigging*

47 (1) In this section, *bid-rigging* means

(a) an agreement or arrangement between or among two or more persons whereby one or more of those persons agrees or undertakes not to submit a bid or tender in response to a call or request for bids or tenders, or agrees or undertakes to withdraw a bid or tender submitted in response to such a call or request, or

(b) the submission, in response to a call or request for bids or tenders, of bids or tenders that are arrived at by agreement or arrangement between or among two or more bidders or tenderers,

Procédures en vertu des articles 76, 79, 90.1 ou 92

45.1 Aucune poursuite ne peut être intentée à l'endroit d'une personne en application des paragraphes 45(1) ou (1.1) si les faits au soutien de la poursuite sont les mêmes ou essentiellement les mêmes que ceux allégués au soutien de l'ordonnance que le commissaire a demandée à l'endroit de cette personne en vertu des articles 76, 79, 90.1 ou 92.

L.R. (1985), ch. 19 (2^e suppl.), art. 31; 2009, ch. 2, art. 410; 2024, ch. 15, art. 232.

Directives étrangères

46 (1) Toute personne morale, où qu'elle ait été constituée, qui exploite une entreprise au Canada et qui applique, en totalité ou en partie au Canada, une directive ou instruction ou un énoncé de politique ou autre communication à la personne morale ou à quelque autre personne, provenant d'une personne se trouvant dans un pays étranger qui est en mesure de diriger ou d'influencer les principes suivis par la personne morale, lorsque la communication a pour objet de donner effet à un complot, une association d'intérêts, un accord ou un arrangement intervenu à l'étranger qui, s'il était intervenu au Canada, aurait constitué une infraction visée à l'article 45, commet, qu'un administrateur ou dirigeant de la personne morale au Canada soit ou non au courant du complot, de l'association d'intérêts, de l'accord ou de l'arrangement, un acte criminel et encourt, sur déclaration de culpabilité, une amende à la discrétion du tribunal.

Restriction

(2) Aucune poursuite ne peut être intentée en vertu du présent article contre une personne morale déterminée lorsque le commissaire a demandé en vertu de l'article 83 de rendre une ordonnance contre cette personne morale ou toute autre personne et que cette demande est fondée sur les mêmes faits ou sensiblement les mêmes faits que ceux qui seraient exposés dans les poursuites intentées en vertu du présent article.

L.R. (1985), ch. C-34, art. 46; L.R. (1985), ch. 19 (2^e suppl.), art. 32; 1999, ch. 2, art. 37.

Définition de *truquage des offres*

47 (1) Au présent article, *truquage des offres* désigne :

a) l'accord ou arrangement entre plusieurs personnes par lequel au moins l'une d'elles consent ou s'engage à ne pas présenter d'offre ou de soumission en réponse à un appel ou à une demande d'offres ou de soumissions ou à en retirer une qui a été présentée dans le cadre d'un tel appel ou d'une telle demande;

b) la présentation, en réponse à un appel ou à une demande, d'offres ou de soumissions qui sont le fruit d'un accord ou arrangement entre plusieurs enchérisseurs ou soumissionnaires,

where the agreement or arrangement is not made known to the person calling for or requesting the bids or tenders at or before the time when any bid or tender is submitted or withdrawn, as the case may be, by any person who is a party to the agreement or arrangement.

Bid-rigging

(2) Every person who is a party to bid-rigging is guilty of an indictable offence and liable on conviction to a fine in the discretion of the court or to imprisonment for a term not exceeding 14 years, or to both.

Exception

(3) This section does not apply to

(a) an agreement or arrangement that is entered into or a submission that is arrived at only by parties each of which is, in respect of every one of the others, an affiliate; or

(b) an agreement or arrangement that is an *arrangement*, as defined in section 53.7 of the *Canada Transportation Act*, or a submission that is arrived at under that arrangement, that has been authorized by the Minister of Transport under subsection 53.73(8) of that Act and for which the authorization has not been revoked, if the agreement, arrangement or submission is directly related to, and reasonably necessary for giving effect to, the objective of the arrangement.

R.S., 1985, c. C-34, s. 47; R.S., 1985, c. 19 (2nd Supp.), s. 33; 2009, c. 2, s. 411; 2018, c. 8, s. 111; 2018, c. 10, s. 86; 2018, c. 10, s. 97.

Conspiracy relating to professional sport

48 (1) Every one who conspires, combines, agrees or arranges with another person

(a) to limit unreasonably the opportunities for any other person to participate, as a player or competitor, in professional sport or to impose unreasonable terms or conditions on those persons who so participate, or

(b) to limit unreasonably the opportunity for any other person to negotiate with and, if agreement is reached, to play for the team or club of his choice in a professional league

is guilty of an indictable offence and liable on conviction to a fine in the discretion of the court or to imprisonment for a term not exceeding five years or to both.

lorsque l'accord ou l'arrangement n'est pas porté à la connaissance de la personne procédant à l'appel ou à la demande, au plus tard au moment de la présentation ou du retrait de l'offre ou de la soumission par une des parties à cet accord ou arrangement.

Truquage des offres

(2) Quiconque participe à un truquage d'offres commet un acte criminel et encourt, sur déclaration de culpabilité, l'amende que le tribunal estime indiquée et un emprisonnement maximal de quatorze ans, ou l'une de ces peines.

Restriction

(3) Le présent article ne s'applique pas :

a) à un accord, à un arrangement ou à une soumission intervenu exclusivement entre des parties qui sont chacune des affiliées de toutes les autres;

b) à un accord ou à un arrangement constituant une *entente*, au sens de l'article 53.7 de la *Loi sur les transports au Canada*, autorisée par le ministre des Transports en application du paragraphe 53.73(8) de cette loi, ou à une soumission intervenue dans le cadre d'une telle entente, dans la mesure où l'autorisation n'a pas été révoquée et l'accord, l'arrangement ou la soumission est directement lié à l'objectif de l'entente et raisonnablement nécessaire à la réalisation de cet objectif.

L.R. (1985), ch. C-34, art. 47; L.R. (1985), ch. 19 (2^e suppl.), art. 33; 2009, ch. 2, art. 411; 2018, ch. 8, art. 111; 2018, ch. 10, art. 86; 2018, ch. 10, art. 97.

Complot relatif au sport professionnel

48 (1) Commet un acte criminel et encourt, sur déclaration de culpabilité, une amende à la discrétion du tribunal et un emprisonnement maximal de cinq ans, ou l'une de ces peines, quiconque complot, se coalise ou conclut un accord ou arrangement avec une autre personne :

a) soit pour limiter déraisonnablement les possibilités qu'a une autre personne de participer, en tant que joueur ou concurrent, à un sport professionnel ou pour imposer des conditions déraisonnables à ces participants;

b) soit pour limiter déraisonnablement la possibilité qu'a une autre personne de négocier avec l'équipe ou le club de son choix dans une ligue de professionnels et, si l'accord est conclu, de jouer pour cette équipe ou ce club.

(i) that is entered into only by financial institutions each of which is an affiliate of each of the others.

Definition of *federal financial institution*

(3) In this section and section 45, *federal financial institution* means a bank or an authorized foreign bank within the meaning of section 2 of the *Bank Act*, a company to which the *Trust and Loan Companies Act* applies or a company or society to which the *Insurance Companies Act* applies.

Where proceedings commenced under section 76, 79, 90.1 or 92

(4) No proceedings may be commenced under this section against a person on the basis of facts that are the same or substantially the same as the facts on the basis of which an order against that person is sought by the Commissioner under section 76, 79, 90.1 or 92.

R.S., 1985, c. C-34, s. 49; R.S., 1985, c. 19 (2nd Supp.), s. 34; 1991, c. 45, s. 548, c. 46, ss. 591, 593, c. 47, s. 715; 1993, c. 34, s. 51; 1999, c. 2, s. 37, c. 28, s. 153, c. 31, s. 49(F); 2009, c. 2, s. 412.

50 [Repealed, 2009, c. 2, s. 413]

51 [Repealed, 2009, c. 2, s. 413]

False or misleading representations

52 (1) No person shall, for the purpose of promoting, directly or indirectly, the supply or use of a product or for the purpose of promoting, directly or indirectly, any business interest, by any means whatever, knowingly or recklessly make a representation to the public that is false or misleading in a material respect.

Proof of certain matters not required

(1.1) For greater certainty, in establishing that subsection (1) was contravened, it is not necessary to prove that

- (a) any person was deceived or misled;
- (b) any member of the public to whom the representation was made was within Canada; or
- (c) the representation was made in a place to which the public had access.

Permitted representations

(1.2) For greater certainty, in this section and in sections 52.01, 52.1, 74.01, 74.011 and 74.02, the making or sending of a representation includes permitting a representation to be made or sent.

Définition de *institution financière fédérale*

(3) Au présent article et à l'article 45, *institution financière fédérale* s'entend d'une banque, d'une banque étrangère autorisée, au sens de l'article 2 de la *Loi sur les banques*, d'une société régie par la *Loi sur les sociétés de fiducie et de prêt* ou d'une société ou société de secours régie par la *Loi sur les sociétés d'assurances*.

Procédures en vertu des articles 76, 79, 90.1 ou 92

(4) Aucune poursuite ne peut être intentée à l'endroit d'une personne en application du présent article si les faits au soutien de la poursuite sont les mêmes ou essentiellement les mêmes que ceux allégués au soutien d'une ordonnance à l'endroit de cette personne demandée par le commissaire en vertu des articles 76, 79, 90.1 ou 92.

L.R. (1985), ch. C-34, art. 49; L.R. (1985), ch. 19 (2^e suppl.), art. 34; 1991, ch. 45, art. 548, ch. 46, art. 591 et 593, ch. 47, art. 715; 1993, ch. 34, art. 51; 1999, ch. 2, art. 37, ch. 28, art. 153, ch. 31, art. 49(F); 2009, ch. 2, art. 412.

50 [Abrogé, 2009, ch. 2, art. 413]

51 [Abrogé, 2009, ch. 2, art. 413]

Indications fausses ou trompeuses

52 (1) Nul ne peut, de quelque manière que ce soit, aux fins de promouvoir directement ou indirectement soit la fourniture ou l'utilisation d'un produit, soit des intérêts commerciaux quelconques, donner au public, sciemment ou sans se soucier des conséquences, des indications fausses ou trompeuses sur un point important.

Preuve non nécessaire

(1.1) Il est entendu qu'il n'est pas nécessaire, afin d'établir qu'il y a eu infraction au paragraphe (1), de prouver :

- a) qu'une personne a été trompée ou induite en erreur;
- b) qu'une personne faisant partie du public à qui les indications ont été données se trouvait au Canada;
- c) que les indications ont été données à un endroit auquel le public avait accès.

Indications

(1.2) Il est entendu que, pour l'application du présent article et des articles 52.01, 52.1, 74.01, 74.011 et 74.02, le fait de permettre que des indications soient données ou envoyées est assimilé au fait de donner ou d'envoyer des indications.

Drip pricing

(1.3) For greater certainty, the making of a representation of a price that is not attainable due to fixed obligatory charges or fees constitutes a false or misleading representation, unless the obligatory charges or fees represent only an amount imposed on a purchaser of the product referred to in subsection (1) by or under an Act of Parliament or the legislature of a province.

Representations accompanying products

(2) For the purposes of this section, a representation that is

- (a)** expressed on an article offered or displayed for sale or its wrapper or container,
- (b)** expressed on anything attached to, inserted in or accompanying an article offered or displayed for sale, its wrapper or container, or anything on which the article is mounted for display or sale,
- (c)** expressed on an in-store or other point-of-purchase display,
- (d)** made in the course of in-store or door-to-door selling to a person as ultimate user, or by communicating orally by any means of telecommunication to a person as ultimate user, or
- (e)** contained in or on anything that is sold, sent, delivered, transmitted or made available in any other manner to a member of the public,

is deemed to be made to the public by and only by the person who causes the representation to be so expressed, made or contained, subject to subsection (2.1).

Representations from outside Canada

(2.1) Where a person referred to in subsection (2) is outside Canada, a representation described in paragraph (2)(a), (b), (c) or (e) is, for the purposes of subsection (1), deemed to be made to the public by the person who imports into Canada the article, thing or display referred to in that paragraph.

Deemed representation to public

(3) Subject to subsection (2), a person who, for the purpose of promoting, directly or indirectly, the supply or use of a product or any business interest, supplies to a wholesaler, retailer or other distributor of a product any material or thing that contains a representation of a nature referred to in subsection (1) is deemed to have made that representation to the public.

Indication de prix partiel

(1.3) Il est entendu que l'indication d'un prix qui n'est pas atteignable en raison de frais obligatoires fixes qui s'y ajoutent constitue une indication fausse ou trompeuse, sauf si les frais obligatoires ne représentent que le montant imposé sous le régime d'une loi fédérale ou provinciale à l'acquéreur du produit visé au paragraphe (1).

Indications accompagnant un produit

(2) Pour l'application du présent article, sauf le paragraphe (2.1), sont réputées n'être données au public que par la personne de qui elles proviennent les indications qui, selon le cas :

- a)** apparaissent sur un article mis en vente ou exposé pour la vente, ou sur son emballage;
- b)** apparaissent soit sur quelque chose qui est fixé à un article mis en vente ou exposé pour la vente ou à son emballage ou qui y est inséré ou joint, soit sur quelque chose qui sert de support à l'article pour l'étalage ou la vente;
- c)** apparaissent à un étalage d'un magasin ou d'un autre point de vente;
- d)** sont données, au cours d'opérations de vente en magasin, par démarchage ou par communication orale faite par tout moyen de télécommunication, à un usager éventuel;
- e)** se trouvent dans ou sur quelque chose qui est vendu, envoyé, livré ou transmis au public ou mis à sa disposition de quelque manière que ce soit.

Indications provenant de l'étranger

(2.1) Dans le cas où la personne visée au paragraphe (2) est à l'étranger, les indications visées aux alinéas (2)a), b), c) ou e) sont réputées, pour l'application du paragraphe (1), être données au public par la personne qui importe au Canada l'article, la chose ou l'instrument d'étalage visé à l'alinéa correspondant.

Idem

(3) Sous réserve du paragraphe (2), quiconque, aux fins de promouvoir directement ou indirectement soit la fourniture ou l'utilisation d'un produit, soit des intérêts commerciaux quelconques, fournit à un grossiste, détaillant ou autre distributeur d'un produit de la documentation ou autre chose contenant des indications du genre mentionné au paragraphe (1) est réputé avoir donné ces indications au public.

General impression to be considered

(4) In a prosecution for a contravention of this section, the general impression conveyed by a representation as well as its literal meaning shall be taken into account in determining whether or not the representation is false or misleading in a material respect.

Offence and punishment

(5) Any person who contravenes subsection (1) is guilty of an offence and liable

(a) on conviction on indictment, to a fine in the discretion of the court or to imprisonment for a term not exceeding 14 years, or to both; or

(b) on summary conviction, to a fine not exceeding \$200,000 or to imprisonment for a term not exceeding one year, or to both.

Reviewable conduct

(6) Nothing in Part VII.1 shall be read as excluding the application of this section to a representation that constitutes reviewable conduct within the meaning of that Part.

Duplication of proceedings

(7) No proceedings may be commenced under this section against a person against whom an order is, on application by the Commissioner, sought under Part VII.1 on the basis of the same or substantially the same facts as would be alleged in proceedings under this section.

R.S., 1985, c. C-34, s. 52; 1999, c. 2, s. 12; 2009, c. 2, s. 414; 2010, c. 23, s. 74; 2014, c. 31, s. 33; 2022, c. 10, s. 258; 2024, c. 15, s. 233; 2024, c. 15, s. 233.1.

False or misleading representation — sender or subject matter information

52.01 (1) No person shall, for the purpose of promoting, directly or indirectly, any business interest or the supply or use of a product, knowingly or recklessly send or cause to be sent a false or misleading representation in the sender information or subject matter information of an electronic message.

False or misleading representation — electronic message

(2) No person shall, for the purpose of promoting, directly or indirectly, any business interest or the supply or use of a product, knowingly or recklessly send or cause to be sent in an electronic message a representation that is false or misleading in a material respect.

Il faut tenir compte de l'impression générale

(4) Dans toute poursuite intentée en vertu du présent article, pour déterminer si les indications sont fausses ou trompeuses sur un point important il faut tenir compte de l'impression générale qu'elles donnent ainsi que de leur sens littéral.

Infraction et peine

(5) Quiconque contrevient au paragraphe (1) commet une infraction et encourt, sur déclaration de culpabilité :

a) par mise en accusation, l'amende que le tribunal estime indiquée et un emprisonnement maximal de quatorze ans, ou l'une de ces peines;

b) par procédure sommaire, une amende maximale de 200 000 \$ et un emprisonnement maximal d'un an, ou l'une de ces peines.

Comportement susceptible d'examen

(6) Le présent article s'applique au fait de donner des indications constituant, au sens de la partie VII.1, un comportement susceptible d'examen.

Une seule poursuite

(7) Il ne peut être intenté de poursuite en vertu du présent article contre une personne contre laquelle le commissaire a demandé une ordonnance aux termes de la partie VII.1, si les faits qui seraient allégués au soutien de la poursuite sont les mêmes ou essentiellement les mêmes que ceux qui l'ont été au soutien de la demande.

L.R. (1985), ch. C-34, art. 52; 1999, ch. 2, art. 12; 2009, ch. 2, art. 414; 2010, ch. 23, art. 74; 2014, ch. 31, art. 33; 2022, ch. 10, art. 258; 2024, ch. 15, art. 233; 2024, ch. 15, art. 233.1.

Indications fausses ou trompeuses dans les renseignements sur l'expéditeur ou dans l'objet

52.01 (1) Nul ne peut, aux fins de promouvoir, directement ou indirectement, soit la fourniture ou l'usage d'un produit, soit des intérêts commerciaux quelconques, envoyer ou faire envoyer, sciemment ou sans se soucier des conséquences, des indications fausses ou trompeuses dans les renseignements sur l'expéditeur ou dans l'objet d'un message électronique.

Indications fausses ou trompeuses dans un message électronique

(2) Nul ne peut, aux fins de promouvoir, directement ou indirectement, soit la fourniture ou l'usage d'un produit, soit des intérêts commerciaux quelconques, envoyer ou faire envoyer dans un message électronique, sciemment ou sans se soucier des conséquences, des indications fausses ou trompeuses sur un point important.

person, refuses to answer a question or to produce a record or thing to the person designated under paragraph 30.11(2)(c), where no ruling has been made under paragraph 30.11(8)(a),

(a) without giving the detailed statement required by subsection 30.11(9); or

(b) if the person was previously asked the same question or requested to produce the same record or thing and refused to do so and the reasons on which that person based the previous refusal were determined not to be well-founded by

(i) a judge, if the reasons were based on the Canadian law of non-disclosure of information or privilege, or

(ii) a court of the foreign state or by a person designated by the foreign state, if the reasons were based on a law that applies to the foreign state.

2002, c. 16, s. 7.

Contravention of order under Part VII.1 or VIII

66 Every person who contravenes an order made under Part VII.1, except paragraphs 74.1(1)(c) and (d), or under Part VIII, except subsection 79(3.1), is guilty of an offence and liable

(a) on conviction on indictment, to a fine in the discretion of the court or to imprisonment for a term not exceeding five years, or to both; or

(b) on summary conviction, to a fine not exceeding \$25,000 or to imprisonment for a term not exceeding one year, or to both.

R.S., 1985, c. C-34, s. 66; R.S., 1985, c. 19 (2nd Supp.), s. 39; 1999, c. 2, s. 19; 2009, c. 2, s. 420.

Whistleblowing

66.1 (1) Any person who has reasonable grounds to believe that a person has committed or intends to commit an offence under the Act, may notify the Commissioner of the particulars of the matter and may request that his or her identity be kept confidential with respect to the notification.

Confidentiality

(2) The Commissioner shall keep confidential the identity of a person who has notified the Commissioner under subsection (1) and to whom an assurance of confidentiality has been provided by any person who performs duties or functions in the administration or enforcement of this Act.

1999, c. 2, s. 19.

termes de l'alinéa 30.11(8)a), refuse, sans motif valable et suffisant dont la preuve lui incombe, de répondre à une question ou de remettre des documents ou autres choses à la personne désignée en conformité avec l'alinéa 30.11(2)c) :

a) soit sans remettre l'exposé détaillé visé au paragraphe 30.11(9);

b) soit après que la question lui a déjà été posée ou qu'on lui a déjà demandé de remettre les documents ou autres choses et que les motifs de refus ont été rejetés :

(i) par le juge, s'ils sont fondés sur le droit canadien relatif à la non-divulgence de renseignements et à l'existence de privilèges,

(ii) par un tribunal d'un État étranger ou une personne désignée par celui-ci, s'ils sont fondés sur une règle de droit en vigueur dans cet État.

2002, ch. 16, art. 7.

Ordonnances : parties VII.1 et VIII

66 Quiconque contrevient à une ordonnance rendue en vertu de la partie VII.1, exception faite des alinéas 74.1(1)c) et d), ou en vertu de la partie VIII, exception faite du paragraphe 79(3.1), commet une infraction et encourt, sur déclaration de culpabilité :

a) par mise en accusation, l'amende que le tribunal estime indiquée et un emprisonnement maximal de cinq ans, ou l'une de ces peines;

b) par procédure sommaire, une amende maximale de 25 000 \$ et un emprisonnement maximal d'un an, ou l'une de ces peines.

L.R. (1985), ch. C-34, art. 66; L.R. (1985), ch. 19 (2^e suppl.), art. 39; 1999, ch. 2, art. 19; 2009, ch. 2, art. 420.

Dénonciation

66.1 (1) Toute personne qui a des motifs raisonnables de croire qu'une autre personne a commis une infraction à la présente loi, ou a l'intention d'en commettre une, peut notifier au commissaire des détails sur la question et exiger l'anonymat relativement à cette dénonciation.

Caractère confidentiel

(2) Le commissaire est tenu de garder confidentielle l'identité du dénonciateur auquel l'assurance de l'anonymat a été donnée par quiconque exerce des attributions sous le régime de la présente loi.

1999, ch. 2, art. 19.

provided in Part XXI of the *Criminal Code* for appeals from a trial court and from a court of appeal.

Proceedings optional

(4) Proceedings under subsection 34(2) may in the discretion of the Attorney General of Canada be instituted in either the Federal Court or a superior court of criminal jurisdiction in the province but no prosecution shall be instituted against an individual in the Federal Court in respect of an offence under Part VI or section 66 without the consent of the individual.

R.S., 1985, c. C-34, s. 73; 1999, c. 2, s. 21; 2002, c. 8, ss. 183, 198, c. 16, s. 8; 2009, c. 2, s. 421.

74 [Repealed, 1999, c. 2, s. 22]

PART VII.1

Deceptive Marketing Practices

Reviewable Matters

Misrepresentations to public

74.01 (1) A person engages in reviewable conduct who, for the purpose of promoting, directly or indirectly, the supply or use of a product or for the purpose of promoting, directly or indirectly, any business interest, by any means whatever,

(a) makes a representation to the public that is false or misleading in a material respect;

(b) makes a representation to the public in the form of a statement, warranty or guarantee of the performance, efficacy or length of life of a product that is not based on an adequate and proper test thereof, the proof of which lies on the person making the representation;

(b.1) makes a representation to the public in the form of a statement, warranty or guarantee of a product's benefits for protecting or restoring the environment or mitigating the environmental, social and ecological causes or effects of climate change that is not based on an adequate and proper test, the proof of which lies on the person making the representation;

(b.2) makes a representation to the public with respect to the benefits of a business or business activity for protecting or restoring the environment or mitigating the environmental and ecological causes or effects

présente loi, conformément à la partie XXI du *Code criminel* pour les appels d'un tribunal de première instance et d'une cour d'appel.

Procédures facultatives

(4) Des procédures engagées aux termes du paragraphe 34(2) peuvent, à la discrétion du procureur général du Canada, être intentées soit devant la Cour fédérale, soit devant une cour supérieure de juridiction criminelle dans la province, mais aucune poursuite ne peut être intentée contre un particulier devant la Cour fédérale à l'égard d'une infraction visée à la partie VI ou à l'article 66 sans le consentement de ce particulier.

L.R. (1985), ch. C-34, art. 73; 1999, ch. 2, art. 21; 2002, ch. 8, art. 183 et 198, ch. 16, art. 8; 2009, ch. 2, art. 421.

74 [Abrogé, 1999, ch. 2, art. 22]

PARTIE VII.1

Pratiques commerciales trompeuses

Comportement susceptible d'examen

Indications trompeuses

74.01 (1) Est susceptible d'examen le comportement de quiconque donne au public, de quelque manière que ce soit, aux fins de promouvoir directement ou indirectement soit la fourniture ou l'usage d'un produit, soit des intérêts commerciaux quelconques :

a) ou bien des indications fausses ou trompeuses sur un point important;

b) ou bien, sous la forme d'une déclaration ou d'une garantie visant le rendement, l'efficacité ou la durée utile d'un produit, des indications qui ne se fondent pas sur une épreuve suffisante et appropriée, dont la preuve incombe à la personne qui donne les indications;

b.1) ou bien, sous la forme d'une déclaration ou d'une garantie visant les avantages d'un produit pour la protection ou la restauration de l'environnement ou l'atténuation des causes ou des effets environnementaux, sociaux et écologiques des changements climatiques, des indications qui ne se fondent pas sur une épreuve suffisante et appropriée, dont la preuve incombe à la personne qui donne les indications;

b.2) ou bien des indications sur les avantages d'une entreprise ou de l'activité d'une entreprise pour la protection ou la restauration de l'environnement ou

PART VIII

Matters Reviewable by Tribunal

Restrictive Trade Practices

Refusal to Deal

Jurisdiction of Tribunal — cases of refusal to deal

75 (1) The Tribunal may, on application by the Commissioner or a person granted leave under section 103.1, order one or more suppliers of a product, including a means of diagnosis or repair, in a market to accept a person as a customer, or to make the means of diagnosis or repair available to a person, within a specified period and on the terms that the Tribunal considers appropriate if the Tribunal finds that

- (a) the person is substantially affected in the whole or part of their business or is precluded from carrying on business due to their inability to obtain adequate supplies of the product anywhere in the market on usual trade terms;
- (b) the person is unable to obtain adequate supplies of the product because of insufficient competition among suppliers of the product in the market;
- (c) the person is willing and able to meet the usual trade terms of the supplier or suppliers of the product;
- (d) the product is in ample supply or, in the case of a means of diagnosis or repair, can be readily supplied; and
- (e) the refusal to deal is having or is likely to have an adverse effect on competition in a market.

Non-application

(1.1) An order made under subsection (1) does not apply in the case of an article if, within the specified time, any customs duties on the article are removed, reduced or remitted and the effect of the removal, reduction or remission is to place the person on an equal footing with other persons who are able to obtain adequate supplies of the article in Canada.

PARTIE VIII

Affaires que le Tribunal peut examiner

Pratiques restrictives du commerce

Refus de vendre

Compétence du Tribunal dans les cas de refus de vendre

75 (1) Le Tribunal peut, sur demande du commissaire ou d'une personne autorisée en vertu de l'article 103.1, ordonner qu'un ou plusieurs fournisseurs d'un produit, y compris un moyen de diagnostic ou de réparation, sur un marché acceptent une personne comme client, ou fournissent à une personne un moyen de diagnostic ou de réparation, dans un délai déterminé et aux conditions qu'il estime indiquées, s'il conclut, à la fois :

- a) que la personne est sensiblement gênée dans tout ou partie de son entreprise ou ne peut exploiter une entreprise du fait qu'elle est incapable de se procurer le produit en quantité suffisante où que ce soit sur le marché, aux conditions de commerce normales;
- b) que la personne est incapable de se procurer le produit en quantité suffisante en raison de l'insuffisance de la concurrence entre les fournisseurs de ce produit sur le marché;
- c) que la personne accepte et est en mesure de respecter les conditions de commerce normales imposées par le ou les fournisseurs de ce produit;
- d) que le produit est disponible en quantité amplement suffisante ou, dans le cas d'un moyen de diagnostic ou de réparation, peut être facilement fourni;
- e) que le refus de vendre a ou aura vraisemblablement pour effet de nuire à la concurrence dans un marché.

Non-application

(1.1) L'ordonnance rendue en vertu du paragraphe (1) ne s'applique pas dans le cas d'un article si, au cours du délai déterminé, les droits de douane qui lui sont applicables sont supprimés, réduits ou remis de façon à mettre la personne sur un pied d'égalité avec d'autres personnes qui sont capables de se procurer l'article en quantité suffisante au Canada.

When persons deemed to be affiliated

(6) For the purposes of subsection (4) in its application to market restriction, where there is an agreement whereby one person (the “first” person) supplies or causes to be supplied to another person (the “second” person) an ingredient or ingredients that the second person processes by the addition of labour and material into an article of food or drink that he then sells in association with a trademark that the first person owns or in respect of which the first person is a registered user, the first person and the second person are deemed, in respect of the agreement, to be affiliated.

Inferences

(7) In considering an application by a person granted leave under section 103.1, the Tribunal may not draw any inference from the fact that the Commissioner has or has not taken any action in respect of the matter raised by the application.

R.S., 1985, c. C-34, s. 77; R.S., 1985, c. 19 (2nd Supp.), s. 45; 1999, c. 2, ss. 23, 37, c. 31, s. 52(F); 2002, c. 16, ss. 11.2, 11.3; 2014, c. 20, s. 366(E); 2018, c. 8, s. 113; 2024, c. 15, s. 246.

Abuse of Dominant Position

Definition of *anti-competitive act*

78 (1) For the purposes of section 79, ***anti-competitive act*** means any act intended to have a predatory, exclusionary or disciplinary negative effect on a competitor, or to have an adverse effect on competition, and includes any of the following acts:

(a) squeezing, by a vertically integrated supplier, of the margin available to an unintegrated customer who competes with the supplier, for the purpose of impeding or preventing the customer’s entry into, or expansion in, a market;

(b) acquisition by a supplier of a customer who would otherwise be available to a competitor of the supplier, or acquisition by a customer of a supplier who would otherwise be available to a competitor of the customer, for the purpose of impeding or preventing the competitor’s entry into, or eliminating the competitor from, a market;

(c) freight equalization on the plant of a competitor for the purpose of impeding or preventing the competitor’s entry into, or eliminating the competitor from, a market;

(d) use of fighting brands introduced selectively on a temporary basis to discipline or eliminate a competitor;

Cas où les personnes sont réputées être affiliées

(6) Pour l’application du paragraphe (4) en ce qui concerne la limitation du marché, dans le cadre de tout accord par lequel une personne (la « première » personne) fournit ou fait fournir à une autre personne (la « seconde » personne) un ou des ingrédients que cette dernière transforme, après apport de travail et de matériaux, en aliments ou boissons qu’elle vend sous une marque de commerce appartenant à la première personne ou dont cette dernière est l’usager inscrit, ces deux personnes sont, à l’égard de cet accord, réputées être affiliées.

Application

(7) Le Tribunal saisi d’une demande présentée par une personne autorisée en vertu de l’article 103.1 ne peut tirer quelque conclusion que ce soit du fait que le commissaire a accompli un geste ou non à l’égard de l’objet de la demande.

L.R. (1985), ch. C-34, art. 77; L.R. (1985), ch. 19 (2^e suppl.), art. 45; 1999, ch. 2, art. 23 et 37, ch. 31, art. 52(F); 2002, ch. 16, art. 11.2 et 11.3; 2014, ch. 20, art. 366(A); 2018, ch. 8, art. 113; 2024, ch. 15, art. 246.

Abus de position dominante

Définition de *agissement anti-concurrentiel*

78 (1) Pour l’application de l’article 79, ***agissement anti-concurrentiel*** s’entend de tout agissement destiné à avoir un effet négatif visant l’exclusion, l’éviction ou la mise au pas d’un concurrent, ou à nuire à la concurrence, notamment les agissements suivants :

a) la compression, par un fournisseur intégré verticalement, de la marge bénéficiaire accessible à un client non intégré qui est en concurrence avec ce fournisseur, dans les cas où cette compression a pour but d’empêcher l’entrée ou la participation accrue du client dans un marché ou encore de faire obstacle à cette entrée ou à cette participation accrue;

b) l’acquisition par un fournisseur d’un client qui serait par ailleurs accessible à un concurrent du fournisseur, ou l’acquisition par un client d’un fournisseur qui serait par ailleurs accessible à un concurrent du client, dans le but d’empêcher ce concurrent d’entrer dans un marché, dans le but de faire obstacle à cette entrée ou encore dans le but de l’éliminer d’un marché;

c) la péréquation du fret en utilisant comme base l’établissement d’un concurrent dans le but d’empêcher son entrée dans un marché ou d’y faire obstacle ou encore de l’éliminer d’un marché;

(e) pre-emption of scarce facilities or resources required by a competitor for the operation of a business, with the object of withholding the facilities or resources from a market;

(f) buying up of products to prevent the erosion of existing price levels;

(g) adoption of product specifications that are incompatible with products produced by any other person and are designed to prevent his entry into, or to eliminate him from, a market;

(h) requiring or inducing a supplier to sell only or primarily to certain customers, or to refrain from selling to a competitor, with the object of preventing a competitor's entry into, or expansion in, a market;

(i) selling articles at a price lower than the acquisition cost for the purpose of disciplining or eliminating a competitor;

(j) a selective or discriminatory response to an actual or potential competitor for the purpose of impeding or preventing the competitor's entry into, or expansion in, a market or eliminating the competitor from a market; and

(k) directly or indirectly imposing excessive and unfair selling prices.

(2) [Repealed, 2009, c. 2, s. 427]

R.S., 1985, c. 19 (2nd Supp.), s. 45; 2000, c. 15, s. 13; 2009, c. 2, s. 427; 2022, c. 10, s. 261; 2023, c. 31, s. 7.1.

Prohibition if abuse of dominant position

79 (1) On application by the Commissioner or a person granted leave under section 103.1, if the Tribunal finds that one or more persons substantially or completely control a class or species of business throughout Canada or any area of Canada, it may make an order prohibiting the person or persons from engaging in a practice or conduct if it finds that the person or persons have engaged in or are engaging in

(a) a practice of anti-competitive acts; or

(b) conduct

(i) that had, is having or is likely to have the effect of preventing or lessening competition substantially

d) l'utilisation sélective et temporaire de marques de combat destinées à mettre au pas ou à éliminer un concurrent;

e) la préemption d'installations ou de ressources rares nécessaires à un concurrent pour l'exploitation d'une entreprise, dans le but de retenir ces installations ou ces ressources hors d'un marché;

f) l'achat de produits dans le but d'empêcher l'érosion des structures de prix existantes;

g) l'adoption, pour des produits, de normes incompatibles avec les produits fabriqués par une autre personne et destinées à empêcher l'entrée de cette dernière dans un marché ou à l'éliminer d'un marché;

h) le fait d'inciter un fournisseur à ne vendre uniquement ou principalement qu'à certains clients, ou à ne pas vendre à un concurrent ou encore le fait d'exiger l'une ou l'autre de ces attitudes de la part de ce fournisseur, afin d'empêcher l'entrée ou la participation accrue d'un concurrent dans un marché;

i) le fait de vendre des articles à un prix inférieur au coût d'acquisition de ces articles dans le but de discipliner ou d'éliminer un concurrent;

j) la réponse sélective ou discriminatoire à un concurrent actuel ou potentiel, visant à entraver ou à empêcher l'entrée ou l'expansion d'un concurrent sur un marché ou à l'éliminer du marché;

k) l'imposition directe ou indirecte de prix de vente excessifs et injustes.

(2) [Abrogé, 2009, ch. 2, art. 427]

L.R. (1985), ch. 19 (2^e suppl.), art. 45; 2000, ch. 15, art. 13; 2009, ch. 2, art. 427; 2022, ch. 10, art. 261; 2023, ch. 31, art. 7.1.

Ordonnance d'interdiction : abus de position dominante

79 (1) Lorsque, à la suite d'une demande du commissaire ou d'une personne autorisée en vertu de l'article 103.1, il conclut qu'une ou plusieurs personnes contrôlent sensiblement ou complètement une catégorie ou espèce d'entreprises à la grandeur du Canada ou d'une de ses régions et adoptent ou ont adopté une pratique ou un comportement ci-après, le Tribunal peut rendre une ordonnance leur interdisant d'adopter la pratique ou le comportement :

a) une pratique d'agissements anti-concurrentiels;

b) un comportement qui a, a eu ou aura vraisemblablement pour effet d'empêcher ou de diminuer sensiblement la concurrence dans un marché dans lequel la

in a market in which the person or persons have a plausible competitive interest, and

(ii) the effect is not a result of superior competitive performance.

Additional or alternative order

(2) If, on an application under subsection (1), the Tribunal finds that a practice of anti-competitive acts amounts to conduct that has had or is having the effect of preventing or lessening competition substantially in a market in which the person or persons have a plausible competitive interest and that an order under subsection (1) is not likely to restore competition in that market, the Tribunal may, in addition to or in lieu of making an order under subsection (1), make an order directing any or all persons against whom an order is sought to take actions, including the divestiture of assets or shares, that are reasonable and necessary to overcome the effects of the practice in that market.

Limitation

(3) In making an order under subsection (2), the Tribunal shall make the order in such terms as will in its opinion interfere with the rights of any person to whom the order is directed or any other person affected by it only to the extent necessary to achieve the purpose of the order.

Administrative monetary penalty

(3.1) If the Tribunal finds that a person has engaged in or is engaging in a practice of anti-competitive acts that amounts to conduct that has had or is having the effect of preventing or lessening competition substantially in a market in which the person has a plausible competitive interest and it makes an order against the person under subsection (1) or (2), it may also order them to pay, in any manner that it specifies, an administrative monetary penalty in an amount not exceeding the greater of

(a) \$25,000,000 and, for each subsequent order under either of those subsections, an amount not exceeding \$35,000,000, and

(b) three times the value of the benefit derived from the anti-competitive practice, or, if that amount cannot be reasonably determined, 3% of the person's annual worldwide gross revenues.

personne ou les personnes ont un intérêt concurrentiel valable, cet effet ne résultant pas d'un rendement concurrentiel supérieur.

Ordonnance supplémentaire ou substitutive

(2) Dans les cas où, à la suite de la demande visée au paragraphe (1), il conclut qu'une pratique d'agissements anti-concurrentiels constitue un comportement qui a eu ou a pour effet d'empêcher ou de diminuer sensiblement la concurrence dans un marché dans lequel la personne a un intérêt concurrentiel valable et qu'une ordonnance rendue aux termes du paragraphe (1) n'aurait vraisemblablement pas pour effet de rétablir la concurrence dans ce marché, le Tribunal peut, en sus ou au lieu de rendre l'ordonnance prévue au paragraphe (1), rendre une ordonnance enjoignant à l'une ou l'autre ou à l'ensemble des personnes visées par la demande d'ordonnance de prendre des mesures raisonnables et nécessaires dans le but d'enrayer les effets de la pratique sur le marché en question et, notamment, de se départir d'éléments d'actif ou d'actions.

Restriction

(3) Lorsque le Tribunal rend une ordonnance en application du paragraphe (2), il le fait aux conditions qui, à son avis, ne porteront atteinte aux droits de la personne visée par cette ordonnance ou à ceux des autres personnes touchées par cette ordonnance que dans la mesure de ce qui est nécessaire à la réalisation de l'objet de l'ordonnance.

Sanction administrative pécuniaire

(3.1) S'il conclut qu'une personne adopte ou a adopté une pratique d'agissements anti-concurrentiels constituant un comportement qui a eu ou a pour effet d'empêcher ou de diminuer sensiblement la concurrence dans un marché dans lequel la personne a un intérêt concurrentiel valable et rend une ordonnance en vertu de l'un des paragraphes (1) ou (2) contre la personne, le Tribunal peut aussi lui ordonner de payer, selon les modalités qu'il peut préciser, une sanction administrative pécuniaire maximale qui ne peut dépasser le plus élevé des montants suivants :

a) 25 000 000 \$ et, pour toute ordonnance subséquente rendue en vertu de l'un de ces paragraphes, 35 000 000 \$;

b) trois fois la valeur du bénéfice sur lequel la pratique a eu une incidence ou, si ce montant ne peut pas être déterminé raisonnablement, trois pour cent des recettes globales brutes annuelles de cette personne.

Aggravating or mitigating factors

(3.2) In determining the amount of an administrative monetary penalty, the Tribunal shall take into account any evidence of the following:

- (a)** the effect on competition in the relevant market;
- (b)** the gross revenue from sales affected by the practice;
- (c)** any actual or anticipated profits affected by the practice;
- (d)** the financial position of the person against whom the order is made;
- (d.1)** the amount that the person against whom the order is made is required to pay under an order made under subsection (4.1);
- (e)** the history of compliance with this Act by the person against whom the order is made; and
- (f)** any other relevant factor.

Purpose of order

(3.3) The purpose of an order made against a person under subsection (3.1) is to promote practices by that person that are in conformity with the purposes of this section and not to punish that person.

Factors to be considered

(4) In determining, for the purposes of subsections (1) and (2), whether conduct has had, is having or is likely to have the effect of preventing or lessening competition substantially in a market, the Tribunal may consider

- (a)** the effect of the conduct on barriers to entry in the market, including network effects;
- (b)** the effect of the conduct on price or non-price competition, including quality, choice or consumer privacy;
- (c)** the nature and extent of change and innovation in a relevant market; and
- (d)** any other factor that is relevant to competition in the market that is or would be affected by the conduct.

Additional order — person granted leave

(4.1) If, as the result of an application by a person granted leave under section 103.1, the Tribunal finds that a

Facteurs à prendre en compte

(3.2) Pour la détermination du montant de la sanction administrative pécuniaire, il est tenu compte des éléments suivants :

- a)** l'effet sur la concurrence dans le marché pertinent;
- b)** le revenu brut provenant des ventes sur lesquelles la pratique a eu une incidence;
- c)** les bénéfices réels ou prévus sur lesquels la pratique a eu une incidence;
- d)** la situation financière de la personne visée par l'ordonnance;
- d.1)** la somme que la personne visée par l'ordonnance est tenue de payer au titre d'une ordonnance rendue en vertu du paragraphe (4.1);
- e)** le comportement antérieur de la personne visée par l'ordonnance en ce qui a trait au respect de la présente loi;
- f)** tout autre élément pertinent.

But de la sanction

(3.3) La sanction prévue au paragraphe (3.1) vise à encourager la personne visée par l'ordonnance à adopter des pratiques compatibles avec les objectifs du présent article et non pas à la punir.

Facteurs à considérer

(4) Pour l'application des paragraphes (1) et (2), lorsqu'il décide de la question de savoir si un comportement a eu, a ou aura vraisemblablement pour effet d'empêcher ou de diminuer sensiblement la concurrence dans un marché, le Tribunal peut tenir compte des facteurs suivants :

- a)** les entraves à l'accès au marché, y compris les effets de réseau;
- b)** tout effet du comportement sur la concurrence hors prix ou par les prix, notamment la qualité, le choix ou la vie privée des consommateurs;
- c)** la nature et la portée des changements et des innovations dans tout marché pertinent;
- d)** tout autre facteur qui est relatif à la concurrence dans le marché et qui est ou serait touché par le comportement.

Ordonnance additionnelle — personne autorisée

(4.1) Si, à la suite d'une demande présentée par une personne autorisée en vertu de l'article 103.1, il conclut

person has engaged in or is engaging in a practice of anti-competitive acts that amounts to conduct that has had or is having the effect of preventing or lessening competition substantially in a market in which the person has a plausible competitive interest and it makes an order under subsection (1) or (2) against the person, it may also order the person against whom the order is made to pay an amount, not exceeding the value of the benefit derived from the conduct that is the subject of the order, to be distributed among the applicant and any other person affected by the conduct, in any manner that the Tribunal considers appropriate.

Implementation of the order

(4.2) The Tribunal may specify in an order made under subsection (4.1) any term that it considers necessary for the order's implementation, including any term referred to in any of paragraphs 75(1.3)(a) to (g).

Exception

(5) For the purpose of this section, an act engaged in pursuant only to the exercise of any right or enjoyment of any interest derived under the *Copyright Act*, *Industrial Design Act*, *Integrated Circuit Topography Act*, *Patent Act*, *Trademarks Act* or any other Act of Parliament pertaining to intellectual or industrial property is not an anti-competitive act.

Limitation period

(6) No application may be made under this section in respect of a practice of anti-competitive acts or conduct more than three years after the practice or conduct has ceased.

Where proceedings commenced under section 45, 49, 76, 90.1 or 92

(7) No application may be made under this section against a person on the basis of facts that are the same or substantially the same as the facts on the basis of which

- (a)** proceedings have been commenced against that person under section 45 or 49; or
- (b)** an order against that person has been made under section 76, 90.1 or 92.

Inferences

(8) In considering an application by a person granted leave under section 103.1, the Tribunal may not draw any inference from the fact that the Commissioner has or has

qu'une personne adopte ou a adopté une pratique d'agissements anti-concurrentiels constituant un comportement qui a eu ou a pour effet d'empêcher ou de diminuer sensiblement la concurrence dans un marché dans lequel la personne a un intérêt concurrentiel valable et rend une ordonnance en vertu des paragraphes (1) ou (2) contre la personne, le Tribunal peut également lui ordonner de payer une somme — ne pouvant excéder la valeur du bénéfice tiré du comportement visé par l'ordonnance — devant être répartie, de la manière qu'il estime indiquée, entre le demandeur et toute autre personne touchée par le comportement.

Exécution de l'ordonnance

(4.2) Le Tribunal peut, dans l'ordonnance rendue en vertu du paragraphe (4.1), préciser les conditions qu'il estime nécessaires à son exécution, notamment tout élément prévu à l'un des alinéas 75(1.3)a) à g).

Exception

(5) Pour l'application du présent article, un agissement résultant du seul fait de l'exercice de quelque droit ou de la jouissance de quelque intérêt découlant de la *Loi sur les brevets*, de la *Loi sur les dessins industriels*, de la *Loi sur le droit d'auteur*, de la *Loi sur les marques de commerce*, de la *Loi sur les topographies de circuits intégrés* ou de toute autre loi fédérale relative à la propriété intellectuelle ou industrielle ne constitue pas un agissement anti-concurrentiel.

Prescription

(6) Aucune demande ne peut être présentée en vertu du présent article à l'égard d'une pratique d'agissements anti-concurrentiels ou d'un comportement, si la pratique ou le comportement en question a cessé depuis plus de trois ans.

Procédures en vertu des articles 45, 49, 76, 90.1 ou 92

(7) Aucune demande à l'endroit d'une personne ne peut être présentée au titre du présent article si les faits au soutien de la demande sont les mêmes ou essentiellement les mêmes que ceux qui ont été allégués au soutien :

- a)** d'une procédure engagée à l'endroit de cette personne en vertu des articles 45 ou 49;
- b)** d'une ordonnance rendue contre cette personne en vertu des articles 76, 90.1 ou 92.

Application

(8) Le Tribunal saisi d'une demande présentée par une personne autorisée en vertu de l'article 103.1 ne peut tirer quelque conclusion que ce soit du fait que le commissaire

not taken any action in respect of the matter raised by the application.

R.S., 1985, c. 19 (2nd Suppl.), s. 45; 1990, c. 37, s. 31; 1999, c. 2, s. 37; 2002, c. 16, s. 11.4; 2009, c. 2, s. 428; 2014, c. 20, s. 366(E); 2022, c. 10, s. 262; 2023, c. 31, s. 7.2; 2023, c. 31, s. 12.1; 2024, c. 15, s. 247.

Unpaid monetary penalty

79.1 The amount of an administrative monetary penalty imposed on a person under subsection 79(3.1) is a debt due to Her Majesty in right of Canada and may be recovered as such from that person in a court of competent jurisdiction.

2002, c. 16, s. 11.5; 2018, c. 8, s. 114(E).

Delivered Pricing

Definition of *delivered pricing*

80 (1) For the purposes of section 81, ***delivered pricing*** means the practice of refusing a customer, or a person seeking to become a customer, delivery of an article at any place in which the supplier engages in a practice of making delivery of the article to any other of the supplier's customers on the same trade terms that would be available to the first-mentioned customer if his place of business were located in that place.

Definition of *trade terms*

(2) For the purposes of subsection (1), the expression ***trade terms*** means terms in respect of payment, units of purchase and reasonable technical and servicing requirements.

R.S., 1985, c. 19 (2nd Suppl.), s. 45.

Delivered pricing

81 (1) Where, on application by the Commissioner, the Tribunal finds that delivered pricing is engaged in by a major supplier of an article in a market or is widespread in a market with the result that a customer, or a person seeking to become a customer, is denied an advantage that would otherwise be available to him in the market, the Tribunal may make an order prohibiting all or any of such suppliers from engaging in delivered pricing.

Exception where significant capital investment needed

(2) No order shall be made against a supplier under this section where the Tribunal finds that the supplier could not accommodate any additional customers at a locality without making significant capital investment at that locality.

a accompli un geste ou non à l'égard de l'objet de la demande.

L.R. (1985), ch. 19 (2^e suppl.), art. 45; 1990, ch. 37, art. 31; 1999, ch. 2, art. 37; 2002, ch. 16, art. 11.4; 2009, ch. 2, art. 428; 2014, ch. 20, art. 366(A); 2022, ch. 10, art. 262; 2023, ch. 31, art. 7.2; 2023, ch. 31, art. 12.1; 2024, ch. 15, art. 247.

Sanctions administratives pécuniaires impayées

79.1 Les sanctions administratives pécuniaires imposées au titre du paragraphe 79(3.1) constituent des créances de Sa Majesté du chef du Canada, dont le recouvrement peut être poursuivi à ce titre devant tout tribunal compétent.

2002, ch. 16, art. 11.5; 2018, ch. 8, art. 114(A).

Prix à la livraison

Définition de *prix à la livraison*

80 (1) Aux fins de l'article 81, ***prix à la livraison*** s'entend de la pratique de refuser à un client, ou à une personne qui cherche à devenir un client, la livraison d'un article en un endroit où le fournisseur s'adonne à une pratique d'effectuer la livraison de cet article à l'un quelconque de ses autres clients aux conditions de commerce qui seraient accessibles au client qui fait l'objet du refus si son entreprise était située à cet endroit.

Définition de *conditions de commerce*

(2) Pour l'application du paragraphe (1), ***conditions de commerce*** s'entend des conditions relatives au paiement, aux quantités unitaires d'achat et aux exigences raisonnables d'ordre technique ou d'entretien.

L.R. (1985), ch. 19 (2^e suppl.), art. 45.

Prix à la livraison

81 (1) Dans les cas où, à la suite d'une demande du commissaire, le Tribunal conclut que le prix à la livraison est appliqué par un fournisseur important d'un article dans un marché ou qu'il est très répandu dans un marché avec la conséquence qu'un client, ou une personne désirant devenir un client, se voit refuser un avantage qui lui serait autrement accessible dans ce marché, il peut rendre une ordonnance interdisant à l'ensemble ou à l'un quelconque de ces fournisseurs d'appliquer le prix à la livraison.

Exception : nécessité d'investissement en capital

(2) Le Tribunal ne rend pas d'ordonnance contre un fournisseur en application du présent article s'il conclut que ce fournisseur ne pouvait pas servir de clients supplémentaires en un lieu donné sans pour cela y engager un investissement en capital relativement important.

Blackline of Revisions to the *Competition Act* from 2009 to 2022

Abuse of Dominant Position

Definition of *anti-competitive act*

78 (1) For the purposes of section 79, anti-competitive act, ~~without restricting the generality of the term,~~ means any act intended to have a predatory, exclusionary or disciplinary negative effect on a competitor, or to have an adverse effect on competition, and includes any of the following acts:

(a) squeezing, by a vertically integrated supplier, of the margin available to an unintegrated customer who competes with the supplier, for the purpose of impeding or preventing the customer's entry into, or expansion in, a market;

(b) acquisition by a supplier of a customer who would otherwise be available to a competitor of the supplier, or acquisition by a customer of a supplier who would otherwise be available to a competitor of the customer, for the purpose of impeding or preventing the competitor's entry into, or eliminating the competitor from, a market;

(c) freight equalization on the plant of a competitor for the purpose of impeding or preventing the competitor's entry into, or eliminating the competitor from, a market;

(d) use of fighting brands introduced selectively on a temporary basis to discipline or eliminate a competitor;

(e) pre-emption of scarce facilities or resources required by a competitor for the operation of a business, with the object of withholding the facilities or resources from a market;

(f) buying up of products to prevent the erosion of existing price levels;

(g) adoption of product specifications that are incompatible with products produced by any other person and are designed to prevent his entry into, or to eliminate him from, a market;

(h) requiring or inducing a supplier to sell only or primarily to certain customers, or to refrain from selling to a competitor, with the object of preventing a competitor's entry into, or expansion in, a market; ~~and~~

(i) selling articles at a price lower than the acquisition cost for the purpose of disciplining or eliminating a competitor; ~~;~~ and

(j) a selective or discriminatory response to an actual or potential competitor for the purpose of impeding or preventing the competitor's entry into, or expansion in, a market or eliminating the competitor from a market.

~~(j) and~~ (k) [Repealed, 2009, c. 2, s. 427]

(2) [Repealed, 2009, c. 2, s. 427]

Prohibition ~~where~~if abuse of dominant position

79 (1) ~~Where~~if, on application by the Commissioner or a person granted leave under section 103.1, the Tribunal finds that

- (a) one or more persons substantially or completely control, throughout Canada or any area thereof, a class or species of business,
- (b) that person or those persons have engaged in or are engaging in a practice of anticompetitive acts, and
- (c) the practice has had, is having or is likely to have the effect of preventing or lessening competition substantially in a market,

the Tribunal may make an order prohibiting all or any of those persons from engaging in that practice.

Additional or alternative order

(2) Where, on an application under subsection (1), the Tribunal finds that a practice of anticompetitive acts has had or is having the effect of preventing or lessening competition substantially in a market and that an order under subsection (1) is not likely to restore competition in that market, the Tribunal may, in addition to or in lieu of making an order under subsection (1), make an order directing any or all the persons against whom an order is sought to take such actions, including the divestiture of assets or shares, as are reasonable and as are necessary to overcome the effects of the practice in that market.

Limitation

(3) In making an order under subsection (2), the Tribunal shall make the order in such terms as will in its opinion interfere with the rights of any person to whom the order is directed or any other person affected by it only to the extent necessary to achieve the purpose of the order.

Administrative monetary penalty

(3.1) If the Tribunal makes an order against a person under subsection (1) or (2), it may also order them to pay, in any manner that the Tribunal specifies, an administrative monetary penalty in an amount not exceeding the greater of

(a) \$10,000,000 and, for each subsequent order under either of those subsections, an amount not exceeding \$15,000,000, and

(b) three times the value of the benefit derived from the anti-competitive practice, or, if that amount cannot be reasonably determined, 3% of the person's annual worldwide gross revenues.

Aggravating or mitigating factors

(3.2) In determining the amount of an administrative monetary penalty, the Tribunal shall take into account any evidence of the following:

- (a) the effect on competition in the relevant market;
- (b) the gross revenue from sales affected by the practice;
- (c) any actual or anticipated profits affected by the practice;
- (d) the financial position of the person against whom the order is made;
- (e) the history of compliance with this Act by the person against whom the order is made; and
- (f) any other relevant factor.

Purpose of order

(3.3) The purpose of an order made against a person under subsection (3.1) is to promote practices by that person that are in conformity with the purposes of this section and not to punish that person.

~~Superior competitive performance~~ Factors to be considered

(4) In determining, for the purposes of subsection (1), whether a practice has had, is having or is likely to have the effect of preventing or lessening competition substantially in a market, the Tribunal shall consider whether the practice is a result of superior competitive performance—
and may consider

- (a) the effect of the practice on barriers to entry in the market, including network effects;
- (b) the effect of the practice on price or non-price competition, including quality, choice or consumer privacy;
- (c) the nature and extent of change and innovation in a relevant market; and
- (d) any other factor that is relevant to competition in the market that is or would be affected by the practice.

Exception

(5) For the purpose of this section, an act engaged in pursuant only to the exercise of any right or enjoyment of any interest derived under the *Copyright Act*, *Industrial Design Act*, *Integrated Circuit Topography Act*, *Patent Act*, ~~Trade-marks~~ Trademarks Act or any other Act of Parliament pertaining to intellectual or industrial property is not an anti-competitive act.

Limitation period

(6) No application may be made under this section in respect of a practice of anti-competitive acts more than three years after the practice has ceased.

Where proceedings commenced under section 45, 49, 76, 90.1 or 92

(7) No application may be made under this section against a person on the basis of facts that are the same or substantially the same as the facts on the basis of which

(a) proceedings have been commenced against that person under section 45 or 49; or

(b) an order against that person is sought by the Commissioner under section 76, 90.1 or 92.

Inferences

(8) In considering an application by a person granted leave under section 103.1, the Tribunal may not draw any inference from the fact that the Commissioner has or has not taken any action in respect of the matter raised by the application.

Unpaid monetary ~~penalty~~leave

79.1 The amount of an administrative monetary penalty imposed on ~~an entity~~a person under subsection 79(3.1) is a debt due to Her Majesty in right of Canada and may be recovered as such from that ~~entity~~person in a court of competent jurisdiction.

Blackline of Changes to the *Competition Act* from 2022 to 2023

Abuse of Dominant Position

Definition of anti-competitive act

78(1) For the purposes of section 79, anti-competitive act means any act intended to have a predatory, exclusionary or disciplinary negative effect on a competitor, or to have an adverse effect on competition, and includes any of the following acts:

- (a) squeezing, by a vertically integrated supplier, of the margin available to an unintegrated customer who competes with the supplier, for the purpose of impeding or preventing the customer's entry into, or expansion in, a market;
- (b) acquisition by a supplier of a customer who would otherwise be available to a competitor of the supplier, or acquisition by a customer of a supplier who would otherwise be available to a competitor of the customer, for the purpose of impeding or preventing the competitor's entry into, or eliminating the competitor from, a market;
- (c) freight equalization on the plant of a competitor for the purpose of impeding or preventing the competitor's entry into, or eliminating the competitor from, a market;
- (d) use of fighting brands introduced selectively on a temporary basis to discipline or eliminate a competitor;
- (e) pre-emption of scarce facilities or resources required by a competitor for the operation of a business, with the object of withholding the facilities or resources from a market;
- (f) buying up of products to prevent the erosion of existing price levels;
- (g) adoption of product specifications that are incompatible with products produced by any other person and are designed to prevent his entry into, or to eliminate him from, a market;
- (h) requiring or inducing a supplier to sell only or primarily to certain customers, or to refrain from selling to a competitor, with the object of preventing a competitor's entry into, or expansion in, a market;
- (i) selling articles at a price lower than the acquisition cost for the purpose of disciplining or eliminating a competitor; ~~and~~
- (j) a selective or discriminatory response to an actual or potential competitor for the purpose of impeding or preventing the competitor's entry into, or expansion in, a market or eliminating the competitor from a market; ~~and~~ and
- (k) ~~[Repealed, 2009, c. 2, s. 427]~~ directly or indirectly imposing excessive and unfair selling prices.

(2) [Repealed, 2009, c. 2, s. 427]

Prohibition if abuse of dominant position

79 (1) ~~If, on~~ On application by the Commissioner or a person granted leave under section 103.1, ~~if~~

the Tribunal finds that

~~(a) one or more persons substantially or completely control, throughout Canada or any area thereof, a class or species of business;~~
species of business throughout Canada or any area of Canada, it may make an order prohibiting the person or persons from engaging in a practice or conduct if it finds that the
~~(b) that person or those persons have engaged in or are engaging in a practice of anticompetitive acts, and~~

(a) a practice of anti-competitive acts; or

(b) conduct

~~(c) the practice has~~ that had, is having or is likely to have the effect of preventing or lessening competition substantially in a market in which the person or persons have a plausible competitive interest, and

~~the Tribunal may make an order prohibiting all or any of those persons from engaging in that practice.~~

(ii) the effect is not a result of superior competitive performance.

Additional or alternative order

(2) ~~Where~~ If, on an application under subsection (1), the Tribunal finds that a practice of ~~anticompetitive acts~~ anti-competitive acts amounts to conduct that has had or is having the effect of preventing or lessening competition substantially in a market in which the person or persons have a plausible competitive interest and that an order under subsection (1) is not likely to restore competition in that market, the Tribunal may, in addition to or in lieu of making an order under subsection (1), make an order directing any or all ~~the~~ persons against whom an order is sought to take ~~such~~ actions, including the divestiture of assets or shares, ~~as~~ that are reasonable and ~~as are~~ necessary to overcome the effects of the practice in that market.

Limitation

(3) In making an order under subsection (2), the Tribunal shall make the order in such terms as will in its opinion interfere with the rights of any person to whom the order is directed or any other person affected by it only to the extent necessary to achieve the purpose of the order.

Administrative monetary penalty

(3.1) If the Tribunal finds that a person has engaged in or is engaging in a practice of anti-competitive acts that amounts to conduct that has had or is having the effect of preventing or lessening competition substantially in a market in which the person has a plausible competitive interest and it makes an order against ~~a~~ the person under subsection (1) or (2), it may also order them to pay, in any manner that ~~the Tribunal~~ it specifies, an administrative monetary penalty in an amount not exceeding the greater of

(a) \$~~10,000,000~~25,000,000 and, for each subsequent order under either of those subsections, an amount not exceeding \$~~15,000,000~~35,000,000, and

(b) three times the value of the benefit derived from the anti-competitive practice, or, if that amount cannot be reasonably determined, 3% of the person's annual worldwide gross revenues.

Aggravating or mitigating factors

(3.2) In determining the amount of an administrative monetary penalty, the Tribunal shall take into account any evidence of the following:

- (a) the effect on competition in the relevant market;
- (b) the gross revenue from sales affected by the practice;
- (c) any actual or anticipated profits affected by the practice;
- (d) the financial position of the person against whom the order is made;
- (e) the history of compliance with this Act by the person against whom the order is made; and
- (f) any other relevant factor.

Purpose of order

(3.3) The purpose of an order made against a person under subsection (3.1) is to promote practices by that person that are in conformity with the purposes of this section and not to punish that person.

Factors to be considered

(4) In determining, for the purposes of ~~subsection~~subsections (1) and (2), whether a ~~practice~~conduct has had, is having or is likely to have the effect of preventing or lessening competition substantially in a market, the Tribunal ~~shall consider whether the practice is a result of superior competitive performance and~~ may consider

- (a) the effect of the ~~practice~~conduct on barriers to entry in the market, including network effects;
- (b) the effect of the ~~practice~~conduct on price or non-price competition, including quality, choice or consumer privacy;
- (c) the nature and extent of change and innovation in a relevant market; and
- (d) any other factor that is relevant to competition in the market that is or would be affected by the ~~practice~~conduct.

Exception

(5) For the purpose of this section, an act engaged in pursuant only to the exercise of any right or enjoyment of any interest derived under the *Copyright Act*, *Industrial Design Act*, *Integrated Circuit Topography Act*, *Patent Act*, *Trademarks Act* or any other Act of Parliament pertaining to intellectual or industrial property is not an anti-competitive act.

Limitation period

(6) No application may be made under this section in respect of a practice of anti-competitive acts [or conduct](#) more than three years after the practice [or conduct](#) has ceased.

Where proceedings commenced under section 45, 49, 76, 90.1 or 92

(7) No application may be made under this section against a person on the basis of facts that are the same or substantially the same as the facts on the basis of which

(a) proceedings have been commenced against that person under section 45 or 49; or

(b) an order against that person is sought by the Commissioner under section 76, 90.1 or ~~92~~[2](#).

Inferences

(8) In considering an application by a person granted leave under section 103.1, the Tribunal may not draw any inference from the fact that the Commissioner has or has not taken any action in respect of the matter raised by the application.

Unpaid monetary ~~leave~~[penalty](#)

79.1 The amount of an administrative monetary penalty imposed on a person under subsection 79(3.1) is a debt due to Her Majesty in right of Canada and may be recovered as such from that person in a court of competent jurisdiction.

Blackline of Changes to the *Competition Act* from 2023 to Present

Abuse of Dominant Position

Definition of *anti-competitive act*

78 (1) For the purposes of section 79, anti-competitive act means any act intended to have a predatory, exclusionary or disciplinary negative effect on a competitor, or to have an adverse effect on competition, and includes any of the following acts:

- (a) squeezing, by a vertically integrated supplier, of the margin available to an unintegrated customer who competes with the supplier, for the purpose of impeding or preventing the customer's entry into, or expansion in, a market;
- (b) acquisition by a supplier of a customer who would otherwise be available to a competitor of the supplier, or acquisition by a customer of a supplier who would otherwise be available to a competitor of the customer, for the purpose of impeding or preventing the competitor's entry into, or eliminating the competitor from, a market;
- (c) freight equalization on the plant of a competitor for the purpose of impeding or preventing the competitor's entry into, or eliminating the competitor from, a market;
- (d) use of fighting brands introduced selectively on a temporary basis to discipline or eliminate a competitor;
- (e) pre-emption of scarce facilities or resources required by a competitor for the operation of a business, with the object of withholding the facilities or resources from a market;
- (f) buying up of products to prevent the erosion of existing price levels;
- (g) adoption of product specifications that are incompatible with products produced by any other person and are designed to prevent his entry into, or to eliminate him from, a market;
- (h) requiring or inducing a supplier to sell only or primarily to certain customers, or to refrain from selling to a competitor, with the object of preventing a competitor's entry into, or expansion in, a market;
- (i) selling articles at a price lower than the acquisition cost for the purpose of disciplining or eliminating a competitor;
- (j) a selective or discriminatory response to an actual or potential competitor for the purpose of impeding or preventing the competitor's entry into, or expansion in, a market or eliminating the competitor from a market; and
- (k) directly or indirectly imposing excessive and unfair selling prices.

(2) [Repealed, 2009, c. 2, s. 427]

Prohibition if abuse of dominant position

79 (1) On application by the Commissioner or a person granted leave under section 103.1, if the Tribunal finds that one or more persons substantially or completely control a class or species of business throughout Canada or any area of Canada, it may make an order prohibiting the person or persons from engaging in a practice or conduct if it finds that the person or persons have engaged in or are engaging in

(a) a practice of anti-competitive acts; or

(b) conduct

(i) that had, is having or is likely to have the effect of preventing or lessening competition substantially in a market in which the person or persons have a plausible competitive interest, and

(ii) the effect is not a result of superior competitive performance.

Additional or alternative order

(2) If, on an application under subsection (1), the Tribunal finds that a practice of anti-competitive acts amounts to conduct that has had or is having the effect of preventing or lessening competition substantially in a market in which the person or persons have a plausible competitive interest and that an order under subsection (1) is not likely to restore competition in that market, the Tribunal may, in addition to or in lieu of making an order under subsection (1), make an order directing any or all persons against whom an order is sought to take actions, including the divestiture of assets or shares, that are reasonable and necessary to overcome the effects of the practice in that market.

Limitation

(3) In making an order under subsection (2), the Tribunal shall make the order in such terms as will in its opinion interfere with the rights of any person to whom the order is directed or any other person affected by it only to the extent necessary to achieve the purpose of the order.

Administrative monetary penalty

(3.1) If the Tribunal finds that a person has engaged in or is engaging in a practice of anti-competitive acts that amounts to conduct that has had or is having the effect of preventing or lessening competition substantially in a market in which the person has a plausible competitive interest and it makes an order against the person under subsection (1) or (2), it may also order them to pay, in any manner that it specifies, an administrative monetary penalty in an amount not exceeding the greater of

(a) \$25,000,000 and, for each subsequent order under either of those subsections, an amount not exceeding \$35,000,000, and

(b) three times the value of the benefit derived from the anti-competitive practice, or, if that amount cannot be reasonably determined, 3% of the person's annual worldwide gross revenues.

Aggravating or mitigating factors

(3.2) In determining the amount of an administrative monetary penalty, the Tribunal shall take into account any evidence of the following:

- (a) the effect on competition in the relevant market;
- (b) the gross revenue from sales affected by the practice;
- (c) any actual or anticipated profits affected by the practice;
- (d) the financial position of the person against whom the order is made;

(d.1) the amount that the person against whom the order is made is required to pay under an order made under subsection (4.1);

(e) the history of compliance with this Act by the person against whom the order is made; and

(f) any other relevant factor.

Purpose of order

(3.3) The purpose of an order made against a person under subsection (3.1) is to promote practices by that person that are in conformity with the purposes of this section and not to punish that person.

Factors to be considered

(4) In determining, for the purposes of subsections (1) and (2), whether conduct has had, is having or is likely to have the effect of preventing or lessening competition substantially in a market, the Tribunal may consider

- (a) the effect of the conduct on barriers to entry in the market, including network effects;
- (b) the effect of the conduct on price or non-price competition, including quality, choice or consumer privacy;
- (c) the nature and extent of change and innovation in a relevant market; and
- (d) any other factor that is relevant to competition in the market that is or would be affected by the conduct.

Additional order – person granted leave

(4.1) If, as the result of an application by a person granted leave under section 103.1, the Tribunal finds that a person has engaged in or is engaging in a practice of anti-competitive acts that amounts to conduct that has had or is having the effect of preventing or lessening competition substantially in a market in which the person has a plausible competitive interest and it makes an order under subsection (1) or (2) against the person, it may also order the person against whom the order is made to pay an amount, not exceeding the value of the benefit derived from the conduct that is the subject of the order, to be distributed among the

applicant and any other person affected by the conduct, in any manner that the Tribunal considers appropriate.

Implementation of the order

(4.2) The Tribunal may specify in an order made under subsection (4.1) any term that it considers necessary for the order's implementation, including any term referred to in any of paragraphs 75(1.3)(a) to (g).

Exception

(5) For the purpose of this section, an act engaged in pursuant only to the exercise of any right or enjoyment of any interest derived under the *Copyright Act*, *Industrial Design Act*, *Integrated Circuit Topography Act*, *Patent Act*, *Trademarks Act* or any other Act of Parliament pertaining to intellectual or industrial property is not an anti-competitive act.

Limitation period

(6) No application may be made under this section in respect of a practice of anti-competitive acts or conduct more than three years after the practice or conduct has ceased.

Where proceedings commenced under section 45, 49, 76, 90.1 or 92

(7) No application may be made under this section against a person on the basis of facts that are the same or substantially the same as the facts on the basis of which

(a) proceedings have been commenced against that person under section 45 or 49; or

(b) an order against that person ~~is sought by the Commissioner~~ has been made under section 76, 90.1 or ~~292~~.

Inferences

(8) In considering an application by a person granted leave under section 103.1, the Tribunal may not draw any inference from the fact that the Commissioner has or has not taken any action in respect of the matter raised by the application.

Unpaid monetary penalty

79.1 The amount of an administrative monetary penalty imposed on a person under subsection 79(3.1) is a debt due to Her Majesty in right of Canada and may be recovered as such from that person in a court of competent jurisdiction.



CANADA

CONSOLIDATION

CODIFICATION

Competition Tribunal Act**Loi sur le Tribunal de la concurrence**

R.S.C. 1985, c. 19 (2nd Supp.)

S.R.C. 1985, ch. 19 (2^e suppl.)**NOTE****[1986, c. 26, assented to 17th June, 1986]****NOTE****[1986, ch. 26, sanctionné le 17 juin 1986]**

Current to September 1, 2025

Last amended on June 20, 2024

À jour au 1 septembre 2025

Dernière modification le 20 juin 2024



R.S.C. 1985, c. 19 (2nd Supp.)

S.R.C. 1985, ch. 19 (2^e suppl.)

An Act to establish the Competition Tribunal and to amend the Combines Investigation Act and the Bank Act and other Acts in consequence thereof

Loi constituant le Tribunal de la concurrence, modifiant la Loi relative aux enquêtes sur les coalitions et la Loi sur les banques et apportant des modifications corrélatives à d'autres lois

PART I

Competition Tribunal Act

Short Title

Short title

1 This Part may be cited as the *Competition Tribunal Act*.

Interpretation

Definitions

2 In this Part,

judicial member means a member of the Tribunal appointed under paragraph 3(2)(a); (*juge*)

lay member means a member of the Tribunal appointed under paragraph 3(2)(b); (*autre membre*)

Minister means the Minister of Industry; (*ministre*)

Tribunal means the Competition Tribunal established by subsection 3(1). (*Tribunal*)

R.S., 1985, c. 19 (2nd Supp.), s. 2; 1992, c. 1, s. 145(F); 1995, c. 1, s. 62.

Tribunal Established

Tribunal

3 (1) There is hereby established a tribunal to be known as the Competition Tribunal.

PARTIE I

Tribunal de la concurrence

Titre abrégé

Titre abrégé

1 *Loi sur le Tribunal de la concurrence.*

Définitions

Définitions

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

autre membre Membre du Tribunal nommé en application de l'alinéa 3(2)b). (*lay member*)

juge Membre du Tribunal nommé en application de l'alinéa 3(2)a). (*judicial member*)

ministre Le ministre de l'Industrie. (*Minister*)

Tribunal Le Tribunal de la concurrence constitué conformément au paragraphe 3(1). (*Tribunal*)

L.R. (1985), ch. 19 (2^e suppl.), art. 2; 1992, ch. 1, art. 145(F); 1995, ch. 1, art. 62.

Constitution du Tribunal

Tribunal

3 (1) Est constitué le Tribunal de la concurrence.

Constitution of Tribunal

(2) The Tribunal shall consist of

- (a) not more than six members to be appointed from among the judges of the Federal Court by the Governor in Council on the recommendation of the Minister of Justice; and
- (b) not more than eight other members to be appointed by the Governor in Council on the recommendation of the Minister.

Advisory council

(3) The Governor in Council may establish an advisory council to advise the Minister with respect to appointments of lay members, which council is to be composed of not more than ten members who are knowledgeable in economics, industry, commerce or public affairs and may include, without restricting the generality of the foregoing, individuals chosen from business communities, the legal community, consumer groups and labour.

Consultation

(4) The Minister shall consult with any advisory council established under subsection (3) before making a recommendation with respect to the appointment of a lay member.

R.S., 1985, c. 19 (2nd Suppl.), s. 3; 2002, c. 8, ss. 183, 198, c. 16, s. 16.

Chairman

4 (1) The Governor in Council shall designate one of the judicial members to be Chairman of the Tribunal.

Role of Chairman

(2) The Chairman has supervision over and direction of the work of the Tribunal including, without restricting the generality of the foregoing, the allocation of the work of the members thereof.

Absence or incapacity

(3) Where the office of Chairman is vacant, or the Chairman is absent from Canada or is for any reason unable to act, the powers of the Chairman shall be exercised and the duties performed by the senior judicial member who is in Canada and is able and willing to act.

Tenure of judicial members

5 (1) Each judicial member shall be appointed for a term not exceeding seven years and holds office so long as he remains a judge of the Federal Court.

Composition

(2) Le Tribunal se compose :

- a) d'au plus six membres nommés par le gouverneur en conseil sur recommandation du ministre de la Justice et choisis parmi les juges de la Cour fédérale;
- b) d'au plus huit autres membres nommés par le gouverneur en conseil sur recommandation du ministre.

Conseil consultatif

(3) Le gouverneur en conseil peut constituer un conseil consultatif chargé de conseiller le ministre en ce qui concerne la nomination des autres membres et composé d'au plus dix personnes versées dans les affaires publiques, économiques, commerciales ou industrielles. Sans que soit limitée la portée générale de ce qui précède, ces personnes peuvent être des individus appartenant à la collectivité juridique, à des groupes de consommateurs, au monde des affaires et au monde du travail.

Consultation

(4) Avant de recommander la nomination d'un autre membre, le ministre demande l'avis du conseil consultatif constitué en application du paragraphe (3).

L.R. (1985), ch. 19 (2^e suppl.), art. 3; 2002, ch. 8, art. 183 et 198, ch. 16, art. 16.

Président

4 (1) Le gouverneur en conseil nomme, parmi les juges, le président du Tribunal.

Rôle du président

(2) Le président assume la direction des travaux du Tribunal et, notamment, voit à la répartition des tâches entre ses membres.

Absence ou empêchement

(3) En cas d'absence du Canada ou d'empêchement du président ou de vacance de son poste, le juge de rang le plus élevé qui se trouve au Canada assure l'intérim à condition d'être en mesure d'agir et d'y consentir.

Durée du mandat des juges

5 (1) La durée maximale du mandat des juges est de sept ans et ceux-ci occupent leur poste aussi longtemps qu'ils demeurent juges de la Cour fédérale.

Tenure of lay members

(2) Each lay member shall be appointed for a term not exceeding seven years and holds office during good behaviour but may be removed by the Governor in Council for cause.

Re-appointment

(3) A member of the Tribunal, on the expiration of a first or any subsequent term of office, is eligible to be re-appointed for a further term.

Acting after expiration of appointment

(4) A person may continue to act as a member of the Tribunal after the expiration of his term of appointment in respect of any matter in which he became engaged during the term of his appointment.

Temporary substitute members

(5) In the event of the absence or incapacity of a member of the Tribunal, the Governor in Council may appoint a temporary substitute member for such period of time as the Governor in Council prescribes.

Remuneration of lay members

6 (1) Each lay member shall be paid such remuneration as may be fixed by the Governor in Council.

Expenses of members

(2) Each member of the Tribunal is entitled to be paid the travel allowances that a judge is entitled to be paid under the *Judges Act*.

Other benefits

(3) Each lay member is deemed to be employed in the federal public administration for the purposes of the *Government Employees Compensation Act* and any regulations made under section 9 of the *Aeronautics Act*.

R.S., 1985, c. 19 (2nd Supp.), s. 6; 2003, c. 22, s. 224(E).

Oath of office

7 (1) Every member of the Tribunal shall, before entering on the duties of his office, take an oath that he will duly and faithfully, and to the best of his skill and knowledge, execute the powers and trusts reposed in him as a member of the Tribunal.

How administered

(2) The oath referred to in subsection (1) shall be administered to the Chairman of the Tribunal before the Chief Justice of the Federal Court, and to the other members by the Chairman, or in his absence or incapacity, by any other member.

Durée du mandat des autres membres

(2) La durée maximale du mandat des autres membres est de sept ans et ceux-ci occupent leur poste à titre inamovible, sous réserve de révocation motivée que prononce le gouverneur en conseil.

Nouveau mandat

(3) Au terme de son premier mandat ou d'un mandat subséquent, un membre peut être nommé pour un autre mandat.

Pouvoirs au terme d'un mandat

(4) Une personne peut, après l'expiration de son mandat, continuer à exercer les pouvoirs d'un membre du Tribunal à l'égard de toute question dont elle avait été saisie au cours de son mandat.

Membres suppléants

(5) En cas d'absence ou d'empêchement d'un membre du Tribunal, le gouverneur en conseil peut, pour la durée qu'il précise, nommer un membre suppléant.

Rémunération des autres membres

6 (1) Les autres membres reçoivent la rémunération que fixe le gouverneur en conseil.

Frais des membres

(2) Les membres du Tribunal reçoivent les indemnités de déplacement auxquelles un juge a droit aux termes de la *Loi sur les juges*.

Autres avantages

(3) Pour l'application de la *Loi sur l'indemnisation des agents de l'État* et des règlements pris en application de l'article 9 de la *Loi sur l'aéronautique*, les autres membres sont réputés faire partie de l'administration publique fédérale.

L.R. (1985), ch. 19 (2e suppl.), art. 6; 2003, ch. 22, art. 224(A).

Serment professionnel

7 (1) Préalablement à leur entrée en fonctions, les membres du Tribunal prêtent serment d'exercer régulièrement, fidèlement et au mieux de leur capacité et de leurs connaissances les pouvoirs et attributions qui leur sont dévolus.

Prestation

(2) Le juge en chef de la Cour fédérale reçoit le serment du président du Tribunal. Ce dernier reçoit le serment des autres juges et des autres membres et, en cas d'absence ou d'empêchement de celui-ci, un autre juge ou autre membre reçoit leur serment.

Organization of Work

Sittings of Tribunal

10 (1) Subject to section 11, every application to the Tribunal shall be heard before not less than three or more than five members sitting together, at least one of whom is a judicial member and at least one of whom is a lay member.

Judicial member to preside at hearings

(2) The Chairman shall designate a judicial member to preside at any hearing or, if the Chairman is present at a hearing, may preside himself.

Prohibition where financial interest

(3) No member shall take part in any matter before the Tribunal in which the member has a direct or indirect financial interest.

Hearing of applications

11 (1) The Chairman of the Tribunal, sitting alone, or a judicial member designated by the Chairman, sitting alone, may hear and dispose of applications under subsection 100(1), section 103.1 or 103.3 or subsection 104(1) or 123.1(1) of the *Competition Act* and any related matters.

Administrative remedies

(2) Applications for orders under Part VII.1 of the *Competition Act* and any related matters shall be heard and disposed of by the Chairman of the Tribunal, sitting alone, or by a judicial member designated by the Chairman, sitting alone.

R.S., 1985, c. 19 (2nd Supp.), s. 11; 1999, c. 2, s. 43; 2000, c. 15, s. 16; 2002, c. 16, s. 19; 2009, c. 2, s. 441.

Proceedings

Questions of law, fact, mixed law and fact

12 (1) In any proceedings before the Tribunal,

(a) questions of law shall be determined only by the judicial members sitting in those proceedings; and

(b) questions of fact or mixed law and fact shall be determined by all the members sitting in those proceedings.

Where there are differing opinions

(2) In any proceedings before the Tribunal,

Organisation du Tribunal

Séances du Tribunal

10 (1) Sous réserve de l'article 11, toute demande présentée au Tribunal est entendue par au moins trois mais au plus cinq membres siégeant ensemble et, parmi lesquels il doit y avoir au moins un juge et un autre membre.

Président de séance

(2) Le président désigne, pour chaque séance du Tribunal, un juge à titre de président, mais s'il est présent, il peut lui-même la présider.

Interdiction : intérêt financier

(3) Un membre ne peut pas participer aux activités du Tribunal lorsque celui-ci est saisi d'une question en rapport avec laquelle il a un intérêt financier direct ou indirect.

Demandes

11 (1) Le président, siégeant seul, ou un juge désigné par le président et siégeant seul, peut statuer sur les demandes d'ordonnance présentées en application du paragraphe 100(1), des articles 103.1 ou 103.3 ou des paragraphes 104(1) ou 123.1(1) de la *Loi sur la concurrence* ainsi que sur toute question afférente.

Recours administratifs

(2) Il est statué sur les demandes d'ordonnance prévues à la partie VII.1 de la *Loi sur la concurrence*, ainsi que sur toute question s'y rattachant, par le président, siégeant seul, ou par un juge désigné par le président et siégeant seul.

L.R. (1985), ch. 19 (2^e suppl.), art. 11; 1999, ch. 2, art. 43; 2000, ch. 15, art. 16; 2002, ch. 16, art. 19; 2009, ch. 2, art. 441.

Procédures devant le Tribunal

Questions de droit, de fait ou de droit et de fait

12 (1) Dans toute procédure devant le Tribunal :

a) seuls les juges qui siègent ont compétence pour trancher les questions de droit;

b) tous les membres qui siègent ont compétence pour trancher les questions de fait ou de droit et de fait.

Opinions divergentes

(2) Dans toute procédure devant le Tribunal :

(a) in the event of a difference of opinion among the members determining any question, the opinion of the majority shall prevail; and

(b) in the event of an equally divided opinion among the members determining any question, the presiding member may determine the question.

Where member unable to take part in judgment

(3) Where a member of the Tribunal is unable to take part in the giving of judgment in any proceedings or has died, the other members sitting in those proceedings may, whether or not they include a judicial member or a lay member, give judgment and, for that purpose, shall be deemed to constitute the Tribunal.

Appeal

Appeal

13 (1) Subject to subsection (2), an appeal lies to the Federal Court of Appeal from any decision or order, whether final, interlocutory or interim, of the Tribunal as if it were a judgment of the Federal Court.

Questions of fact

(2) An appeal on a question of fact lies under subsection (1) only with the leave of the Federal Court of Appeal.

R.S., 1985, c. 19 (2nd Supp.), s. 13; 2002, c. 8, s. 130.

Administration of Tribunal

14 [Repealed, 2014, c. 20, s. 447]

Sittings

15 The Tribunal may sit at such times and at such places throughout Canada as it considers necessary or desirable for the proper conduct of its business.

Rules

Rules

16 (1) Subject to the approval of the Governor in Council, the Tribunal may make general rules that are not inconsistent with this Part or the *Competition Act*

(a) for regulating the practice and procedure of the Tribunal; and

(b) for carrying out the work of the Tribunal and the management of its internal affairs.

a) l'opinion de la majorité l'emporte s'il y a divergence d'opinion entre les membres sur une question donnée;

b) le président de séance peut trancher toute question si les opinions sur celle-ci sont également partagées entre les membres.

Membre incapable de participer à un jugement

(3) Dans le cas où un membre du Tribunal ne peut pas participer à un jugement dans une procédure parce qu'il en est incapable ou qu'il est décédé, les autres membres siégeant à cette procédure peuvent, qu'il y ait ou non parmi eux un juge ou un autre membre, rendre jugement et à cette fin, ils sont réputés constituer le Tribunal.

Appel

Appel

13 (1) Sous réserve du paragraphe (2), les décisions ou ordonnances du Tribunal, que celles-ci soient définitives, interlocutoires ou provisoires, sont susceptibles d'appel devant la Cour d'appel fédérale tout comme s'il s'agissait de jugements de la Cour fédérale.

Questions de fait

(2) Un appel sur une question de fait n'a lieu qu'avec l'autorisation de la Cour d'appel fédérale.

L.R. (1985), ch. 19 (2^e suppl.), art. 13; 2002, ch. 8, art. 130.

Administration du Tribunal

14 [Abrogé, 2014, ch. 20, art. 447]

Séances

15 Le Tribunal tient ses réunions au Canada, aux dates, heures et lieux qu'il estime indiqués pour la bonne exécution de ses travaux.

Règles

Règles

16 (1) Sous réserve de l'approbation du gouverneur en conseil, le Tribunal peut établir des règles d'application générale qui ne sont pas incompatibles avec la présente partie ou avec la *Loi sur la concurrence* :

a) afin de régir la pratique et la procédure devant lui;

b) concernant l'accomplissement de ses travaux et la gestion de ses affaires internes.



CANADA

CONSOLIDATION

CODIFICATION

Competition Tribunal Rules

Règles du Tribunal de la concurrence

SOR/2008-141

DORS/2008-141

Current to September 1, 2025

À jour au 1 septembre 2025

Notice of withdrawal

(2) The respondent shall serve a notice of withdrawal on each party and on any intervenor and file the notice with proof of service.

Costs

28 If a party withdraws from or discontinues the proceedings, the Tribunal may award costs in accordance with section 8.1 of the *Competition Tribunal Act*.

Hearings

Hearings open to the public

29 Subject to rule 30, hearings shall be open to the public.

In-camera hearings

30 (1) A party, an intervenor or a person interested in the proceedings may request that all or a portion of a hearing not be open to the public.

Content of request

(2) A person who makes the request shall advise the Tribunal of the reasons for the request, including details of the specific, direct harm that would allegedly result from conducting the hearing or a portion of the hearing in public.

Power of the Tribunal

(3) The Tribunal may, if it is of the opinion that there are valid reasons for a hearing not to be open to the public, make any order that it deems appropriate.

Practice and Procedure

Composition of the Tribunal

31 Subject to sections 10 and 11 of the *Competition Tribunal Act* and for the purposes of these Rules, the Tribunal shall consist of one or more members designated by the Chairperson, at least one of whom is a judicial member.

Case record in electronic format

32 The original and official case record of an electronic hearing shall be kept by the Tribunal only in electronic format.

Practice directions

33 (1) The Tribunal may issue practice directions.

Avis de retrait

(2) Le défendeur signifie un avis de retrait aux autres parties et aux intervenants et le dépose avec la preuve de sa signification.

Frais

28 Si une des parties se désiste de l'instance ou retire sa réponse, le Tribunal peut déterminer des frais conformément à l'article 8.1 de la *Loi sur le Tribunal de la concurrence*.

Audience

Audience publique

29 Sous réserve de la règle 30, le public peut assister aux audiences du Tribunal.

Audience à huis clos

30 (1) Toute partie, tout intervenant ou toute personne ayant un intérêt dans une instance peut demander que tout ou partie d'une audience soit tenue à huis clos.

Contenu de la demande

(2) La personne qui présente la demande en expose les motifs au Tribunal, y compris des précisions sur le préjudice direct qu'occasionnerait la présence du public à l'audience ou à une partie de celle-ci.

Pouvoirs du Tribunal

(3) Le Tribunal peut rendre l'ordonnance qu'il juge indiquée lorsqu'il estime qu'il existe des raisons valables de tenir l'audience à huis clos.

Pratique et procédure

Composition du Tribunal

31 Pour l'application des présentes règles et sous réserve des articles 10 et 11 de la *Loi sur le Tribunal de la concurrence*, le Tribunal est composé d'un ou de plusieurs membres désignés par le président, dont au moins un membre judiciaire.

Dossier officiel sous forme électronique

32 Le Tribunal conserve le dossier original et officiel de l'audience électronique uniquement sous forme électronique.

Directives de pratique

33 (1) Le Tribunal peut établir des directives de pratique.

in a pleading may be withdrawn on consent of the other party or with leave of the Tribunal.

Discovery

Affidavit of documents

60 (1) The applicant and each respondent who has filed a response shall, within the time prescribed at a case management conference, serve an affidavit of documents on each other party.

Content

(2) An affidavit of documents shall include

- (a)** a list identifying the documents that are relevant to any matter in issue and that are or were in the possession, power or control of the party;
- (b)** any claim that a document is confidential or contains confidential information;
- (c)** any claim that a document is privileged; and
- (d)** a statement of the grounds for each claim of privilege.

Power of the Tribunal

61 Upon the motion of a party who has served an affidavit of documents and who opposes a claim for privilege of another party, the Tribunal may inspect the document and determine the validity of the claim.

Application of deemed undertaking

62 (1) This rule applies to evidence obtained during documentary, written and oral discovery and information obtained from that evidence.

Deemed undertaking

(2) All parties and their counsel are deemed to undertake not to use evidence or information to which this rule applies for any purposes other than those of the proceeding in which the evidence was obtained.

Exceptions

(3) Subrule (2) does not prohibit

de reconnaissance ou contenu dans un acte de procédure, ainsi que l'aveu réputé tel aux termes de la règle 57 peuvent faire l'objet d'une rétractation.

Communication préalable

Affidavit de documents

60 (1) Le demandeur et chaque défendeur qui a déposé une réponse signifient aux autres parties un affidavit de documents dans le délai imparti lors de la conférence de gestion de l'instance.

Contenu

(2) L'affidavit de documents comporte les renseignements suivants :

- a)** une liste des documents qui sont pertinents quant aux questions soulevées et qui sont ou étaient en la possession, sous l'autorité ou sous la garde de la partie;
- b)** toute allégation de confidentialité à l'égard d'un document ou de renseignements dans un document;
- c)** toute allégation de privilège à l'égard d'un document;
- d)** les motifs à l'appui de chaque allégation de privilège.

Pouvoirs du Tribunal

61 À la requête d'une partie qui a signifié un affidavit de documents et qui s'oppose à une allégation de privilège formulée par une autre partie, le Tribunal peut examiner le document en cause afin de déterminer le bien-fondé de l'allégation.

Application de la présomption d'engagement implicite

62 (1) La présente règle s'applique aux éléments de preuve obtenus durant la communication des documents, l'interrogatoire préalable oral et l'interrogatoire préalable par écrit, et aux renseignements tirés de ces éléments de preuve.

Présomption d'engagement

(2) Toutes les parties et leurs avocats sont réputés s'engager à ne pas utiliser les éléments de preuve ou les renseignements auxquels la présente règle s'applique à des fins autres que celles de l'instance au cours de laquelle les éléments de preuve ont été obtenus.

Exception

(3) Le paragraphe (2) n'a pas pour effet d'interdire :



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CODIFICATION

Criminal Code

Code criminel

R.S.C., 1985, c. C-46

L.R.C. (1985), ch. C-46

Current to September 1, 2025

À jour au 1 septembre 2025

Last amended on April 8, 2025

Dernière modification le 8 avril 2025

- (h) the importance of the witness's testimony to the case;
- (i) whether effective alternatives to the making of the proposed order are available in the circumstances;
- (j) the salutary and deleterious effects of the proposed order; and
- (k) any other factor that the judge or justice considers relevant.

No adverse inference

(4) No adverse inference may be drawn from the fact that an order is, or is not, made under this section.

2015, c. 20, s. 22.

Information for search warrant

487 (1) A justice who is satisfied by information on oath in Form 1 that there are reasonable grounds to believe that there is in a building, receptacle or place

- (a) anything on or in respect of which any offence against this Act or any other Act of Parliament has been or is suspected to have been committed,
- (b) anything that there are reasonable grounds to believe will afford evidence with respect to the commission of an offence, or will reveal the whereabouts of a person who is believed to have committed an offence, against this Act or any other Act of Parliament,
- (c) anything that there are reasonable grounds to believe is intended to be used for the purpose of committing any offence against the person for which a person may be arrested without warrant, or

(c.1) any offence-related property,

may at any time issue a warrant authorizing a peace officer or a public officer who has been appointed or designated to administer or enforce a federal or provincial law and whose duties include the enforcement of this Act or any other Act of Parliament and who is named in the warrant

- (d) to search the building, receptacle or place for any such thing and to seize it, and
- (e) subject to any other Act of Parliament, to, as soon as practicable, bring the thing seized before, or make a report in respect of it to, a justice in accordance with section 489.1.

g) l'intérêt de la société à encourager la dénonciation des infractions et la participation des victimes et des témoins au processus de justice pénale;

h) l'importance du témoignage dans l'instance;

i) l'existence dans les circonstances d'autres moyens efficaces que celui de rendre l'ordonnance;

j) les effets bénéfiques et préjudiciables de l'ordonnance demandée;

k) tout autre facteur qu'il estime pertinent.

Conclusion défavorable

(4) Le fait qu'une ordonnance visée au présent article soit ou non rendue ne peut donner lieu à des conclusions défavorables.

2015, ch. 20, art. 22.

Dénonciation pour mandat de perquisition

487 (1) Un juge de paix qui est convaincu, à la suite d'une dénonciation faite sous serment selon la formule 1, qu'il existe des motifs raisonnables de croire que, dans un bâtiment, contenant ou lieu, se trouve, selon le cas :

- a)** une chose à l'égard de laquelle une infraction à la présente loi, ou à toute autre loi fédérale, a été commise ou est présumée avoir été commise;
- b)** une chose dont on a des motifs raisonnables de croire qu'elle fournira une preuve touchant la commission d'une infraction ou révélera l'endroit où se trouve la personne qui est présumée avoir commis une infraction à la présente loi, ou à toute autre loi fédérale;
- c)** une chose dont on a des motifs raisonnables de croire qu'elle est destinée à servir aux fins de la perpétration d'une infraction contre la personne, pour laquelle un individu peut être arrêté sans mandat;

c.1) un bien infractionnel,

peut à tout moment décerner un mandat autorisant un agent de la paix ou, dans le cas d'un fonctionnaire public nommé ou désigné pour l'application ou l'exécution d'une loi fédérale ou provinciale et chargé notamment de faire observer la présente loi ou toute autre loi fédérale, celui qui y est nommé :

- d)** d'une part, à faire une perquisition dans ce bâtiment, contenant ou lieu, pour rechercher cette chose et la saisir;
- e)** d'autre part, sous réserve de toute autre loi fédérale, dans les plus brefs délais possible, à apporter la

chose devant un juge de paix, ou en faire rapport, en conformité avec l'article 489.1.

Execution in Canada

(2) A warrant issued under subsection (1) may be executed at any place in Canada. A public officer named in the warrant, or any peace officer, who executes the warrant must have authority to act in that capacity in the place where the warrant is executed.

Operation of computer system and copying equipment

(2.1) A person authorized under this section to search a computer system in a building or place for data may

- (a) use or cause to be used any computer system at the building or place to search any data contained in or available to the computer system;
- (b) reproduce or cause to be reproduced any data in the form of a print-out or other intelligible output;
- (c) seize the print-out or other output for examination or copying; and
- (d) use or cause to be used any copying equipment at the place to make copies of the data.

Duty of person in possession or control

(2.2) Every person who is in possession or control of any building or place in respect of which a search is carried out under this section shall, on presentation of the warrant, permit the person carrying out the search

- (a) to use or cause to be used any computer system at the building or place in order to search any data contained in or available to the computer system for data that the person is authorized by this section to search for;
- (b) to obtain a hard copy of the data and to seize it; and
- (c) to use or cause to be used any copying equipment at the place to make copies of the data.

Form

(3) A search warrant issued under this section may be in the form set out as Form 5 in Part XXVIII, varied to suit the case.

(4) [Repealed, 2019, c. 25, s. 191]

R.S., 1985, c. C-46, s. 487; R.S., 1985, c. 27 (1st Suppl.), s. 68; 1994, c. 44, s. 36; 1997, c. 18, s. 41, c. 23, s. 12; 1999, c. 5, s. 16; 2008, c. 18, s. 11; 2019, c. 25, s. 191; 2022, c. 17, s. 16.

Exécution au Canada

(2) Le mandat peut être exécuté en tout lieu au Canada. Le fonctionnaire public qui y est nommé ou tout agent de la paix qui exécute le mandat doit être habilité à agir à ce titre dans le lieu où celui-ci est exécuté.

Usage d'un système informatique

(2.1) La personne autorisée à perquisitionner des données contenues dans un ordinateur se trouvant dans un lieu ou un bâtiment peut :

- a) utiliser ou faire utiliser tout ordinateur s'y trouvant pour vérifier les données que celui-ci contient ou auxquelles il donne accès;
- b) reproduire ou faire reproduire des données sous forme d'imprimé ou toute autre forme intelligible;
- c) saisir tout imprimé ou sortie de données pour examen ou reproduction;
- d) utiliser ou faire utiliser le matériel s'y trouvant pour reproduire des données.

Obligation du responsable du lieu

(2.2) Sur présentation du mandat, le responsable du lieu qui fait l'objet de la perquisition doit faire en sorte que la personne qui procède à celle-ci puisse procéder aux opérations mentionnées au paragraphe (2.1).

Formule

(3) Un mandat de perquisition décerné en vertu du présent article peut être rédigé selon la formule 5 de la partie XXVIII, ajustée selon les circonstances.

(4) [Abrogé, 2019, ch. 25, art. 191]

L.R. (1985), ch. C-46, art. 487; L.R. (1985), ch. 27 (1^{er} suppl.), art. 68; 1994, ch. 44, art. 36; 1997, ch. 18, art. 41, ch. 23, art. 12; 1999, ch. 5, art. 16; 2008, ch. 18, art. 11; 2019, ch. 25, art. 191; 2022, ch. 17, art. 16.

Limitation

(4) A person who is under investigation for the offence referred to in subsection (2) may not be made subject to an order.

2004, c. 3, s. 7; 2014, c. 31, s. 20.

Production order — specified dates

487.0141 (1) On *ex parte* application made by a peace officer or public officer, a justice or judge may order a person to produce a document that is a copy of a document that is in their possession or control on any of the dates specified in the order or prepare and produce a document containing data that is in their possession or control on any of the dates specified in the order.

Conditions for making order

(2) Before making the order, the justice or judge must be satisfied by information on oath in Form 5.004 that there are reasonable grounds to believe that

- (a)** an offence has been or will be committed under this or any other Act of Parliament; and
- (b)** the document or data, if it is in the person's possession or control on any of the dates to be specified in the order, will afford evidence respecting the commission of the offence.

Form

(3) The order is to be in Form 5.0051.

Dates specified in order

(4) The order may specify up to 10 dates that fall within the 60-day period after the day on which it is made.

Suspicious transactions

(5) The order may also require the person to produce to a peace officer or public officer named in the order a copy of all reports made under any of sections 7, 7.1 and 9 of the *Proceeds of Crime (Money Laundering) and Terrorist Financing Act* during the period the order is in effect if the justice or judge is satisfied by information on oath in Form 5.004 that there are reasonable grounds to believe that the information contained in such a report will afford evidence respecting the commission of the offence referred to in subsection (2).

Limite

(4) La personne faisant l'objet d'une enquête relative à l'infraction visée au paragraphe (2) ne peut être assujettie à l'ordonnance.

2004, ch. 3, art. 7; 2014, ch. 31, art. 20.

Ordonnance de communication : dates précisées

487.0141 (1) Le juge de paix ou le juge peut, sur demande *ex parte* présentée par un agent de la paix ou un fonctionnaire public, ordonner à toute personne de communiquer un document qui est la copie d'un document qui est en sa possession ou à sa disposition à l'une des dates précisées dans l'ordonnance ou d'établir et de communiquer un document comportant des données qui sont en sa possession ou à sa disposition à l'une de ces dates.

Conditions préalables à l'ordonnance

(2) Il ne rend l'ordonnance que s'il est convaincu, par une dénonciation sous serment faite selon la formule 5.004, qu'il existe des motifs raisonnables de croire, à la fois :

- a)** qu'une infraction à la présente loi ou à toute autre loi fédérale a été ou sera commise;
- b)** que le document ou les données, s'ils sont en la possession de la personne ou à sa disposition à l'une des dates qui seront précisées dans l'ordonnance, ils fourniront une preuve concernant la perpétration de l'infraction.

Formule

(3) L'ordonnance est rendue selon la formule 5.0051.

Dates précisées dans l'ordonnance

(4) Le juge de paix ou le juge précise, dans l'ordonnance, au plus dix dates qui tombent au cours de la période de soixante jours suivant la date où l'ordonnance est rendue.

Opérations douteuses

(5) L'ordonnance peut aussi exiger que la personne communique à l'agent de la paix ou au fonctionnaire public nommé dans l'ordonnance une copie de toutes déclarations qu'elle fait en application de l'un des articles 7, 7.1 et 9 de la *Loi sur le recyclage des produits de la criminalité et le financement des activités terroristes* au cours de la période où l'ordonnance est en vigueur si le juge de paix ou le juge est convaincu, par une dénonciation sous serment faite selon la formule 5.004, qu'il existe des motifs raisonnables de croire que les renseignements contenus dans la déclaration fourniront une preuve concernant la perpétration de l'infraction visée au paragraphe (2).

Restrictions

(6) The person must not be required to

(a) produce documents more than once in any 72-hour period;

(b) produce a document that is a copy of a document that was in their possession or control before the day on which the order is made; or

(c) prepare and produce a document that contains data that was in their possession or control before the day on which the order is made.

Limitation

(7) A person who is under investigation for the offence referred to in subsection (2) may not be made subject to an order.

Expiry of order

(8) Unless the order is revoked earlier, it expires 60 days after the day on which it is made.

Renewals

(9) A justice or judge may renew the order for a period of not more than 60 days on *ex parte* application made by a peace officer or public officer indicating the reason and period for which the renewal is required.

Conditions for renewal

(10) Before renewing the order, the justice or judge must be satisfied by information on oath in Form 5.004 that the conditions specified in subsection (2) are met.

Dates specified in renewed order

(11) If the order is renewed, it may specify up to 10 dates during the period for which it is renewed.

2024, c. 17, s. 357.

Production order to trace specified communication

487.015 (1) On *ex parte* application made by a peace officer or public officer for the purpose of identifying a device or person involved in the transmission of a communication, a justice or judge may order a person to prepare and produce a document containing transmission data that is related to that purpose and that is, when they are served with the order, in their possession or control.

Réserves

(6) La personne ne peut être tenue de communiquer des documents plus d'une fois au cours d'une période de soixante-douze heures, ni de communiquer un document qui est la copie d'un document qui était en sa possession ou à sa disposition avant la date où l'ordonnance est rendue, ni d'établir et de communiquer un document comportant des données qui étaient en sa possession ou à sa disposition avant cette date.

Limite

(7) La personne faisant l'objet d'une enquête relative à l'infraction visée au paragraphe (2) ne peut être assujettie à l'ordonnance.

Expiration de l'ordonnance

(8) L'ordonnance expire soixante jours après la date à laquelle qu'elle a été rendue, à moins qu'elle n'ait été révoquée auparavant.

Renouvellements

(9) Un juge de paix ou un juge peut renouveler l'ordonnance pour une période maximale de soixante jours sur demande *ex parte* présentée par un agent de la paix ou un fonctionnaire public indiquant la raison et la période pour lesquelles le renouvellement est demandé.

Conditions préalables au renouvellement

(10) Il ne renouvelle l'ordonnance que s'il est convaincu, par une dénonciation sous serment faite selon la formule 5.004, que les conditions indiquées au paragraphe (2) sont remplies.

Dates précisées dans l'ordonnance renouvelée

(11) S'il renouvelle l'ordonnance, le juge de paix ou le juge précise au plus dix dates qui tombent au cours de la période de renouvellement.

2024, ch. 17, art. 357.

Ordonnance de communication en vue de retracer une communication donnée

487.015 (1) Le juge de paix ou le juge peut, sur demande *ex parte* présentée par un agent de la paix ou un fonctionnaire public afin d'identifier tout dispositif ayant servi à la transmission de la communication ou toute personne y ayant participé, ordonner à toute personne d'établir et de communiquer un document comportant des données de transmission qui ont trait à l'identification et qui, au moment où l'ordonnance lui est signifiée, sont en sa possession ou à sa disposition.

Names of jurors

(1.1) The name of each juror, including alternate jurors, who is sworn shall be kept apart until the juror is excused or the jury gives its verdict or is discharged, at which time the name shall be returned to the box as often as occasion arises, as long as an issue remains to be tried before a jury.

Same jury may try another issue by consent

(2) The court may try an issue with the same jury in whole or in part that previously tried or was drawn to try another issue, without the jurors being sworn again, but if the prosecutor or the accused objects to any of the jurors or the court excuses any of the jurors, the court shall order those persons to withdraw and shall direct that the required number of cards to make up a full jury be drawn and, subject to the provisions of this Part relating to challenges, orders to excuse and directions to stand by, the persons whose cards are drawn shall be sworn.

Sections directory

(3) Failure to comply with the directions of this section or section 631, 635 or 641 does not affect the validity of a proceeding.

R.S., 1985, c. C-46, s. 643; 1992, c. 41, s. 5; 2001, c. 32, s. 42; 2002, c. 13, s. 58; 2011, c. 16, s. 12.

Discharge of juror

644 (1) Where in the course of a trial the judge is satisfied that a juror should not, by reason of illness or other reasonable cause, continue to act, the judge may discharge the juror.

Replacement of juror

(1.1) A judge may select another juror to take the place of a juror who by reason of illness or other reasonable cause cannot continue to act, if the jury has not yet begun to hear evidence, either by drawing a name from a panel of persons who were summoned to act as jurors and who are available at the court at the time of replacing the juror or by using the procedure referred to in section 642.

Trial may continue

(2) Where in the course of a trial a member of the jury dies or is discharged pursuant to subsection (1), the jury shall, unless the judge otherwise directs and if the number of jurors is not reduced below ten, be deemed to remain properly constituted for all purposes of the trial and the trial shall proceed and a verdict may be given accordingly.

Juré

(1.1) Le nom de tout juré assermenté, y compris celui de tout juré suppléant, est gardé à part jusqu'à ce que, selon le cas, celui-ci soit dispensé ou le jury ait rendu son verdict ou ait été libéré, sur quoi le nom est remplacé dans la boîte aussi souvent que l'occasion se présente tant qu'il reste une affaire à juger devant un jury.

Instruction par le même jury

(2) Le tribunal peut instruire un procès avec le même jury, en totalité ou en partie, qui a déjà jugé ou qui a été tiré pour juger une autre affaire, sans que les jurés soient assermentés de nouveau; toutefois, si le poursuivant ou l'accusé a des objections contre l'un des jurés, ou si le tribunal en excuse un ou plusieurs, le tribunal ordonne à ces personnes de se retirer et demande que le nombre de cartes requis pour former un jury complet soit tiré et, sous réserve des autres dispositions de la présente partie relatives aux dispenses, récusations et mises à l'écart, les personnes dont les cartes sont tirées sont assermentées.

Vice de procédure

(3) Le non-respect du présent article ou des articles 631, 635 ou 641 n'atteint pas la validité d'une procédure.

L.R. (1985), ch. C-46, art. 643; 1992, ch. 41, art. 5; 2001, ch. 32, art. 42; 2002, ch. 13, art. 58; 2011, ch. 16, art. 12.

Libération d'un juré

644 (1) Lorsque, au cours d'un procès, le juge est convaincu qu'un juré ne devrait pas, par suite de maladie ou pour une autre cause raisonnable, continuer à siéger, il peut le libérer.

Remplacement d'un juré

(1.1) Il peut le remplacer si le jury n'a encore rien entendu de la preuve en lui substituant un autre juré qu'il choisit parmi les personnes dont le nom figure au tableau et qui sont présentes au tribunal ou qu'il assigne conformément à l'article 642.

Le procès peut continuer

(2) Lorsque, au cours d'un procès, un membre du juré décède ou est libéré au titre du paragraphe (1), le jury est considéré, à toutes les fins du procès, comme demeurant régulièrement constitué, à moins que le juge n'en ordonne autrement et à condition que le nombre des jurés ne soit pas réduit à moins de dix; le procès se continuera et un verdict pourra être rendu en conséquence.

Trial may continue without jury

(3) If in the course of a trial the number of jurors is reduced below 10, the judge may, with the consent of the parties, discharge the jurors, continue the trial without a jury and render a verdict.

R.S., 1985, c. C-46, s. 644; 1992, c. 41, s. 6; 1997, c. 18, s. 75; 2019, c. 25, s. 273.

Trial**Trial continuous**

645 (1) The trial of an accused shall proceed continuously subject to adjournment by the court.

Adjournment

(2) A judge may adjourn a trial from time to time in the same sittings.

Formal adjournment unnecessary

(3) For the purpose of subsection (2), no formal adjournment of trial or entry thereof is required.

Questions reserved for decision

(4) A judge, in any case tried without a jury, may reserve final decision on any question raised at the trial, or any matter raised further to a pre-hearing conference, and the decision, when given, shall be deemed to have been given at the trial.

Questions reserved for decision in a trial with a jury

(5) In any case to be tried with a jury, the judge before whom an accused is or is to be tried has jurisdiction, before any juror on a panel of jurors is called pursuant to subsection 631(3) or (3.1) and in the absence of any such juror, to deal with any matter that would ordinarily or necessarily be dealt with in the absence of the jury after it has been sworn.

R.S., 1985, c. C-46, s. 645; R.S., 1985, c. 27 (1st Supp.), s. 133; 1997, c. 18, s. 76; 2001, c. 32, s. 43.

Taking evidence

646 On the trial of an accused for an indictable offence, the evidence of the witnesses for the prosecutor and the accused and the addresses of the prosecutor and the accused or counsel for the accused by way of summing up shall be taken in accordance with the provisions of Part XVIII, other than subsections 540(7) to (9), relating to the taking of evidence at preliminary inquiries.

R.S., 1985, c. C-46, s. 646; 2002, c. 13, s. 59.

Poursuite du procès sans jury

(3) Lorsque, au cours d'un procès, le nombre des jurés est réduit à moins de dix, le juge peut, avec le consentement des parties, libérer les jurés et poursuivre le procès sans jury et rendre un verdict.

L.R. (1985), ch. C-46, art. 644; 1992, ch. 41, art. 6; 1997, ch. 18, art. 75; 2019, ch. 25, art. 273.

Procès**Instruction continue**

645 (1) Le procès d'un accusé se poursuit continûment, sous réserve d'ajournement par le tribunal.

Ajournement

(2) Le juge peut ajourner le procès de temps à autre au cours d'une même session.

Ajournement formel non nécessaire

(3) À cette fin, aucun ajournement formel du procès n'est requis, et il n'est pas nécessaire d'en faire une inscription.

Questions réservées pour décision

(4) Le juge, dans une cause entendue sans jury, peut réserver sa décision définitive sur toute question soulevée au procès ou lors d'une conférence préparatoire, et sa décision, une fois donnée, est censée l'avoir été au procès.

Questions en l'absence du jury

(5) Dans le cas d'un procès par jury, le juge peut, avant que les candidats-jurés ne soient appelés en vertu des paragraphes 631(3) ou (3.1) et en l'absence de ceux-ci, décider des questions qui normalement ou nécessairement feraient l'objet d'une décision en l'absence du jury, une fois celui-ci constitué.

L.R. (1985), ch. C-46, art. 645; L.R. (1985), ch. 27 (1^{er} suppl.), art. 133; 1997, ch. 18, art. 76; 2001, ch. 32, art. 43.

Prise des témoignages

646 Lors du procès d'une personne accusée d'un acte criminel, les dépositions des témoins pour le poursuivant et l'accusé ainsi que les exposés du poursuivant et de l'accusé ou de l'avocat de l'accusé, par voie de résumé, sont recueillis en conformité avec les dispositions de la partie XVIII relatives à la prise des témoignages aux enquêtes préliminaires, à l'exception des paragraphes 540(7) à (9).

L.R. (1985), ch. C-46, art. 646; 2002, ch. 13, art. 59.

Subsequent disclosure

(2) Where a record is made available for inspection to any person under subparagraph (1)(d)(i), that person may subsequently disclose information contained in the record, but may not disclose the information in any form that would reasonably be expected to identify the person to whom it relates.

Information, copies

(3) Any person to whom a record is authorized to be made available under this section may be given any information contained in the record and may be given a copy of any part of the record.

Evidence

(4) Nothing in this section authorizes the introduction into evidence of any part of a record that would not otherwise be admissible in evidence.

Idem

(5) A record kept pursuant to section 717.2 or 717.3 may not be introduced into evidence, except for the purposes set out in paragraph 721(3)(c), more than two years after the end of the period for which the person agreed to participate in the alternative measures.

1995, c. 22, s. 6.

Purpose and Principles of Sentencing

Purpose

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

- (a) to denounce unlawful conduct and the harm done to victims or to the community that is caused by unlawful conduct;
- (b) to deter the offender and other persons from committing offences;
- (c) to separate offenders from society, where necessary;
- (d) to assist in rehabilitating offenders;
- (e) to provide reparations for harm done to victims or to the community; and

Révélation postérieure

(2) La personne qui, aux termes du sous-alinéa (1)d)(i), a accès à un dossier peut postérieurement communiquer les renseignements qui y sont contenus; toutefois cette communication ne peut se faire d'une manière qui permettrait normalement d'identifier la personne en cause.

Communication de renseignements et de copies

(3) Les personnes à qui l'accès à un dossier peut, en application du présent article, être accordé peuvent obtenir tous renseignements contenus dans le dossier ou tout extrait de celui-ci.

Production en preuve

(4) Le présent article n'autorise pas la production en preuve des pièces d'un dossier qui, autrement, ne seraient pas admissibles en preuve.

Idem

(5) Tout dossier tenu en application des articles 717.2 ou 717.3 ne peut être produit en preuve après l'expiration d'une période de deux ans suivant la fin de la période d'application des mesures de rechange, sauf si le dossier est produit à l'égard des éléments mentionnés à l'alinéa 721(3)c).

1995, ch. 22, art. 6.

Objectif et principes

Objectif

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

- a) dénoncer le comportement illégal et le tort causé par celui-ci aux victimes ou à la collectivité;
- b) dissuader les délinquants, et quiconque, de commettre des infractions;
- c) isoler, au besoin, les délinquants du reste de la société;
- d) favoriser la réinsertion sociale des délinquants;
- e) assurer la réparation des torts causés aux victimes ou à la collectivité;

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

R.S., 1985, c. C-46, s. 718; R.S., 1985, c. 27 (1st Supp.), s. 155; 1995, c. 22, s. 6; 2015, c. 13, s. 23.

Objectives — offences against children

718.01 When a court imposes a sentence for an offence that involved the abuse of a person under the age of eighteen years, it shall give primary consideration to the objectives of denunciation and deterrence of such conduct.

2005, c. 32, s. 24.

Objectives — offence against peace officer or other justice system participant

718.02 When a court imposes a sentence for an offence under subsection 270(1), section 270.01 or 270.02 or paragraph 423.1(1)(b), the court shall give primary consideration to the objectives of denunciation and deterrence of the conduct that forms the basis of the offence.

2009, c. 22, s. 18.

Objectives — offence against certain animals

718.03 When a court imposes a sentence for an offence under subsection 445.01(1), the court shall give primary consideration to the objectives of denunciation and deterrence of the conduct that forms the basis of the offence.

2015, c. 34, s. 4.

Objectives — offence against vulnerable person

718.04 When a court imposes a sentence for an offence that involved the abuse of a person who is vulnerable because of personal circumstances — including because the person is Aboriginal and female — the court shall give primary consideration to the objectives of denunciation and deterrence of the conduct that forms the basis of the offence.

2019, c. 25, s. 292.1.

Fundamental principle

718.1 A sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender.

R.S., 1985, c. 27 (1st Supp.), s. 156; 1995, c. 22, s. 6.

Other sentencing principles

718.2 A court that imposes a sentence shall also take into consideration the following principles:

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

L.R. (1985), ch. C-46, art. 718; L.R. (1985), ch. 27 (1^{er} suppl.), art. 155; 1995, ch. 22, art. 6; 2015, ch. 13, art. 23.

Objectif — infraction perpétrée à l'égard des enfants

718.01 Le tribunal qui impose une peine pour une infraction qui constitue un mauvais traitement à l'égard d'une personne âgée de moins de dix-huit ans accorde une attention particulière aux objectifs de dénonciation et de dissuasion d'un tel comportement.

2005, ch. 32, art. 24.

Objectifs — infraction à l'égard d'un agent de la paix ou autre personne associée au système judiciaire

718.02 Le tribunal qui impose une peine pour l'une des infractions prévues au paragraphe 270(1), aux articles 270.01 ou 270.02 ou à l'alinéa 423.1(1)b) accorde une attention particulière aux objectifs de dénonciation et de dissuasion de l'agissement à l'origine de l'infraction.

2009, ch. 22, art. 18.

Objectifs — infraction à l'égard de certains animaux

718.03 Le tribunal qui impose une peine pour une infraction prévue au paragraphe 445.01(1) accorde une attention particulière aux objectifs de dénonciation et de dissuasion de l'agissement à l'origine de l'infraction.

2015, ch. 34, art. 4.

Objectifs — infraction à l'égard d'une personne vulnérable

718.04 Le tribunal qui impose une peine pour une infraction qui constitue un mauvais traitement à l'égard d'une personne vulnérable en raison de sa situation personnelle, notamment en raison du fait qu'elle est une personne autochtone de sexe féminin, accorde une attention particulière aux objectifs de dénonciation et de dissuasion de l'agissement à l'origine de l'infraction.

2019, ch. 25, art. 292.1.

Principe fondamental

718.1 La peine est proportionnelle à la gravité de l'infraction et au degré de responsabilité du délinquant.

L.R. (1985), ch. 27 (1^{er} suppl.), art. 156; 1995, ch. 22, art. 6.

Principes de détermination de la peine

718.2 Le tribunal détermine la peine à infliger compte tenu également des principes suivants :

a) la peine devrait être adaptée aux circonstances aggravantes ou atténuantes liées à la perpétration de l'infraction ou à la situation du délinquant; sont

(a) a sentence should be increased or reduced to account for any relevant aggravating or mitigating circumstances relating to the offence or the offender, and, without limiting the generality of the foregoing,

(i) evidence that the offence was motivated by bias, prejudice or hate based on race, national or ethnic origin, language, colour, religion, sex, age, mental or physical disability, sexual orientation, or gender identity or expression, or on any other similar factor,

(ii) evidence that the offender, in committing the offence, abused the offender's intimate partner or a member of the victim or the offender's family,

(ii.1) evidence that the offender, in committing the offence, abused a person under the age of eighteen years,

(ii.2) evidence that the offender involved a person under the age of 18 years in the commission of the offence,

(iii) evidence that the offender, in committing the offence, abused a position of trust or authority in relation to the victim,

(iii.1) evidence that the offence had a significant impact on the victim, considering their age and other personal circumstances, including their health and financial situation,

(iii.2) evidence that the offence was committed against a person who, in the performance of their duties and functions, was providing health services, including personal care services,

(iv) evidence that the offence was committed for the benefit of, at the direction of or in association with a criminal organization,

(v) evidence that the offence was a terrorism offence,

(vi) evidence that the offence was committed while the offender was subject to a conditional sentence order made under section 742.1 or released on parole, statutory release or unescorted temporary absence under the *Corrections and Conditional Release Act*, and

(vii) evidence that the commission of the offence had the effect of impeding another person from obtaining health services, including personal care services,

notamment considérées comme des circonstances aggravantes des éléments de preuve établissant :

(i) que l'infraction est motivée par des préjugés ou de la haine fondés sur des facteurs tels que la race, l'origine nationale ou ethnique, la langue, la couleur, la religion, le sexe, l'âge, la déficience mentale ou physique, l'orientation sexuelle ou l'identité ou l'expression de genre,

(ii) que l'infraction perpétrée par le délinquant constitue un mauvais traitement soit de son partenaire intime soit d'un membre de la famille de la victime ou du délinquant,

(ii.1) que l'infraction perpétrée par le délinquant constitue un mauvais traitement à l'égard d'une personne âgée de moins de dix-huit ans,

(ii.2) que le délinquant a amené une personne âgée de moins de dix-huit ans à prendre part à la perpétration de l'infraction,

(iii) que l'infraction perpétrée par le délinquant constitue un abus de la confiance de la victime ou un abus d'autorité à son égard,

(iii.1) que l'infraction a eu un effet important sur la victime en raison de son âge et de tout autre élément de sa situation personnelle, notamment sa santé et sa situation financière,

(iii.2) que l'infraction a été perpétrée à l'encontre d'une personne qui, dans l'exercice de ses attributions, fournissait des services de santé, notamment des services de soins personnels,

(iv) que l'infraction a été commise au profit ou sous la direction d'une organisation criminelle, ou en association avec elle,

(v) que l'infraction perpétrée par le délinquant est une infraction de terrorisme,

(vi) que l'infraction a été perpétrée alors que le délinquant faisait l'objet d'une ordonnance de sursis rendue au titre de l'article 742.1 ou qu'il bénéficiait d'une libération conditionnelle ou d'office ou d'une permission de sortir sans escorte en vertu de la *Loi sur le système correctionnel et la mise en liberté sous condition*,

(vii) que l'infraction perpétrée a eu pour effet de nuire à l'obtention par autrui de services de santé, notamment des services de soins personnels;

shall be deemed to be aggravating circumstances;

(b) a sentence should be similar to sentences imposed on similar offenders for similar offences committed in similar circumstances;

(c) where consecutive sentences are imposed, the combined sentence should not be unduly long or harsh;

(d) an offender should not be deprived of liberty, if less restrictive sanctions may be appropriate in the circumstances; and

(e) all available sanctions, other than imprisonment, that are reasonable in the circumstances and consistent with the harm done to victims or to the community should be considered for all offenders, with particular attention to the circumstances of Aboriginal offenders.

1995, c. 22, s. 6; 1997, c. 23, s. 17; 2000, c. 12, s. 95; 2001, c. 32, s. 44(F), c. 41, s. 20; 2005, c. 32, s. 25; 2012, c. 29, s. 2; 2015, c. 13, s. 24, c. 23, s. 16; 2017, c. 13, s. 4; 2019, c. 25, s. 293; 2021, c. 27, s. 5; 2024, c. 17, s. 374.

Additional consideration — increased vulnerability

718.201 A court that imposes a sentence in respect of an offence that involved the abuse of an intimate partner shall consider the increased vulnerability of female persons who are victims, giving particular attention to the circumstances of Aboriginal female victims.

2019, c. 25, s. 293.1.

Organizations

Additional factors

718.21 A court that imposes a sentence on an organization shall also take into consideration the following factors:

(a) any advantage realized by the organization as a result of the offence;

(b) the degree of planning involved in carrying out the offence and the duration and complexity of the offence;

(c) whether the organization has attempted to conceal its assets, or convert them, in order to show that it is not able to pay a fine or make restitution;

(d) the impact that the sentence would have on the economic viability of the organization and the continued employment of its employees;

b) l'harmonisation des peines, c'est-à-dire l'infliction de peines semblables à celles infligées à des délinquants pour des infractions semblables commises dans des circonstances semblables;

c) l'obligation d'éviter l'excès de nature ou de durée dans l'infliction de peines consécutives;

d) l'obligation, avant d'envisager la privation de liberté, d'examiner la possibilité de sanctions moins contraignantes lorsque les circonstances le justifient;

e) l'examen, plus particulièrement en ce qui concerne les délinquants autochtones, de toutes les sanctions substitutives qui sont raisonnables dans les circonstances et qui tiennent compte du tort causé aux victimes ou à la collectivité.

1995, ch. 22, art. 6; 1997, ch. 23, art. 17; 2000, ch. 12, art. 95; 2001, ch. 32, art. 44(F), ch. 41, art. 20; 2005, ch. 32, art. 25; 2012, ch. 29, art. 2; 2015, ch. 13, art. 24, ch. 23, art. 16; 2017, ch. 13, art. 4; 2019, ch. 25, art. 293; 2021, ch. 27, art. 5; 2024, ch. 17, art. 374.

Considération additionnelle — vulnérabilité accrue

718.201 Le tribunal qui impose une peine pour une infraction qui constitue un mauvais traitement à l'égard d'un partenaire intime prend en considération la vulnérabilité accrue des victimes de sexe féminin, en accordant une attention particulière à la situation des victimes autochtones de sexe féminin.

2019, ch. 25, art. 293.1.

Organisations

Facteurs à prendre en compte

718.21 Le tribunal détermine la peine à infliger à toute organisation en tenant compte également des facteurs suivants :

a) les avantages tirés par l'organisation du fait de la perpétration de l'infraction;

b) le degré de complexité des préparatifs reliés à l'infraction et de l'infraction elle-même et la période au cours de laquelle elle a été commise;

c) le fait que l'organisation a tenté de dissimuler des éléments d'actif, ou d'en convertir, afin de se montrer incapable de payer une amende ou d'effectuer une restitution;

d) l'effet qu'aurait la peine sur la viabilité économique de l'organisation et le maintien en poste de ses employés;

(e) the cost to public authorities of the investigation and prosecution of the offence;

(f) any regulatory penalty imposed on the organization or one of its representatives in respect of the conduct that formed the basis of the offence;

(g) whether the organization was — or any of its representatives who were involved in the commission of the offence were — convicted of a similar offence or sanctioned by a regulatory body for similar conduct;

(h) any penalty imposed by the organization on a representative for their role in the commission of the offence;

(i) any restitution that the organization is ordered to make or any amount that the organization has paid to a victim of the offence; and

(j) any measures that the organization has taken to reduce the likelihood of it committing a subsequent offence.

2003, c. 21, s. 14.

Punishment Generally

Degrees of punishment

718.3 (1) Where 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 offence.

Discretion respecting punishment

(2) Where an enactment prescribes a 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 offence, but no punishment is a minimum punishment unless it is declared to be a minimum punishment.

Imprisonment in default where term not specified

(3) Where an accused is convicted of an offence punishable with both fine and imprisonment and a term of imprisonment in default of payment of the fine is not specified in the enactment that prescribes the punishment to be imposed, the imprisonment that may be imposed in default of payment shall not exceed the term of imprisonment that is prescribed in respect of the offence.

e) les frais supportés par les administrations publiques dans le cadre des enquêtes et des poursuites relatives à l'infraction;

f) l'imposition de pénalités à l'organisation ou à ses agents à l'égard des agissements à l'origine de l'infraction;

g) les déclarations de culpabilité ou pénalités dont l'organisation — ou tel de ses agents qui a participé à la perpétration de l'infraction — a fait l'objet pour des agissements similaires;

h) l'imposition par l'organisation de pénalités à ses agents pour leur rôle dans la perpétration de l'infraction;

i) toute restitution ou indemnisation imposée à l'organisation ou effectuée par elle au profit de la victime;

j) l'adoption par l'organisation de mesures en vue de réduire la probabilité qu'elle commette d'autres infractions.

2003, ch. 21, art. 14.

Peines en général

Degré de la peine

718.3 (1) Lorsqu'une disposition prescrit différents degrés ou genres de peine à l'égard d'une infraction, la punition à infliger est, sous réserve des restrictions contenues dans la disposition, à la discrétion du tribunal qui condamne l'auteur de l'infraction.

Appréciation du tribunal

(2) Lorsqu'une disposition prescrit une peine à l'égard d'une infraction, la peine à infliger est, sous réserve des restrictions contenues dans la disposition, laissée à l'appréciation du tribunal qui condamne l'auteur de l'infraction, mais nulle peine n'est une peine minimale à moins qu'elle ne soit déclarée telle.

Emprisonnement à défaut de paiement d'une amende

(3) Lorsque l'accusé est déclaré coupable d'une infraction punissable à la fois d'une amende et d'un emprisonnement et qu'une période d'emprisonnement à défaut de paiement de l'amende n'est pas spécifiée dans la disposition qui prescrit la peine à infliger, l'emprisonnement pouvant être infligé à défaut de paiement ne peut dépasser l'emprisonnement prescrit à l'égard de l'infraction.

Eligibility for Parole

Power of court to delay parole

743.6 (1) Notwithstanding subsection 120(1) of the *Corrections and Conditional Release Act*, where an offender receives, on or after November 1, 1992, a sentence of imprisonment of two years or more, including a sentence of imprisonment for life imposed otherwise than as a minimum punishment, on conviction for an offence set out in Schedule I or II to that Act that was prosecuted by way of indictment, the court may, if satisfied, having regard to the circumstances of the commission of the offence and the character and circumstances of the offender, that the expression of society's denunciation of the offence or the objective of specific or general deterrence so requires, order that the portion of the sentence that must be served before the offender may be released on full parole is one half of the sentence or ten years, whichever is less.

Power of court to delay parole

(1.1) Notwithstanding section 120 of the *Corrections and Conditional Release Act*, where an offender receives a sentence of imprisonment of two years or more, including a sentence of imprisonment for life imposed otherwise than as a minimum punishment, on conviction for a criminal organization offence other than an offence under section 467.11, 467.111, 467.12 or 467.13, the court may order that the portion of the sentence that must be served before the offender may be released on full parole is one half of the sentence or ten years, whichever is less.

Power of court to delay parole

(1.2) Notwithstanding section 120 of the *Corrections and Conditional Release Act*, where an offender receives a sentence of imprisonment of two years or more, including a sentence of imprisonment for life, on conviction for a terrorism offence or an offence under section 467.11, 467.111, 467.12 or 467.13, the court shall order that the portion of the sentence that must be served before the offender may be released on full parole is one half of the sentence or ten years, whichever is less, unless the court is satisfied, having regard to the circumstances of the commission of the offence and the character and circumstances of the offender, that the expression of society's denunciation of the offence and the objectives of specific and general deterrence would be adequately served by a period of parole ineligibility determined in accordance with the *Corrections and Conditional Release Act*.

Admissibilité à la libération conditionnelle

Pouvoir judiciaire d'augmentation du temps d'épreuve

743.6 (1) Par dérogation au paragraphe 120(1) de la *Loi sur le système correctionnel et la mise en liberté sous condition*, le tribunal peut, s'il est convaincu, selon les circonstances de l'infraction, du caractère et des particularités du délinquant, que la réprobation de la société à l'égard de l'infraction commise ou l'effet dissuasif de l'ordonnance l'exige, ordonner que le délinquant condamné le 1^{er} novembre 1992 ou par la suite, sur déclaration de culpabilité par mise en accusation, à une peine d'emprisonnement d'au moins deux ans — y compris une peine d'emprisonnement à perpétuité à condition que cette peine n'ait pas constitué un minimum en l'occurrence — pour une infraction mentionnée aux annexes I ou II de cette loi, purge, avant d'être admissible à la libération conditionnelle totale, le moindre de la moitié de sa peine ou dix ans.

Exception dans le cas d'une organisation criminelle

(1.1) Par dérogation à l'article 120 de la *Loi sur le système correctionnel et la mise en liberté sous condition*, le tribunal peut ordonner que le délinquant qui, pour une infraction d'organisation criminelle autre qu'une infraction prévue aux articles 467.11, 467.111, 467.12 ou 467.13, est condamné sur déclaration de culpabilité à une peine d'emprisonnement de deux ans ou plus — y compris une peine d'emprisonnement à perpétuité à condition que cette peine n'ait pas constitué un minimum en l'occurrence — purge, avant d'être admissible à la libération conditionnelle totale, la moitié de sa peine jusqu'à concurrence de dix ans.

Pouvoir judiciaire de retarder la libération conditionnelle

(1.2) Par dérogation à l'article 120 de la *Loi sur le système correctionnel et la mise en liberté sous condition*, le tribunal est tenu, sauf s'il est convaincu, compte tenu des circonstances de l'infraction et du caractère et des particularités du délinquant, que la réprobation de la société à l'égard de l'infraction commise et l'effet dissuasif de l'ordonnance auraient la portée voulue si la période d'inadmissibilité était déterminée conformément à cette loi, d'ordonner que le délinquant condamné à une peine d'emprisonnement d'au moins deux ans — y compris une peine d'emprisonnement à perpétuité — pour une infraction de terrorisme ou une infraction prévue aux articles 467.11, 467.111, 467.12 ou 467.13 purge, avant d'être admissible à la libération conditionnelle totale, la moitié de sa peine jusqu'à concurrence de dix ans.

(a) such period between five and seven years of the sentence as is specified by the judge presiding at the trial, or if no period is specified by the judge presiding at the trial, five years, in the case of a person who was under the age of sixteen at the time of the commission of the offence;

(b) ten years, in the case of a person convicted of first degree murder who was sixteen or seventeen years of age at the time of the commission of the offence; and

(c) seven years, in the case of a person convicted of second degree murder who was sixteen or seventeen years of age at the time of the commission of the offence.

1995, c. 22, ss. 6, 21.

Recommendation by jury

745.2 Subject to section 745.3, where a jury finds an accused guilty of second degree murder, the judge presiding at the trial shall, before discharging the jury, put to them the following question:

You have found the accused guilty of second degree murder and the law requires that I now pronounce a sentence of imprisonment for life against the accused. Do you wish to make any recommendation with respect to the number of years that the accused must serve before the accused is eligible for release on parole? You are not required to make any recommendation but if you do, your recommendation will be considered by me when I am determining whether I should substitute for the ten year period, which the law would otherwise require the accused to serve before the accused is eligible to be considered for release on parole, a number of years that is more than ten but not more than twenty-five.

1995, c. 22, s. 6.

Recommendation by jury — multiple murders

745.21 (1) Where a jury finds an accused guilty of murder and that accused has previously been convicted of murder, the judge presiding at the trial shall, before discharging the jury, put to them the following question:

You have found the accused guilty of murder. The law requires that I now pronounce a sentence of imprisonment for life against the accused. Do you wish to make any recommendation with respect to the period without eligibility for parole to be served for this murder consecutively to the period without eligibility for parole imposed for the previous murder? You are not required to make any recommendation, but if you do, your recommendation will be considered by me when I make my determination.

Application

(2) Subsection (1) applies to an offender who is convicted of murders committed on a day after the day on which this section comes into force and for which the offender is sentenced under this Act, the *National Defence Act* or the *Crimes Against Humanity and War Crimes Act*.

2011, c. 5, s. 4.

l'infraction, délai que le juge qui préside le procès peut porter à au plus sept ans;

b) de dix ans de la peine lorsque cette personne a été déclarée coupable de meurtre au premier degré et qu'elle avait seize ou dix-sept ans au moment de la perpétration de l'infraction;

c) de sept ans de la peine lorsque cette personne a été déclarée coupable de meurtre au deuxième degré et qu'elle avait seize ou dix-sept ans au moment de la perpétration de l'infraction.

1995, ch. 22, art. 6 et 21.

Recommandation du jury

745.2 Sous réserve de l'article 745.3, le juge qui préside le procès doit, avant de dissoudre le jury qui a déclaré un accusé coupable de meurtre au deuxième degré, lui poser la question suivante :

Vous avez déclaré l'accusé coupable de meurtre au deuxième degré et la loi exige que je prononce maintenant contre lui la peine d'emprisonnement à perpétuité. Souhaitez-vous formuler, comme vous avez la faculté de le faire, quant au nombre d'années qu'il doit purger avant de pouvoir bénéficier de la libération conditionnelle, une recommandation dont je tiendrai compte en examinant la possibilité de porter à au plus vingt-cinq ans ce délai qui, aux termes de la loi, s'élève normalement à dix ans?

1995, ch. 22, art. 6.

Recommandation du jury — meurtres multiples

745.21 (1) Dans le cas où un jury déclare coupable de meurtre un accusé déjà reconnu coupable d'un autre meurtre, le juge qui préside le procès doit, avant de dissoudre le jury, lui poser la question suivante :

Vous avez déclaré l'accusé coupable de meurtre et la loi exige que je prononce maintenant contre lui la peine d'emprisonnement à perpétuité. Souhaitez-vous formuler, comme vous avez la faculté de le faire, quant au fait que la période d'inadmissibilité à la libération conditionnelle soit purgée consécutivement à celle fixée pour le meurtre précédent, une recommandation dont je tiendrai compte en examinant la possibilité d'ordonner qu'elles soient purgées consécutivement?

Application

(2) Le paragraphe (1) s'applique aux meurtres commis au plus tôt le lendemain de l'entrée en vigueur du présent paragraphe pour lesquels le contrevenant est condamné à une peine d'emprisonnement en vertu de la présente loi, de la *Loi sur la défense nationale* ou de la *Loi sur les crimes contre l'humanité et les crimes de guerre*.

2011, ch. 5, art. 4.

Persons under sixteen

745.3 Where a jury finds an accused guilty of first degree murder or second degree murder and the accused was under the age of sixteen at the time of the commission of the offence, the judge presiding at the trial shall, before discharging the jury, put to them the following question:

You have found the accused guilty of first degree murder (or second degree murder) and the law requires that I now pronounce a sentence of imprisonment for life against the accused. Do you wish to make any recommendation with respect to the period of imprisonment that the accused must serve before the accused is eligible for release on parole? You are not required to make any recommendation but if you do, your recommendation will be considered by me when I am determining the period of imprisonment that is between five years and seven years that the law would require the accused to serve before the accused is eligible to be considered for release on parole.

1995, c. 22, ss. 6, 22.

Ineligibility for parole

745.4 Subject to section 745.5, at the time of the sentencing under section 745 of an offender who is convicted of second degree murder, the judge who presided at the trial of the offender or, if that judge is unable to do so, any judge of the same court may, having regard to the character of the offender, the nature of the offence and the circumstances surrounding its commission, and to the recommendation, if any, made pursuant to section 745.2, by order, substitute for ten years a number of years of imprisonment (being more than ten but not more than twenty-five) without eligibility for parole, as the judge deems fit in the circumstances.

1995, c. 22, s. 6.

Idem

745.5 At the time of the sentencing under section 745.1 of an offender who is convicted of first degree murder or second degree murder and who was under the age of sixteen at the time of the commission of the offence, the judge who presided at the trial of the offender or, if that judge is unable to do so, any judge of the same court, may, having regard to the age and character of the offender, the nature of the offence and the circumstances surrounding its commission, and to the recommendation, if any, made pursuant to section 745.3, by order, decide the period of imprisonment the offender is to serve that is between five years and seven years without eligibility for parole, as the judge deems fit in the circumstances.

1995, c. 22, ss. 6, 23.

Ineligibility for parole — multiple murders

745.51 (1) At the time of the sentencing under section 745 of an offender who is convicted of murder and who has already been convicted of one or more other

Mineurs

745.3 Le juge qui préside le procès doit, avant de dissoudre le jury qui a déclaré un accusé ayant moins de seize ans à la date de l'infraction coupable de meurtre au premier ou au deuxième degré, lui poser la question suivante :

Vous avez déclaré l'accusé coupable de meurtre au premier (ou deuxième) degré, et la loi exige que je prononce maintenant contre lui la peine d'emprisonnement à perpétuité. Souhaitez-vous formuler, comme vous avez la faculté de le faire, quant à la période d'emprisonnement qu'il doit purger avant de pouvoir bénéficier de la libération conditionnelle, une recommandation dont je tiendrai compte en fixant ce délai, conformément à la loi, à au moins cinq ans et à au plus sept ans?

1995, ch. 22, art. 6 et 22.

Libération conditionnelle

745.4 Sous réserve de l'article 745.5, au moment de prononcer la peine conformément à l'article 745, le juge qui préside le procès du délinquant déclaré coupable de meurtre au deuxième degré — ou en cas d'empêchement, tout juge du même tribunal — peut, compte tenu du caractère du délinquant, de la nature de l'infraction et des circonstances entourant sa perpétration ainsi que de toute recommandation formulée en vertu de l'article 745.2, porter, par ordonnance, le délai préalable à sa libération conditionnelle au nombre d'années, compris entre dix et vingt-cinq, qu'il estime indiqué dans les circonstances.

1995, ch. 22, art. 6.

Idem

745.5 Au moment de prononcer la peine conformément à l'article 745.1, le juge qui préside le procès du délinquant déclaré coupable de meurtre au premier ou au deuxième degré et qui avait moins de seize ans au moment de la commission de l'infraction — ou en cas d'empêchement, tout juge du même tribunal — peut, compte tenu de l'âge et du caractère du délinquant, de la nature de l'infraction et des circonstances entourant sa perpétration, ainsi que de toute recommandation formulée en vertu de l'article 745.3, fixer, par ordonnance, le délai préalable à sa libération conditionnelle à la période, comprise entre cinq et sept ans, qu'il estime indiquée dans les circonstances.

1995, ch. 22, art. 6 et 23.

Délai préalable à la libération conditionnelle — meurtres multiples

745.51 (1) Au moment de prononcer la peine conformément à l'article 745, le juge qui préside le procès du délinquant qui est déclaré coupable de meurtre et qui a

force may, within 90 days after the day on which they have served 15 years of their sentence, make an application under subsection (1).

At least 15 years of sentence served

(2.2) A person who is convicted of murder or high treason and who has served at least 15 years of their sentence on the day on which this subsection comes into force may make an application under subsection (1) within 90 days after

(a) the end of five years after the day on which the person was the subject of a determination made under subsection 745.61(4) or a determination or conclusion to which subsection 745.63(8) applies; or

(b) the day on which this subsection comes into force, if the person has not made an application under subsection (1).

Non-application of subsection (2.2)

(2.3) Subsection (2.2) has no effect on a determination or decision made under subsection 745.61(3) or (5) or 745.63(3), (5) or (6) as it read immediately before the day on which this subsection comes into force. A person in respect of whom a time is set under paragraph 745.61(3)(a) or 745.63(6)(a) as it read immediately before that day may make an application under subsection (1) within 90 days after the end of that time.

Further five-year period if no application made

(2.4) If the person does not make an application in accordance with subsection (2.1), (2.2) or (2.3), as the case may be, they may make an application within 90 days after the day on which they have served a further five years of their sentence following the 90-day period referred to in that subsection, as the case may be.

Subsequent applications

(2.5) A person who makes an application in accordance with subsection (2.1), (2.2) or (2.3), as the case may be, may make another application under subsection (1) within 90 days after

(a) the end of the time set under paragraph 745.61(3)(a) or 745.63(6)(a), if a time is set under that paragraph; or

(b) the end of five years after the day on which the person is the subject of a determination made under

paragraphe peut, dans les quatre-vingt-dix jours suivant la date à laquelle elle a purgé quinze ans de sa peine, présenter une demande en vertu du paragraphe (1).

Restriction — au moins 15 ans de la peine

(2.2) Dans le cas où elle a purgé au moins quinze ans de sa peine à la date d'entrée en vigueur du présent paragraphe, elle peut présenter une demande en vertu du paragraphe (1) :

a) dans le cas où elle a fait l'objet d'une décision au titre du paragraphe 745.61(4) ou d'une décision ou d'une conclusion à laquelle le paragraphe 745.63(8) s'applique, dans les quatre-vingt-dix jours suivant l'expiration d'une période de cinq ans commençant le lendemain de la date de la décision ou de la conclusion;

b) dans le cas où elle n'a pas présenté de demande en vertu du paragraphe (1), dans les quatre-vingt-dix jours suivant la date d'entrée en vigueur du présent paragraphe.

Non-application du par. (2.2)

(2.3) Le paragraphe (2.2) est sans effet sur les décisions rendues en vertu des paragraphes 745.61(3) ou (5) ou 745.63(3), (5) ou (6), dans leur version antérieure à la date d'entrée en vigueur du présent paragraphe. La personne qui fait l'objet d'une décision fixant, au titre des paragraphes 745.61(3) ou 745.63(6), dans leur version antérieure à cette date, un délai à l'expiration duquel il lui sera loisible de présenter une nouvelle demande peut en présenter une en vertu du paragraphe (1) dans les quatre-vingt-dix jours suivant l'expiration de ce délai.

Nouveau délai de cinq ans

(2.4) Si elle n'a pas présenté de demande au titre des paragraphes (2.1), (2.2) ou (2.3), la personne peut en présenter une dans les quatre-vingt-dix jours suivant la date à laquelle elle a purgé une autre période de cinq ans commençant le lendemain de l'expiration du délai de quatre-vingt-dix jours prévu à l'un ou l'autre de ces paragraphes, selon le cas.

Nouvelle demande

(2.5) La personne qui a présenté une demande au titre des paragraphes (2.1), (2.2) ou (2.3) peut en présenter une nouvelle :

a) dans le cas où elle fait l'objet d'une décision fixant — au titre des paragraphes 745.61(3) ou 745.63(6) — un délai à l'expiration duquel il lui sera loisible de présenter une nouvelle demande, dans les quatre-vingt-dix jours suivant l'expiration de ce délai;

subsection 745.61(4) or a determination or conclusion to which subsection 745.63(8) applies, if the person is the subject of such a determination or conclusion.

Subsequent applications

(2.6) A person who had made an application under subsection (1) as it read immediately before the day on which this subsection comes into force, whose application was finally disposed of on or after that day and who has then made a subsequent application may make a further application in accordance with subsection (2.5), if either paragraph (2.5)(a) or (b) is applicable.

(2.7) The 90-day time limits for the making of any application referred to in subsections (2.1) to (2.5) may be extended by the appropriate Chief Justice, or his or her designate, to a maximum of 180 days if the person, due to circumstances beyond their control, is unable to make an application within the 90-day time limit.

(2.8) If a person convicted of murder does not make an application under subsection (1) within the maximum time period allowed by this section, the Commissioner of Correctional Service Canada, or his or her designate, shall immediately notify in writing a parent, child, spouse or common-law partner of the victim that the convicted person did not make an application. If it is not possible to notify one of the aforementioned relatives, then the notification shall be given to another relative of the victim. The notification shall specify the next date on which the convicted person will be eligible to make an application under subsection (1).

Definition of *appropriate Chief Justice*

(3) For the purposes of this section and sections 745.61 to 745.64, the ***appropriate Chief Justice*** is

- (a)** in relation to the Province of Ontario, the Chief Justice of the Ontario Court;
- (b)** in relation to the Province of Quebec, the Chief Justice of the Superior Court;
- (c)** in relation to the Province of Newfoundland and Labrador, the Chief Justice of the Supreme Court, Trial Division;
- (d)** in relation to the Provinces of New Brunswick, Manitoba, Saskatchewan and Alberta, the Chief Justice of the Court of Queen's Bench;

b) dans le cas où elle fait l'objet d'une décision au titre du paragraphe 745.61(4) ou d'une décision ou d'une conclusion à laquelle le paragraphe 745.63(8) s'applique, dans les quatre-vingt-dix jours suivant l'expiration d'une période de cinq ans commençant le lendemain de la date de la décision ou de la conclusion.

Nouvelle demande

(2.6) La personne qui a présenté, en vertu du paragraphe (1) dans sa version antérieure à la date d'entrée en vigueur du présent paragraphe, une demande sur laquelle il a été statué à cette date ou par la suite et qui a présenté une autre demande ultérieurement peut en présenter une nouvelle au titre du paragraphe (2.5), si l'un ou l'autre des alinéas (2.5)a) ou b) s'applique.

(2.7) Le délai de quatre-vingt-dix jours dont dispose la personne pour présenter l'un ou l'autre des demandes visée aux paragraphes (2.1) à (2.5) peut être porté à un maximum de cent quatre-vingts jours par le juge en chef compétent ou son remplaçant si, en raison de circonstances indépendantes de sa volonté, cette personne n'est pas en mesure de présenter la demande dans le délai de quatre-vingt-dix jours.

(2.8) Si la personne déclarée coupable d'un meurtre ne présente pas une demande en vertu du paragraphe (1) dans le délai maximal imparti au présent article, le commissaire du Service correctionnel Canada ou son remplaçant en avise aussitôt par écrit l'un des parents, l'enfant, l'époux ou le conjoint de fait de la victime — ou, s'il est impossible de les aviser, un autre membre de sa famille — et précise la date à laquelle la personne déclarée coupable sera de nouveau admissible à présenter une telle demande.

Définition de *juge en chef compétent*

(3) Pour l'application du présent article et des articles 745.61 à 745.64, ***juge en chef compétent*** désigne :

- a)** dans la province d'Ontario, le juge en chef de la Cour de l'Ontario;
- b)** dans la province de Québec, le juge en chef de la Cour supérieure;
- c)** dans la province de Terre-Neuve-et-Labrador, le juge en chef de la Cour suprême, Section de première instance;
- d)** dans les provinces du Nouveau-Brunswick, du Manitoba, de la Saskatchewan et d'Alberta, le juge en chef de la Cour du Banc de la Reine;

(e) in relation to the Provinces of Nova Scotia, British Columbia and Prince Edward Island, the Chief Justice of the Supreme Court; and

(f) in relation to Yukon, the Northwest Territories and Nunavut, the Chief Justice of the Court of Appeal.

1993, c. 28, s. 78; 1995, c. 22, s. 6; 1996, c. 34, s. 2; 1998, c. 15, s. 20; 2002, c. 7, s. 146; 2011, c. 2, s. 3; 2015, c. 3, s. 55.

Judicial screening

745.61 (1) On receipt of an application under subsection 745.6(1), the appropriate Chief Justice shall determine, or shall designate a judge of the superior court of criminal jurisdiction to determine, on the basis of the following written material, whether the applicant has shown, on a balance of probabilities, that there is a substantial likelihood that the application will succeed:

- (a) the application;
- (b) any report provided by the Correctional Service of Canada or other correctional authorities; and
- (c) any other written evidence presented to the Chief Justice or judge by the applicant or the Attorney General.

Criteria

(2) In determining whether the applicant has shown that there is a substantial likelihood that the application will succeed, the Chief Justice or judge shall consider the criteria set out in paragraphs 745.63(1)(a) to (e), with any modifications that the circumstances require.

Decision re new application

(3) If the Chief Justice or judge determines that the applicant has not shown that there is a substantial likelihood that the application will succeed, the Chief Justice or judge may

- (a) set a time, no earlier than five years after the date of the determination, at or after which the applicant may make another application under subsection 745.6(1); or
- (b) decide that the applicant may not make another application under that subsection.

If no decision re new application

(4) If the Chief Justice or judge determines that the applicant has not shown that there is a substantial likelihood that the application will succeed but does not set a time for another application or decide that such an application may not be made, the applicant may make another application no earlier than five years after the date of the determination.

e) dans les provinces de la Nouvelle-Écosse, de la Colombie-Britannique et de l'Île-du-Prince-Édouard, le juge en chef de la Cour suprême;

f) au Yukon, dans les Territoires du Nord-Ouest et au Nunavut, le juge en chef de la Cour d'appel.

1993, ch. 28, art. 78; 1995, ch. 22, art. 6; 1996, ch. 34, art. 2; 1998, ch. 15, art. 20; 2002, ch. 7, art. 146; 2011, ch. 2, art. 3; 2015, ch. 3, art. 55.

Sélection

745.61 (1) Sur réception de la demande prévue au paragraphe 745.6(1), le juge — juge en chef compétent ou juge de la cour supérieure de juridiction criminelle qu'il désigne à cette fin — décide, en se fondant sur les documents ci-après, si le requérant a démontré, selon la prépondérance des probabilités, qu'il existe une probabilité marquée que la demande soit accueillie :

- a) la demande;
- b) tout rapport fourni par le Service correctionnel du Canada ou une autre autorité correctionnelle;
- c) tout autre document que le procureur général ou le requérant présente au juge.

Critères

(2) Le juge prend la décision visée au paragraphe (1) en fonction des critères énoncés aux alinéas 745.63(1)a) à e), compte tenu des adaptations nécessaires.

Décision quant à la nouvelle demande

(3) S'il décide que le requérant n'a pas démontré qu'il existe une probabilité marquée que la demande soit accueillie, le juge peut soit fixer un délai d'au moins cinq ans — suivant la date de la décision — à l'expiration duquel il sera loisible au requérant de présenter une nouvelle demande en vertu du paragraphe 745.6(1), soit décider que celui-ci ne pourra pas présenter une telle demande.

Aucune décision quant à la nouvelle demande

(4) Si le juge décide que le requérant n'a pas démontré qu'il existe une probabilité marquée que la demande soit accueillie, sans toutefois fixer le délai prévu au paragraphe (3) ni décider qu'aucune nouvelle demande ne pourra être présentée, il sera loisible au requérant de présenter une nouvelle demande au plus tôt cinq ans après la date de la décision.

Designation of judge to empanel jury

(5) If the Chief Justice or judge determines that the applicant has shown that there is a substantial likelihood that the application will succeed, the Chief Justice shall designate a judge of the superior court of criminal jurisdiction to empanel a jury to hear the application.

1996, c. 34, s. 2; 2011, c. 2, s. 4.

Appeal

745.62 (1) The applicant or the Attorney General may appeal to the Court of Appeal from a determination or a decision made under section 745.61 on any question of law or fact or mixed law and fact.

Documents to be considered

(2) The appeal shall be determined on the basis of the documents presented to the Chief Justice or judge who made the determination or decision, any reasons for the determination or decision and any other documents that the Court of Appeal requires.

Sections to apply

(3) Sections 673 to 696 apply, with such modifications as the circumstances require.

1996, c. 34, s. 2.

Hearing of application

745.63 (1) The jury empanelled under subsection 745.61(5) to hear the application shall consider the following criteria and determine whether the applicant's number of years of imprisonment without eligibility for parole ought to be reduced:

- (a)** the character of the applicant;
- (b)** the applicant's conduct while serving the sentence;
- (c)** the nature of the offence for which the applicant was convicted;
- (d)** any information provided by a victim at the time of the imposition of the sentence or at the time of the hearing under this section; and
- (e)** any other matters that the judge considers relevant in the circumstances.

Information provided by victim

(1.1) Information provided by a victim referred to in paragraph (1)(d) may be provided either orally or in writing, at the discretion of the victim, or in any other manner that the judge considers appropriate.

(2) [Repealed, 2015, c. 13, s. 34]

Juge chargé de constituer un jury

(5) Si le juge décide que le requérant a démontré qu'il existe une probabilité marquée que la demande soit accueillie, le juge en chef charge un juge de la cour supérieure de juridiction criminelle de constituer un jury pour entendre la demande.

1996, ch. 34, art. 2; 2011, ch. 2, art. 4.

Appel

745.62 (1) Le requérant ou le procureur général peuvent interjeter appel à la cour d'appel d'une décision rendue en vertu de l'article 745.61 sur toute question de droit ou de fait ou toute question mixte de droit et de fait.

Document

(2) Il est statué sur l'appel sur le fondement des documents présentés au juge qui a rendu la décision, des motifs de celle-ci et de tout autre document que la cour d'appel exige.

Articles applicables

(3) Les articles 673 à 696 s'appliquent avec les adaptations nécessaires.

1996, ch. 34, art. 2.

Audience

745.63 (1) Le jury constitué en vertu du paragraphe 745.61(5) pour entendre la demande du requérant décide s'il y a lieu de réduire le délai préalable à la libération conditionnelle de celui-ci, en fonction des critères suivants :

- a)** le caractère du requérant;
- b)** sa conduite durant l'exécution de sa peine;
- c)** la nature de l'infraction pour laquelle il a été condamné;
- d)** tout autre renseignement fourni par la victime au moment de l'infliction de la peine ou lors de l'audience prévue au présent article;
- e)** tout autre renseignement que le juge estime utile dans les circonstances.

Renseignements fournis par la victime

(1.1) Les renseignements fournis aux termes de l'alinéa (1)d) peuvent l'être oralement ou par écrit, à la discrétion de la victime, ou de toute autre manière que le juge estime indiquée.

(2) [Abrogé, 2015, ch. 13, art. 34]

Reduction

(3) The jury hearing an application under subsection (1) may determine that the applicant's number of years of imprisonment without eligibility for parole ought to be reduced. The determination to reduce the number of years must be by unanimous vote.

No reduction

(4) The applicant's number of years of imprisonment without eligibility for parole is not reduced if

- (a)** the jury hearing an application under subsection (1) determines that the number of years ought not to be reduced;
- (b)** the jury hearing an application under subsection (1) concludes that it cannot unanimously determine that the number of years ought to be reduced; or
- (c)** the presiding judge, after the jury has deliberated for a reasonable period, concludes that the jury is unable to unanimously determine that the number of years ought to be reduced.

Where determination to reduce number of years

(5) If the jury determines that the number of years of imprisonment without eligibility for parole ought to be reduced, the jury may, by a vote of not less than two thirds of the members of the jury,

- (a)** substitute a lesser number of years of imprisonment without eligibility for parole than that then applicable; or
- (b)** terminate the ineligibility for parole.

Decision re new application

(6) If the applicant's number of years of imprisonment without eligibility for parole is not reduced, the jury may

- (a)** set a time, no earlier than five years after the date of the determination or conclusion under subsection (4), at or after which the applicant may make another application under subsection 745.6(1); or
- (b)** decide that the applicant may not make another application under that subsection.

Two-thirds decision

(7) The decision of the jury under paragraph (6)(a) or (b) must be made by not less than two thirds of its members.

Réduction

(3) Le jury peut décider qu'il y a lieu de réduire le délai préalable à la libération conditionnelle du requérant. La décision est prise à l'unanimité.

Aucune réduction

(4) Le délai préalable à la libération conditionnelle du requérant n'est pas réduit si, selon le cas :

- a)** le jury décide qu'il n'y a pas lieu de le réduire;
- b)** il conclut qu'il n'est pas en mesure de décider à l'unanimité qu'il y a lieu de le réduire;
- c)** le juge qui préside conclut que le jury, après une période suffisante de délibérations, n'est pas en mesure de décider à l'unanimité qu'il y a lieu de le réduire.

Décision de réduire le délai

(5) Le jury, s'il décide qu'il y a lieu de réduire le délai préalable à la libération conditionnelle du requérant, peut, par décision des deux tiers au moins de ses membres, en ce qui concerne ce délai :

- a)** en réduire le nombre d'années;
- b)** le supprimer.

Nouvelle demande

(6) Si le délai préalable à la libération conditionnelle du requérant n'est pas réduit, le jury peut soit fixer un délai d'au moins cinq ans — suivant la date de la décision ou de la conclusion visées au paragraphe (4) — à l'expiration duquel il sera loisible au requérant de présenter une nouvelle demande en vertu du paragraphe 745.6(1), soit décider que celui-ci ne pourra pas présenter une telle demande.

Majorité des deux tiers

(7) Le jury fixe le délai visé au paragraphe (6) ou prend la décision qui y est visée à la majorité des deux tiers au moins de ses membres.

If no decision re new application

(8) If the jury does not set a date on or after which another application may be made or decide that such an application may not be made, the applicant may make another application no earlier than five years after the date of the determination or conclusion under subsection (4).

1996, c. 34, s. 2; 1999, c. 25, s. 22(Preamble); 2011, c. 2, s. 5; 2015, c. 13, s. 34.

Rules

745.64 (1) The appropriate Chief Justice in each province or territory may make such rules as are required for the purposes of sections 745.6 to 745.63.

Statutory Instruments Act

(1.1) The *Statutory Instruments Act* does not apply to those rules.

Territories

(2) When the appropriate Chief Justice is designating a judge of the superior court of criminal jurisdiction, for the purpose of a judicial screening under subsection 745.61(1) or to empanel a jury to hear an application under subsection 745.61(5), in respect of a conviction that took place in Yukon, the Northwest Territories or Nunavut, the appropriate Chief Justice may designate the judge from the Court of Appeal of Yukon, the Northwest Territories or Nunavut, or the Supreme Court of Yukon or the Northwest Territories or the Nunavut Court of Justice, as the case may be.

1996, c. 34, s. 2; 1999, c. 3, s. 53; 2002, c. 7, s. 147(E); 2019, c. 25, s. 306.

Time spent in custody

746 In calculating the period of imprisonment served for the purposes of section 745, 745.1, 745.4, 745.5 or 745.6, there shall be included any time spent in custody between

(a) in the case of a sentence of imprisonment for life after July 25, 1976, the day on which the person was arrested and taken into custody in respect of the offence for which that person was sentenced to imprisonment for life and the day the sentence was imposed; or

(b) in the case of a sentence of death that has been or is deemed to have been commuted to a sentence of imprisonment for life, the day on which the person was arrested and taken into custody in respect of the offence for which that person was sentenced to death and the day the sentence was commuted or deemed to

Aucune décision quant à la nouvelle demande

(8) Si le jury ne fixe pas le délai à l'expiration duquel il sera loisible au requérant de présenter une nouvelle demande ou ne décide pas qu'aucune telle demande ne pourra être présentée, il sera loisible au requérant de présenter cette demande au plus tôt cinq ans après la date de la décision ou de la conclusion visées au paragraphe (4).

1996, ch. 34, art. 2; 1999, ch. 25, art. 22(préambule); 2011, ch. 2, art. 5; 2015, ch. 13, art. 34.

Règles

745.64 (1) Le juge en chef compétent de chaque province ou territoire peut établir les règles applicables pour l'application des articles 745.6 à 745.63.

Loi sur les textes réglementaires

(1.1) Ces règles ne sont pas assujetties à la *Loi sur les textes réglementaires*.

Territoires

(2) Le juge en chef compétent peut charger un juge de la Cour d'appel, de la Cour suprême du Yukon ou des Territoires du Nord-Ouest ou de la Cour de justice du Nunavut, selon le cas, de prendre la décision visée au paragraphe 745.61(1) ou de constituer, en vertu du paragraphe 745.61(5), un jury qui entendra les demandes relatives aux déclarations de culpabilité prononcées dans ces territoires.

1996, ch. 34, art. 2; 1999, ch. 3, art. 53; 2002, ch. 7, art. 147(A); 2019, ch. 25, art. 306.

Détention sous garde

746 Pour l'application des articles 745, 745.1, 745.4, 745.5 et 745.6, est incluse dans le calcul de la période d'emprisonnement purgée toute période passée sous garde entre la date d'arrestation et de mise sous garde pour l'infraction pour laquelle la personne a été condamnée et celle, dans le cas d'une condamnation à l'emprisonnement à perpétuité :

a) postérieure au 25 juillet 1976, de la condamnation;

b) consécutive à la commutation réelle ou présumée d'une peine de mort, de cette commutation.

L.R. (1985), ch. C-46, art. 746; 1995, ch. 19, art. 41, ch. 22, art. 6 et 24.

C. Pleadings

RECEIVED / REÇU
Date: November 28, 2024
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OTTAWA, ONT.

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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*.

BETWEEN:

COMMISSIONER OF COMPETITION

Applicant

– and –

GOOGLE CANADA CORPORATION AND GOOGLE LLC

Respondents

NOTICE OF APPLICATION

TAKE NOTICE that the Applicant, the Commissioner of Competition (the “**Commissioner**”), will make an application to the Competition Tribunal (the “**Tribunal**”) pursuant to section 79 of the *Competition Act* (the “**Act**”) for an order pursuant to subsection 79 of the Act for:

- a) an order pursuant to subsections 79(1), 79(2) and 79(3.1) of the Act:
 - a. requiring Google Canada Corporation and Google LLC (collectively, “**Google**”) to divest Google’s publisher ad server, DFP, and Google’s ad exchange, AdX, along with any additional structural relief as needed to restore competition and overcome the effects of Google’s anti-competitive practice in Canada;
 - b. otherwise, prohibiting Google from continuing to engage in the anti-competitive practice described herein and from engaging in any other practices with the same purpose and effect in Canada; and
 - c. directing Google to pay an administrative monetary penalty equal to three times the value of the benefit derived from Google’s anti-competitive practice, or if that amount cannot be reasonably determined, 3% of Google’s worldwide gross revenues;
- b) directing Google to pay costs; and
- c) such other relief as the Tribunal may consider appropriate.

AND TAKE NOTICE that the timing and place of hearing of this matter shall be fixed in accordance with the practice of the Tribunal;

AND TAKE FURTHER NOTICE that the Applicant has attached hereto as Schedule “A” a concise statement of the economic theory of the case.

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*.

BETWEEN:

COMMISSIONER OF COMPETITION

Applicant

-and-

GOOGLE CANADA CORPORATION AND GOOGLE LLC

Respondents

NOTICE OF CONSTITUTIONAL QUESTION

TAKE NOTICE that the Respondents, Google Canada Corporation and Google LLC (collectively, "**Google**"), intend to question the constitutional validity, applicability and/or effect of subsection 79(3.1) of the *Competition Act*, R.S.C. 1985, c. C-34, as amended (the "**Competition Act**" or the "**Act**"), and, in the alternative, to the extent necessary for Google to obtain an effective remedy, the constitutional validity, applicability and/or effect of section 11 and subsections 78(1) and 79(1) of the *Competition Act*, subsections 3(2) and 10(1) and section 12 of the *Competition Tribunal Act*, R.S.C. 1985,

c. 19 (2nd Supp.) (the “**Competition Tribunal Act**”) and rules 61 and 64 of the *Competition Tribunal Rules*, SOR/2008-141 (the “**Competition Tribunal Rules**”).

THE QUESTION IS TO BE ARGUED on a date and at a time and place to be fixed by the Competition Tribunal (the “**Tribunal**”).

THE FOLLOWING ARE THE MATERIAL FACTS giving rise to the constitutional question:

A. Introduction

1. Google seeks remedies in respect of existing and ongoing breaches of its rights guaranteed by the *Canadian Charter of Rights and Freedoms* (the “**Charter**”) and the *Canadian Bill of Rights*, S.C. 1960, c. 44 (reproduced in R.S.C. 1985, App. III) (the “**Bill of Rights**”) that have already arisen and will be compounded if the Application commenced by the Commissioner of Competition (the “**Commissioner**”) for Orders against Google under section 79 of the abuse of dominance provisions of the *Competition Act* is allowed to proceed.

2. In his Application, the Commissioner seeks an unprecedented financial penalty against Google pursuant to subsection 79(3.1) of the *Competition Act* in an amount equal to three times the value of the benefit allegedly derived from Google’s purported anticompetitive practices or, if that amount cannot be reasonably determined, 3% of Google’s worldwide gross revenues.

3. Under Canadian law, the extraordinary financial penalty sought by the Commissioner—an amount that could well be measured in the billions of dollars, given

the worldwide gross revenues of Google—is a true penal sanction. As a result, Google is entitled to the protection in this proceeding of rights guaranteed by the *Charter* and the *Bill of Rights*.

4. In light of violations of rights guaranteed to Google under the *Charter* and *Bill of Rights* that have already occurred and will inevitably occur if this Application is permitted to proceed, including as detailed below, the Tribunal should immediately and permanently stay or dismiss this proceeding pursuant to subsection 24(1) of the *Charter*, subsection 2(e) of the *Bill of Rights*, and the power of the Tribunal to control its own processes. In the alternative, if the Commissioner's Application is allowed to move forward, the Tribunal should exclude all evidence that has been or may be obtained from Google in contravention of its rights pursuant to subsection 24(2) of the *Charter*, subsection 2(e) of the *Bill of Rights*, and the power of the Tribunal to control its own processes.

5. The Tribunal should also declare that subsection 79(3.1) of the *Competition Act* is invalid and of no force and effect pursuant to section 52 of the *Constitution Act, 1982*. In the alternative, and to the extent necessary for Google to obtain an effective remedy for the infringement of its rights, the Tribunal should declare that section 11 and subsection 78(1) and 79(1) of the *Competition Act*, subsections 3(2) and 10(1) and section 12 of the *Competition Tribunal Act* and rules 61 and 64 of the *Competition Tribunal Rules* are of no force and effect to the extent of their inconsistency with the *Charter* in light of the Commissioner's pursuit of a true penal consequence against Google under subsection 79(3.1) of the *Competition Act*. Finally, the Tribunal should construe and apply all surviving statutory provisions so as not to abrogate, abridge or infringe Google's rights under the *Bill of Rights*.

C. The Commissioner's Application

16. On November 28, 2024, the Commissioner commenced this Application against Google. In the Application, the Commissioner seeks a series of Orders against Google pursuant to subsections 79(1), 79(2), and 79(3.1) of the *Competition Act* in connection with conduct that is alleged to have begun in or around 2008. Among other things, in paragraph 217(a)(iii) of his Notice of Application, the Commissioner seeks an Order “directing Google to pay [a financial penalty] equal to three times the value of the benefit derived from Google’s anti-competitive practice, or if that amount cannot be reasonably determined, 3% of Google’s worldwide gross revenues”. Depending on the way it is calculated, the financial penalty sought by the Commissioner could be measured in the billions of dollars if Google were found liable. That financial penalty could dwarf the profits Google generates from its display advertising business in Canada.

17. The extraordinary financial penalty sought by the Commissioner in this proceeding is unprecedented not only in abuse of dominance proceedings before the Tribunal, but in Canadian law. The intention of the Commissioner to seek that penalty against Google was disclosed for the first time when he delivered his Notice of Application on November 28, 2024. At no time prior to that date did the Commissioner or representatives of the Bureau advise either Google or the Justices of the Federal Court of Canada who issued the First Section 11 Order and Second Section 11 Order that a financial penalty of this nature or magnitude might be sought in proceedings the Commissioner could commence against Google.

determined on the ordinary “balance of probabilities” standard applicable in civil proceedings, rather than the traditional “beyond a reasonable doubt” standard used in penal proceedings throughout Canada, as a result of the failure of Parliament to require, when it amended the *Competition Act*, that requests by the Commissioner for the imposition of financial penalties under subsection 79(3.1) be subject to proof beyond a reasonable doubt.

23. These constitutional violations are not reasonable limits that can be demonstrably justified in a free and democratic society under section 1 of the *Charter*. Nor do provisions of the *Competition Act*, *Competition Tribunal Act* or *Competition Tribunal Rules* state that they are intended to operate notwithstanding the provisions of the *Charter* or the *Bill of Rights*.

E. The Tribunal Should Permanently Stay These Proceedings or, in the Alternative, Exclude Improperly Compelled Evidence

24. In view of serious breaches of Google’s rights under the *Charter* and *Bill of Rights* that have been ongoing for several years, and that will inevitably continue throughout the course of this Application, it would be untenable for the Tribunal to allow the Commissioner’s Application to continue. Thus, an immediate and permanent stay or dismissal of the Application granted pursuant to subsection 24(1) of the *Charter*, subsection 2(e) of the *Bill of Rights* and the power of the Tribunal to control its own processes is necessary, just and appropriate.

25. In the alternative, all evidence compelled from Google during the Inquiry and Ad Tech Inquiry should be excluded from the hearing of the Commissioner’s Application pursuant to subsection 24(2) of the *Charter*, subsection 2(e) of the *Bill of Rights*, and the

Tribunal's power to control its own processes. The Commissioner should also be compelled to redact from his Notice of Application all references to any such evidence. Any failure to do so would bring the administration of justice into disrepute.

26. Moreover, if the Commissioner's Application is permitted to proceed, he should be: (i) required to make full and complete disclosure to Google pursuant to the decision of the Supreme Court of Canada in *R v. Stinchcombe*² and its progeny; and (ii) precluded from requiring Google to submit to documentary or oral discovery pursuant to rules 61 and 64 of the *Competition Tribunal Rules*.

F. Subsection 79(3.1) of the *Competition Act* Should Be Deemed Invalid and of No Force and Effect Under the *Charter*

27. By purporting to provide the Tribunal with the power to impose true penal consequences in otherwise civil proceedings under the abuse of dominance provisions of the *Competition Act* without also amending the *Competition Act*, *Competition Tribunal Act* and *Competition Tribunal Rules* to provide Respondents with various protections guaranteed by the *Charter* and *Bill of Rights* in penal proceedings, Parliament exceeded its constitutional authority and ignored longstanding self-imposed guardrails provided for under the *Bill of Rights*.

28. Thus, the Tribunal should also declare that, having regard to the sanctions sought by the Commissioner against Google in this proceeding, subsection 79(3.1) of the *Competition Act* is of no force and effect. In the alternative, to the extent necessary for Google to obtain an effective remedy, the Tribunal should declare section 11 and

² [1991] 3 S.C.R. 326.

subsections 78(1) and 79(1) of the *Competition Act*, subsections 3(2) and 10(1) and section 12 of the *Competition Tribunal Act* and rules 61 and 64 of the *Competition Tribunal Rules* to be of no force and effect to the extent of their inconsistency with the *Charter* in light of the Commissioner's pursuit of a true penal consequence against Google under subsection 79(3.1) of the *Competition Act*. The Tribunal should also construe and apply any surviving statutory provisions so as not to abrogate, abridge or infringe Google's rights guaranteed by the *Bill of Rights*, including rights provided for in subsections 1(a) and 2(e).

29. For the various reasons explained above, this Tribunal should grant the relief sought by Google.

PUBLIC

February 14, 2025

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Canada Corporation and Google LLC

CT-2024-010

THE COMPETITION TRIBUNAL

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

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

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

B E T W E E N:

COMMISSIONER OF COMPETITION

Applicant

and

GOOGLE CANADA CORPORATION AND GOOGLE LLC

Respondents

**NOTICE OF MOTION
(Constitutional Challenge)**

TAKE NOTICE THAT the Respondents, Google Canada Corporation and Google LLC (collectively, “**Google**”), will make a Motion to the Honourable Justice Little commencing on Monday, September 29, 2025 at a place to be fixed by the Competition Tribunal.

THE MOTION IS FOR:

- (a) an Order pursuant to section 52 of the *Constitution Act, 1982*:
 - (i) declaring that the financial penalty sought by the Commissioner of Competition (the “**Commissioner**”) in the Application dated November 28, 2024 (the “**Application**”) under subsection 79(3.1) of the *Competition Act*, R.S.C. 1985, c. C-34, as amended (the

“Competition Act” or the **“Act”**) is a true penal consequence such that Google is entitled to the protection in this proceeding of rights guaranteed by the *Canadian Charter of Rights and Freedoms* (the **“Charter”**) and the *Canadian Bill of Rights*, S.C. 1960, c. 44 (reproduced in R.S.C. 1985, App. III) (the **“Bill of Rights”**);

- (ii) declaring that subsection 79(3.1) of the *Competition Act* violates Google’s rights under sections 7 and 8 and subsections 11(c), 11(d), 11(g) and 11(i) of the *Charter* as well as under subsection 2(e) of the *Bill of Rights* and is, therefore, invalid and of no force and effect;
- (iii) declaring that the Tribunal shall construe and apply all surviving statutory provisions so as not to abrogate, abridge or infringe Google’s rights under the *Bill of Rights* or the *Charter*;
- (iv) to the extent necessary to ensure that Google can and will obtain an effective remedy arising from the infringement of its rights, an Order declaring that section 11 and subsection 78(1) and 79(1) of the *Competition Act*, subsections 3(2) and 10(1) and section 12 of the *Competition Tribunal Act*, R.S.C. 1985, c. 19 (2nd Supp.) (the **“Competition Tribunal Act”**) and rules 61 and 64 of the *Competition Tribunal Rules*, SOR/2008-141 (the **“Competition Tribunal Rules”**) are of no force and effect to the extent of their inconsistency with the *Charter* in light of the Commissioner’s pursuit of a true penal

consequence against Google under subsection 79(3.1) of the *Competition Act*;

(b) an Order pursuant to subsection 24(1) of the *Charter*, the *Bill of Rights* and the power of the Tribunal to control its own processes:

(i) declaring that the Commissioner and Bureau's conduct in this proceeding, including in the Inquiry (as defined below) and Ad Tech Inquiry (as defined below), have violated Google's rights under sections 7 and 8 and subsections 11(c), 11(d), 11(g) and 11(i) of the *Charter* as well as under subsection 2(e) of the *Bill of Rights*; and

(ii) as a consequence of the foregoing declaration, immediately and permanently staying or dismissing the Application as against Google;

(c) in the event the Commissioner's Application is allowed to move forward, an Order pursuant to subsection 24(2) of the *Charter*, subsection 2(e) of the *Bill of Rights*, and the power of the Tribunal to control its own processes:

(i) excluding all evidence that has been or may be obtained hereafter from Google in contravention of its rights under sections 7 and 8 and subsections 11(c), 11(d), 11(g) and 11(i) of the *Charter* as well as under subsection 2(e) of the *Bill of Rights*;

(ii) compelling the Commissioner to redact from his Notice of Application all references to evidence that has been obtained from Google in

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contravention of its rights under sections 7 and 8 and subsections 11(c), 11(d), 11(g) and 11(i) of the *Charter* as well as under subsection 2(e) of the *Bill of Rights*;

(iii) requiring the Commissioner to make full and timely pre-hearing disclosure of all relevant information to Google pursuant to the decision of the Supreme Court of Canada in *R v. Stinchcombe*, [1991] 3 S.C.R. 326, and its progeny; and

(iv) precluding Google from any requirement to submit to documentary or oral discovery pursuant to rules 61 and 64 of the *Competition Tribunal Rules*;

(d) the costs of this motion; and

(e) such further and other relief as the Tribunal may deem just.

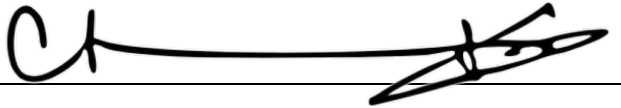
THE GROUNDS FOR THE MOTION ARE:

A. Introduction

(a) Google seeks remedies in respect of existing and ongoing breaches of its rights guaranteed by the *Charter* and the *Bill of Rights* that have already arisen and will be compounded if the Application commenced by the Commissioner for Orders against Google under section 79 of the abuse of dominance provisions of the *Competition Act* is allowed to proceed;

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- (b) the Affidavit of Laura Pearce sworn May 5, 2025;
- (c) the Affidavit of Corinne Lester sworn May 1, 2025;
- (d) the Affidavit of Mary DeCaire sworn May 5, 2025;
- (e) the Expert Report of Rupert Younger dated May 6, 2025;
- (f) the Expert Report of Professor Keith Hylton dated May 6, 2025; and
- (g) such further and other evidence as counsel may advise and the Tribunal may permit.



May 6, 2025

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FILED / PRODUIT

Date: November 28, 2024

CT- 2024-010

Sarah Sharp-Smith for / pour
REGISTRAR / REGISTRAIRE

CT-2024-

OTTAWA, ONT.

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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*.

BETWEEN:

COMMISSIONER OF COMPETITION

Applicant

– and –

GOOGLE CANADA CORPORATION AND GOOGLE LLC

Respondents

NOTICE OF APPLICATION

TAKE NOTICE that the Applicant, the Commissioner of Competition (the “**Commissioner**”), will make an application to the Competition Tribunal (the “**Tribunal**”) pursuant to section 79 of the *Competition Act* (the “**Act**”) for an order pursuant to subsection 79 of the Act for:

- a) an order pursuant to subsections 79(1), 79(2) and 79(3.1) of the Act:
 - a. requiring Google Canada Corporation and Google LLC (collectively, “**Google**”) to divest Google’s publisher ad server, DFP, and Google’s ad exchange, AdX, along with any additional structural relief as needed to restore competition and overcome the effects of Google’s anti-competitive practice in Canada;
 - b. otherwise, prohibiting Google from continuing to engage in the anti-competitive practice described herein and from engaging in any other practices with the same purpose and effect in Canada; and
 - c. requiring Google to pay an administrative monetary penalty in such an amount as the Tribunal decides is appropriate~~directing Google to pay an administrative monetary penalty equal to three times the value of the benefit derived from Google’s anti-competitive practice, or if that amount cannot be reasonably determined, 3% of Google’s worldwide gross revenues;~~
- b) directing Google to pay costs; and
- c) such other relief as the Tribunal may consider appropriate.

AND TAKE NOTICE that the timing and place of hearing of this matter shall be fixed in accordance with the practice of the Tribunal;

AND TAKE FURTHER NOTICE that the Applicant has attached hereto as Schedule “A” a concise statement of the economic theory of the case.

3. *The ad tech tools used to buy and sell open web ads programmatically*

a) *Publisher ad servers*

33. Web publishers wanting to monetize their websites use software known as a “publisher ad server” to manage and track the sale of their ad inventory across different demand sources (e.g., ad exchanges) and transaction types (e.g., direct and indirect deals). Publisher ad servers connect publishers to the broader ad tech stack and most importantly make real-time decisions about what ads to show on their websites. From the publisher perspective, a publisher ad server would typically allow the publisher to set rules, including regarding what ad will be served on its site, as well as regarding through which exchanges (i.e., marketplaces) their ad space would be offered for sale.
34. In addition to their core function (managing ad inventory in real-time), publisher ad servers offer valuable monitoring and reporting features to help publishers track their monetization performance through metrics such as impressions, clicks, and payout rates.
35. Most publishers opt to use a single publisher ad server to manage their web inventory (referred to as “single homing”). This, in part, simplifies the sale (and coordination) of inventory across multiple websites and demand sources, reduces training time for sales teams, and lessens the technical and resource-intensive integration demands associated with publisher ad servers.
36. Switching between publisher ad servers is time-consuming and burdensome. This is for several reasons, including the technical complexity of integrating a new publisher ad server with a publisher’s webpages and back-end billing systems; the financial implications of migration (including potential downtime and new software licenses); the need to invest in training of staff on new software; and, challenges in transferring historical data and ensuring continuity in reporting. Internally, Google describes publisher ad servers as “sticky”.

58. Partly to circumvent Google’s restrictions (i.e., Dynamic Allocation/ First Look advantage) and to generate real-time competition among multiple demand sources, in or around 2015, publishers began adopting a technology called “header bidding.” Header bidding allowed ad exchanges to compete against each other at the same time (in real-time), as opposed to being relegated to a waterfall and/ or subjected to Google’s First Look advantage.
59. In technical terms, header bidding worked by publishers inserting a piece of JavaScript code into the header sections of their website. As soon as a user visited the website, the JavaScript code would route the website’s ad space to a publisher-selected set of ad exchanges simultaneously, *before* Google’s publisher ad server initiated the waterfall process (with Google’s First Look advantage).
60. In practice, header bidding worked as follows: an internet user would click on and begin to load a publisher’s website and, as the page was loading, the user’s browser would send out bid requests to pre-selected ad exchanges, which would submit real-time bids in return. The browser would then select the best bid from among those made and send it to the publisher’s ad server for consideration.
61. Adoption of header bidding by publishers was widespread and swift. By 2016 publishers were reporting 20-40% increases in revenue because of header bidding. Google employees themselves recognized the competitive significance and threat that header bidding represented: “[h]eader tag and [h]eader [w]rapper technology and adoption has grown rapidly in the past 12 months, representing an existential threat to our business, and necessitating a response that maintains DRX’s “[m]ust [c]all” status in the ecosystem”.
62. When header bidding emerged, Google’s First Look advantage under Dynamic Allocation was, in effect, transformed into a “Last Look” advantage. Under Last Look, AdX was able to use the winning bid from the header bidding auction as a floor price in its own auction, effectively enabling it to compete against other

non-transitory increase in price above competitive levels (or degradation in service) in the sale or supply of publisher ad server services.

90. Since 2019, Google has degraded the functionality of its publisher ad server, DFP, by adopting UPR and prohibiting publishers from setting different floor prices for different ad exchanges. Despite significant protest by publishers over the imposed change, Google’s publisher ad server has continued to maintain a market share of more than 90%.
91. Google, and industry participants consider publisher ad servers to be differentiated products from other ad tech tools. For example, DFP is marketed by Google as being separate and distinct from its publisher ad network offering, Google AdSense. Though Google introduced Google Ad Manager (“GAM”) in 2018, which contains both its DFP and AdX products, it still internally identifies its publisher ad server as a separate product and prices the DFP component of GAM separately.
92. Publisher ad servers are designed as a single service to organize and manage a publisher’s entire advertising inventory. Owing to practicality and operational efficiency, publishers generally only use one publisher ad server at a time and rarely incur the high costs to switch from one to another due to engineering integration costs and significant disruptions caused by switching. In-house alternatives to publisher ad servers are equally not feasible options for most publishers because of the associated costs and technological requirements.

3. Advertiser ad networks are a relevant product market

93. Advertiser ad networks used in the programmatic buying of web ads through open channels are another relevant product market for the purpose of this application (hereafter, the “**Advertiser Ad Network market**”). Google offers Google Ads as a product in this market.

94. Advertiser ad networks are simple ad tech buying tools used by advertisers to buy available ad inventory. They serve to aggregate ad inventory (i.e., available ad inventory) from various supply-side sources, and provide advertisers with a means of automating their bidding on the inventory (based on terms set by the advertiser, such as targeting, budget, etc.) as it becomes available.
95. Compared to other ad buying tools (e.g., DSPs), advertiser ad networks generally provide a more easy-to-use, turnkey or automated experience. This distinction is reflected in their different cost-structures, with advertiser ad networks typically charging advertisers on a cost-per-click (“CPC”) basis rather than on a cost-per-mille (“CPM” or cost per thousand impressions) basis. Consequently, advertiser ad networks are most often the exclusive ad buying tool used by smaller, less-sophisticated advertisers who, for example, might have less technical expertise and/or a smaller advertising budget. For larger advertisers, advertiser ad networks are a distinct and complementary ad buying tool (often used in conjunction with DSPs).
96. Many advertisers that use advertiser ad networks as their ad buying tool for web advertising are limited in their ability to switch to alternative ad tech products. DSPs, the other major ad buying tool, require buyers to directly manage their ad campaigns using complex interfaces, often require buyers to use their own proprietary data to bid effectively on inventory, and can require minimum monthly spend levels. This makes these tools not reasonably accessible to smaller and less-sophisticated advertisers.
97. A sole profit-maximizing seller could profitably impose and sustain a small but significant and non-transitory increase in price (or degradation in service) above competitive levels in the sale or supply of the services provided by advertiser ad networks. In 2014, Google experimented with increasing Google Ads’ fee from 14 to 15% (a 7% increase⁸) and found that this would increase Google

⁸ $[(15 - 14) \div 14] \times 100 = 7$

Ads' profit by 5.3%. Google then implemented this price increase. And in 2018, Google performed simulations that altered Google Ads' fee and found that it could profitably increase its take rate from 15% up to 20% (a 33% increase). However, it ultimately decided not to impose the increase due to reputational and legal concerns.

98. To the detriment of its advertiser customers, Google, through Google Ads, has severely restricted advertisers' ability to bid on third party ad exchanges (i.e., ad exchanges other than AdX), where they could access additional publisher inventory. In fact, until 2016, Google Ads routed its advertisers' bids *only* to AdX and today 85% of the ad impressions it purchases on behalf of advertisers, are purchased through AdX. In short, Google has deliberately curtailed the functionality of Google Ads (to the benefit of AdX) by restricting the publisher inventory available for its advertisers to bid on. In spite of this, Google has been able to maintain its "captive" advertiser base without a significant number of advertisers substituting away to other products.
99. Google recognizes advertiser ad networks as a distinct product market as compared to other ad tech tools (e.g., DSPs), with distinct competitors. In marketing its Google Ads and DV360 products, Google notes that the two tools "serve distinctly different customer sets". In describing the distinct customer segmentation of its ad buying tools, Google describes Google Ads users as "[t]ypically smaller and mid-sized marketers who are able to satisfy their display needs with a simple, low-touch solution with minimal customization" and DV360 users as "[l]arge display buyers interested in consolidating their display buying across channels and deploying a strategy with a single view of a customer".

4. Ad Exchanges are a relevant product market

100. Ad exchanges used in the programmatic trading of web ads through open channels are another relevant product market for the purpose of this application.

(hereafter, the “**Ad Exchange market**”) Google offers AdX as a product in this market.

101. Ad exchanges are the ad tech products that facilitate the programmatic selling of ad inventory by connecting publisher ad servers with demand sources, including advertiser ad networks. Ad exchanges provide publishers with a way to offer their ad inventory for sale to a large number of advertisers in real-time (impression by impression), and in so doing access real-time bids from multiple demand sources. Similarly, ad exchanges provide advertisers (through their buying tools) with real-time access to a large supply of ad inventory on which they can bid.
102. Within the ad tech stack, the ad exchange is *the* intermediary layer between publishers and advertisers (i.e., the trading platform) for indirect ad sales. A sole profit-maximizing seller could profitably impose and sustain a small but significant and non-transitory increase in price (or degradation in service) above competitive levels in the sale or supply of ad exchange services.
103. Google’s AdX has been able to charge a take rate of 20%, which it recognizes as being significantly above competitive levels (reflecting the lack of reasonable substitutes). Google has characterized its take rates, which have been at or around the same level since 2012, as being “not long term defensible” and “double the price” as compared with competitors.
104. While there are some limited ways in which publisher ad servers can connect directly with advertiser buying tools (ostensibly obviating the need for an ad exchange), these mechanisms are limited in nature and not reasonable alternatives to the functionality offered by ad exchanges.
105. Direct deals between publishers and advertisers are not a reasonable alternative to indirect programmatic sales. Publishers and advertisers cannot reasonably substitute away from ad exchanges by increasing their reliance on direct deals. Publishers and advertisers view direct deals as complements to auction-based

117. Lastly, Google’s tie across the ad tech stack further deters entry. Google’s substantial market power has enabled it to engage in conduct that has imposed barriers to effective competition. Industry participants recognize that Google has made it near impossible, under current conditions, to gain sufficient scale to compete meaningfully or pose a serious competitive constraint on Google.

1. Google is dominant in the Publisher Ad Server market

118. Direct and indirect indicia of Google’s substantial market power demonstrates that Google substantially or completely controls the Publisher Ad Server market in Canada.

a) Direct indicia of substantial market power

119. Google itself considers DFP dominant, internally describing it as: “the *de facto*, preferred ad server of choice for 90% of publishers”, “must call” for publishers, and having a “monopoly on the ad server”.
120. Google is generally able to dictate the terms upon which it sells or supplies its DFP product and services. Google’s 2019 introduction of UPR is an illustrative example. This change degraded a highly valued functionality of DFP by impairing publishers’ ability to set lower price floors for rival (i.e., non-Google) ad exchanges compared to AdX. Internally, Google acknowledged that this feature was valuable to publishers who were “willing to tolerate some revenue loss in exchange for reduced dependence on Google as a whole” and appreciated that its removal would not be well-received. Nevertheless, Google implemented UPR. Though unhappy, publishers did not switch away to another publisher ad server, largely because there are simply no viable alternatives.
121. Further, in a 2019 internal analysis, Google concluded that DFP could profitably impose a price increase of “10% or more”, further reflecting its position of dominance in this market.

accessing ad exchanges and advertiser demand and scale. Google states that DFP's "global footprint across ad serving and access to inventory is the largest by far".

128. The prevalence of single-homing publisher ad servers and high switching costs create additional barriers to entry and expansion, and thereby further maintain Google's market power. In the words of a former Google executive, "[n]othing has such high switching costs. [...] Switching platforms is a nightmare. Takes an act of God to do it." Due to the central role played by a publisher ad server, multi-homing or migrating ad servers is impracticable. In terms of switching, Google and publishers recognize that the process is complex, disruptive, lengthy and expensive.
129. The Publisher Ad Server market has seen no significant entry or expansion by rivals in several years. To the contrary, there has been considerable exit and consolidation. The few remaining rival publisher ad servers survive by competing on the market's periphery and do not constrain Google's unbridled ability to exercise substantial market power.

2. Google is dominant in the Advertiser Ad Network market

130. Direct and indirect indicia of Google's substantial market power demonstrates that Google substantially or completely controls the Advertiser Ad Network market in Canada.

a) Direct indicia of substantial market power

131. Google Ads can dictate the terms upon which it sells its services, and has itself described its advertiser demand as "captive" and acknowledged that it has "virtually no margin or inventory sourcing constraints".
132. Google targets a 15% margin for its Google Ads product when it bids into an AdX auction. In 2014, Google Ads profitably imposed a fee increase of more than 5% without meaningful constraint from advertisers switching to alternative

products. On several occasions, Google has experimented or simulated material fee increases (e.g., 15% raised to 20%) and concluded that raising its margins would increase profits. For example, in 2018 Google performed simulations demonstrating Google's ability to profitably increase margins on AdX from 15% to 20%. However, it ultimately decided not to impose the increase, not because it was concerned about advertisers switching away from Google Ads, but rather due to reputational and legal concerns.

133. Google's market power is further evidenced by the fact that it can offer advertisers an inferior quality advertiser ad network, without losing a meaningful number of advertisers. For example, Google has long restricted Google Ads' ability to bid into rival ad exchanges, at a cost to advertisers in the form of inferior matches, but at a benefit to AdX (and Google) – as one Google executive described it: “artificially handicapping our buy-side (GDN) to boost the attractiveness of our sell-side (AdX)”.

b) Indirect indicia of substantial market power

134. Google Ads has a market share of at least 70% in the Advertiser Ad Network market in Canada, as measured by impressions.
135. As with the Publisher Ad Server market, Google faces weak competitive constraints in the Advertiser Ad Network market due to high barriers to entry, high switching costs, and the prevalence of advertisers who “single-home” (i.e., use one ad buying tool). Google's market power is evidenced by, and persists despite, its intentional degradation of its advertiser ad network.
136. Google's market power in the Advertiser Ad Network market originates from its pre-existing relationship with advertisers that purchase search advertising. At Google Ads' inception, Google was able to leverage its significant position in general internet search to convert its largest-in-the-world, unique source of advertiser demand over to its web advertising business. Today, Google's search advertising service is provided through Google Ads. This means any advertiser

purchasing search advertising through Google Ads can readily and easily also purchase web advertising through the same tool.

137. This scale and diversity in demand, in turn, has given Google Ads significant advantages over its competitors, and made entry or expansion into this market difficult, bordering on impossible. It has also had the resulting effect of further driving publisher supply towards Google Ads. As Google describes, Google Ads “reaches over 95% of global internet users and is the world’s largest ad network”.
138. Many advertisers (and most small advertisers) only use one ad buying tool (e.g., advertiser ad network) for their web advertising needs. Using one advertiser ad network is less costly than multi-homing and simplifies any needed or desired ad management functionality. Consequently, for single-homing advertisers who advertise on Google search and also want to transact in web ads, there are no realistic alternatives to Google Ads. The scale and diversity of Google’s integrated ad tech products means that Google can offer these advertisers (large and small) unparalleled advantages in the form of publisher supply and access to data.
139. As described above, there are significant barriers to entry and expansion in ad tech markets, including the Advertiser Ad Network market. Among other things, these barriers include access to publisher inventory — necessary for attracting advertisers and compelling them to connect to a new buying tool — and sufficient access to data to facilitate optimal matches for their advertising customers.
140. For web publishers, Google Ads represents a unique, “must have” source of advertising demand without which they would face a significant drop in revenue. Internal analysis conducted by Google in 2014 found that publishers would lose over 60% in revenue from AdX without Google Ads. As one Google executive described, Google Ads demand is: “a substantial source of diversified

demand in the Canadian market, and on its own larger than the sum of all demand on other exchanges. AdWords is incredibly successful in driving auction intensity, which equates to higher bids and yield for publisher inventory”.

141. The Advertiser Ad Network market has seen minimal entry or expansion over the past decade. To the contrary, there has been considerable consolidation, as well as exit by large tech firms like Meta.⁹ The few rival advertiser ad networks that remain do so by competing on the market’s periphery and do not constrain Google’s ability to exercise market power.

3. Google is dominant in the Ad Exchange market

142. Direct and indirect indicia of Google’s substantial market power demonstrates that Google substantially or completely controls the Ad Exchange market in Canada. In the alternative, Google has a strong market position in the Ad Exchange market in Canada.

a) Direct indicia of substantial market power

143. AdX can dictate the terms upon which it sells its services, and has been able to charge supra-competitive fees for over a decade, despite most ad exchanges offering lower fees or reducing their fees (as described in paras 216-217).
144. Google’s ability to charge supra-competitive fees on AdX is primarily a result of AdX’s unique access to Google Ads demand (as described in para 161).
145. Google’s market power is also evidenced by the fact that it can restrict the use of its ad exchange to bolster its position in the Publisher Ad Server market (as described in para 166).

⁹ In 2020, Meta’s advertiser ad network (Facebook Audience Network or “FAN”) stopped bidding on open web ad inventory, but continues to bid on in-app ad inventory.

150. Google began to leverage its position across markets soon after it acquired DoubleClick in 2008, which included DFP and AdX. Almost immediately, Google began tying those products to Google’s advertiser ad network, Google Ads. By conditioning effective access to any one of its ad tech tools on the use of its other tools, Google began locking-in publishers.
151. Subsequent to the tie being put in place, Google undertook a series of actions designed to further distort competition and entrench its dominance across the ad tech stack. Using DFP’s market power, Google undertook to systematically advantage its ad tech tools and steer transactions away from rivals. Google did this in several ways including:
- a) DFP granting AdX advantageous access to its ad inventory over rival exchanges through its Dynamic Allocation feature, which gave AdX an exclusive “first look” and later “last look” bid advantage;
 - b) using negative take rates to steer impressions towards Google Ads and away from other AdX buyers through a program Google internally called Project Bernanke (as detailed below, at paragraphs 179-185); and
 - c) implementing Unified Pricing Rules, which restricted publishers’ ability to price AdX differently from rival ad exchanges.
152. Along the way, Google purposely identified, restrained, and deprecated innovative technologies that stood to benefit publishers and advertisers, but threatened its dominance.
153. Google’s conduct has had (and is having) the intended effect of distorting competition and foreclosing to rival ad tech providers important access to transactions, scale and customers necessary to mount effective competition against Google’s dominance. Each of DFP, AdX, and Google Ads have as a result become the default tools for publishers and advertisers — not because the

tools are superior to those of Google's rivals, but because Google has been able to leverage its market power in each market such that using its suite of tools became the only viable option for a significant majority of publishers and advertisers.

154. The conduct described herein constitutes a practice of anti-competitive acts that Google has and continues to engage in to preserve and enhance its dominant position across the ad tech stack.

1. Google locks publishers into its ad tech tools

155. Before its acquisition of DoubleClick in 2008, Google already had a large captive base of advertiser demand through its position in search advertising. With the acquisition of DoubleClick, Google added DFP and its sizeable pool of publishers to its customer base, and AdX, a then-nascent ad exchange. Not long thereafter Google began taking steps to lock publishers into its publisher ad server, DFP. This was done to secure its position not only in the Publisher Ad Server market, but also to cement its place in the Ad Exchange market.
156. Google knew that by leveraging its market power in the Publisher Ad Server market, it could strengthen its position in the Ad Exchange market. In effect, Google left publishers and advertisers with no choice but to transact through Google's own ad tech stack, and not with its rivals. The actions taken by Google to tie its products together manifested in two ways, as described below.

a) Google conditions access to Google Ads demand on the use of AdX

157. Since 2008, Google has substantially restricted advertisers using Google Ads from bidding on rival ad exchanges' inventory. If publishers want access to the millions of advertisers who use Google Ads' to purchase web advertising, they have no choice but to auction their inventory through AdX. Google thereby

coerces publishers into using AdX, not because it is the superior product, but because failing to do so means losing access to essential advertiser demand.

158. Google possesses the technology to enable Google Ads to bid on rival exchanges. However, Google understood that denying access to its unique advertiser demand would hinder its rivals' ability to compete on the merits. Without this access, publisher payouts on rival exchanges would dwindle, making those platforms less attractive to publishers. By conditioning access to Google Ads' demand on the use of AdX, Google deprived rival ad exchanges of the necessary transactions and scale to compete meaningfully and also raised barriers to entry. As one Google executive described: "I believe if we keep AdWords [Google Ads] demand to ourselves, it will be hard for another marketplace to develop even if they have lower margins".
159. Without the tie between Google Ads and AdX, Google understood that publishers would avail themselves of rival ad tech tools. In 2011, Google conducted an experiment to assess what would happen if it allowed its advertisers to bid freely into rival ad exchanges (i.e., if Google had to compete on the merits). The outcome revealed that AdX would "lose 20 to 30% of its publishers", and DFP would "lose 20% of its publishers". Google understood that "if publishers can gain the same AdWords RTB demand from any yield management/exchange partner, there is a risk that many publishers would terminate their AdX relationship in favor of their preferred alternate vendor".
160. Google has maintained this tie, despite recognizing that its Google Ads advertisers have unspent advertising budgets and that opening up bidding to other ad exchanges could increase their access to inventory (and increase Google's revenue). Despite this clear benefit to advertisers (and revenue boost for Google), Google instead prioritized a long-term strategy of consolidating its market power across the ad tech stack by excluding rivals, which it knew would have an adverse effect on competition, and position Google for greater profits in a less competitive environment at the expense of its advertisers. The buy-side

of Google's business which runs Google Ads was unhappy with this strategy. As one buy-side Google executive said: "[m]ore importantly, we do not like the idea of AdWords being given a disadvantage compared to the other buyers in order to strengthen the publisher pitch (e.g. uphold the 20% margin)".

161. Google recognized that by allowing Google Ads advertisers to bid freely on other ad exchanges, AdX would be forced to compete on the merits and be unable to sustain its supra-competitive fees. As one Google executive stated: "we are NOT seeing pressure on the AdX 20%, but I am making a statement that it is because it provides nearly exclusive access to GDN demand. If GDN bought liberally through all 3PEs [third party exchanges], I think the 20% would crater. What I am suggesting is that 'comparing two bids and running an auction' is proven to not be worth 20%".
162. In 2016, Google began allowing a limited portion of its advertiser demand to bid outside of AdX. This initiative, known as AWBid, offered some marginal benefit to Google Ads advertisers by allowing them to (minimally) access inventory outside of AdX. However, Google implemented measures to disadvantage bids originating from Google Ads made on rival ad exchanges. Google Ads charges take rates between 32-50% on rival ad exchanges compared to 15% on AdX, effectively lowering bids on rival ad exchanges relative to AdX, to the detriment of its advertisers. Google knows that this asymmetrical fee structure will result in bids made to rival exchanges being less competitive, resulting in those exchanges winning fewer auctions, and consequently being less attractive to advertisers and publishers.
163. Despite the introduction of AWBid, Google continues to tell publishers that the only way to access the majority of Google Ads' demand is through AdX. Today, nearly 90% of Google Ads impressions are transacted on AdX.

b) Google conditions access to AdX on the use of DFP

164. The second part of the tie involves Google conditioning real-time bids from AdX on the use of DFP. Specifically, if publishers want to receive real-time bids from AdX (and critical access to Google Ads' unique advertiser demand) they must use DFP. Publishers using other publisher ad servers are effectively locked out of accessing real-time bids from AdX. This restriction effectively forces publishers into adopting DFP as their publisher ad server, undermining rival publisher ad servers' ability to attract publisher customers and thereby gain scale and meaningfully compete. In essence, publishers are compelled to use DFP not because it offers superior functionality, but because publishers require the must-have advertiser demand on Google Ads that is accessible through real-time bidding from AdX. By doing so, Google has leveraged its market power throughout the ad tech ecosystem to maintain, entrench and enhance its dominance.
165. The ability to receive and compare real-time bids from ad exchanges is crucial for publishers. Real-time bidding enhances revenue by allowing publishers to sell ad inventory at variable prices as it becomes available. Recognizing this, Google tied DFP to real-time bidding from AdX, effectively "locking in" publishers to DFP. By restricting real-time bidding from AdX, Google discourages the use of rival publisher ad servers, harming their competitiveness and ability to attract and retain customers.
166. Google has technology to enable real-time bids from AdX to rival publisher ad servers with "minimal effort", which would have resulted in increased revenue for AdX, but chose not to use it in order to maintain DFP's market position. In the words of one Google executive, enabling real-time bids from AdX to rival publisher ad servers would "delete one of the major arguments to use [DFP]".
167. In 2017, Google further solidified this approach by requiring publishers to sign a combined contract for both AdX and DFP. Google has maintained a

superficial method for publishers to access AdX through other publisher ad servers (referred to as “AdX Direct”), which Google internally acknowledges is simply a “concept for antitrust”. However, Google, publishers and other market participants all agree that AdX Direct tags, which do not provide real-time bids from AdX, are not a viable option for publishers. Today, over 99% of AdX impressions are transacted via DFP.

c) Google’s tie is intentional

168. Google has unlawfully tied its three distinct ad tech products together: its unique, must-have advertiser demand (on Google Ads) is accessible only through its ad exchange (AdX), while real-time bidding from its ad exchange is contingent upon using DFP, its publisher ad server. In other words, publishers must use both AdX and DFP or risk losing effective access to this must-have advertiser demand.
169. This tie was neither accidental nor designed to benefit its customers. It was intended to lock publishers and advertisers into Google’s tools within the ad tech stack, and thereby create barriers to entry and expansion for rivals and potential rivals.
170. With this tie, publishers are deprived of the opportunity to access and compare real-time bids from multiple ad exchanges; and advertisers of the ability to bid into rival ad exchanges due to restrictions on Google Ads, which could lead to higher-quality matches. Google’s actions are part of a coordinated and deliberate effort to compel both publishers and advertisers to use AdX and DFP, leaving them with no choice but to use only Google’s ad tech products. As one Google executive put it: “they should realize that AdX is still the only source to get access to all of GDNs demand. If they chose another monetization partner they loose [sic] access to all of GDN.”
171. Google’s true intentions have been exemplified through its deliberate stalling, stifling and deprecating of innovative technologies that stood to benefit

publishers and advertisers, to maintain its tie. In 2011, Google acquired AdMeld and deprecated technology that could have facilitated real-time bids from AdX to other publisher ad servers, which it viewed as a “disintermediation” risk. In 2016, Google undertook to suppress the growth of header bidding technology, which stood to benefit advertisers and publishers. Google viewed the growth of header bidding as an existential threat to the “must call” status of AdX and DFP, because it had the potential to weaken the effects of Google’s tie by aggregating enough advertiser demand and thereby diminish the need for publishers to use AdX and DFP. Google sought to protect its tie and remain the “only way to get Google demand” by not supporting header bidding or real-time bids from AdX to rivals’ publisher ad servers.

172. By conditioning publishers and advertisers to transact through its ad tech tools, Google has stifled competition among publisher ad servers and ad exchanges. Rivals in these markets are denied scale/transactions (i.e., customers), making them less desirable alternatives to Google and less able to meaningfully compete. Publishers who use rival ad exchanges are unable to access Google’s advertiser demand; as a result, these publishers are diverted away from rival ad exchanges and steered towards AdX. Similarly, the inability for publishers using competing publisher ad servers to access real-time bids from AdX corralled publishers away from rival publisher ad servers and towards DFP. Google’s success was due to its anti-competitive tie, rather than the inherent merits of its products. As one Google executive described: “unlike our competitors, pubs have been viewing us as a necessary evil, instead of a responsive, innovative partner”.

2. Google gives AdX a “First Look” and “Last Look” advantage

173. Since 2009, through a “feature” called Dynamic Allocation, Google leveraged DFP’s substantial market power to funnel transactions to AdX, thereby further strengthening the position of its ad exchange, relative to other exchanges. This feature required publishers to offer their ad inventory to AdX before offering it

to rival ad exchanges. In effect, AdX was given a right of first refusal on all inventory, allowing it to “cherry pick” high value queries (i.e., inventory that advertisers were willing to bid more for), while leaving competitors with fewer and less desirable impressions, ultimately reducing publishers’ and advertisers’ incentives to work with rival exchanges.

174. Historically, publishers wanting to auction ad inventory to multiple ad exchanges used a method known as the “waterfall.” Under this approach, publisher ad servers sent ad requests to exchanges sequentially, typically based on their average historical performance, until an exchange met the publisher’s price floor.
175. Through Dynamic Allocation, AdX was given a “First Look” advantage. First Look gave AdX the right of first refusal on ad inventory by putting it at the top of the waterfall, regardless of where it would have ranked in the waterfall based on historical prices. Consequently, AdX could secure impressions even if there were other exchanges that were able to generate higher bids than AdX. As one Google executive indicated, that meant that “[p]ublishers lose every time the third-party exchange has higher payout than the average”.
176. Google recognized that First Look would deprive rival ad exchanges of valuable inventory, adversely affecting their performance. This, in turn, would lead publishers to rank those rivals lower in the waterfall, resulting in a self-reinforcing cycle of diminished inventory for Google’s competitors.
177. Partly to circumvent First Look, in or around 2015, publishers began adopting a technology called “header bidding.” Header bidding allowed publishers to send ad requests and receive real-time bids from multiple ad exchanges outside of Google’s DFP (and Dynamic Allocation). Header bidding involved embedding JavaScript in a website’s code that, once a user visited the site, routed information about the website’s ad space pre-selected ad exchanges simultaneously, before DFP was engaged and First Look executed. By

bypassing Google's First Look, publishers significantly increased participation in the market by third party ad exchanges. This led to a substantial increase in publisher ad revenue. As one Google executive described "[p]ublishers felt locked-in by dynamic allocation in DFP, which only gave AdX ability to compete, so HB [header bidding] was born. HB [header bidding] gives many publishers better yield, so it's a no-brainer for a publisher to adopt it".

178. With the introduction of header bidding, Google's First Look advantage became a "Last Look" advantage. Through Last Look, AdX was given a right of last refusal in respect of bids from rival exchanges. During the header bidding process, third-party ad exchanges submitted bids simultaneously and did not know what their rivals were bidding. But Google, through DFP, disclosed the highest real-time bid from the header-bidding exchanges to AdX, allowing AdX to use that bid as the price floor in its own auction. That way, Last Look enabled AdX to outbid competitors, only requiring a minimal increased margin. As described internally at Google: "AdX can observe all the other exchange bids, and can strategically lower its bid to be the smallest amount sufficient to win... This is referred to as the last-look advantage for AdX: Essentially, it can determine its bid after looking at the bids of other auction candidates".
179. Last Look allowed AdX to win inventory by bidding one penny more than the highest bid from rival ad exchanges. As a result, Last Look had no material benefit to publishers and publishers could not opt-out. As one Google executive described "last look...only benefits us [Google]". In fact, the removal of Last Look was one of the "biggest requests" Google got from the publisher community.
180. In 2014, Google introduced a program known as Sell-Side Dynamic Revenue Share ("SSDRS") to further bolster AdX's ability to win auctions by dynamically adjusting its 20% take rate. SSDRS, coupled with Last Look, allowed AdX to adjust its 20% take rate after seeing the highest competing bid from rival ad exchanges. For example, AdX could reduce its take rate (e.g.,

10%) to win an impression and increase its take rate (e.g., 30%) on another impression and maintain an average 20% take rate.

181. Rival exchanges could not compete with AdX because they did not have AdX's Last Look advantage and the ability to thereafter adjust their take rates through a program such as SSDRS. As a result, Google's AdX was able to win more auctions at the expense of its rivals, not because AdX was a better product, but because it was able to leverage its market power to deprive rival exchanges of critical transactions, scale, and customers, as well as distort competition. Google internally acknowledged that SSDRS was "just yet another way for AdX to exploit the last look advantage", which other ad exchanges could not replicate because, unlike AdX, they could not see bids from other ad exchanges.
182. Google understood that Last Look conferred an unfair advantage to AdX and was met with criticism from publishers. Nevertheless, Google recognized that in a header bidding environment, Last Look gave AdX "a significant informational advantage". Through Dynamic Allocation and the related First and Last Look features, Google restricted publishers' ability to multi-home and denied rivals essential revenue and scale, thereby reinforcing its market power across the ad tech stack — regardless of the impact these "features" had on ad matching quality for its customers.
183. As previously described at paragraph 165, Google also intentionally suppressed and deprecated innovative technologies that stood to benefit publishers and advertisers, including those aimed at facilitating real-time competition between ad exchanges, such as AdMeld's RTB technology, and later header bidding. Header bidding increased publisher revenue by as much as 20-40% by enabling real-time competition between ad exchanges. Yet, instead of embracing this innovative technology from which their publisher customers stood to gain, Google took steps to stall and suppress the growth of header bidding to protect the unfair advantages Dynamic Allocation bestowed on AdX.

184. In 2019, Google moved to a unified first price auction and got rid of its Last Look advantage. Internally, Google acknowledged that this was done proactively and bundled with other beneficial changes for Google (e.g., Unified Pricing Rules, described below beginning at paragraph 186) to avoid being forced by regulators to remove Last Look under disadvantageous terms.

3. Google uses negative take rates to win more auctions

185. In 2013, Google realized that other ad buying tools were lowering their take rates to win more impressions, resulting in a “worrisome” trend of other ad buying tools on AdX growing at the expense of Google Ads.
186. In response, Google introduced a program it referred to internally as Project Bernanke,¹⁰ which adjusted Google Ads’ fixed take rate of 14% to win more ad impressions, while maintaining an average take rate of 14% per publisher.¹¹ This secret program allowed Google Ads to bid such that it earned a lower margin (including using negative take rates) in certain competitive auctions, and a higher margin in non-competitive auctions.
187. Google’s manipulation of its bids was done covertly and with the intention of reinforcing its dominant position in the relevant markets. Through Project Bernanke, Google steered more ad spend towards Google Ads and AdX, and away from rival buying tools and ad exchanges. In instances where Google took a negative take rate to boost its bid above the advertiser’s maximum willingness to pay, Google’s advertisers were winning impressions that another advertiser, using a different ad buying tool, might have valued more highly and but for Google’s take rate manipulation, would have won. In some instances, Google Ads lowered its take rate by as much as -300% to inflate bids on AdX relative

¹⁰ Project Bernanke was named after former US Federal Reserve Chairman Ben Bernanke, because it allowed Google to win more impressions through “quantitative easing” on AdX.

¹¹ As a precursor to Project Bernanke, Google ran Dynamic Revenue Share (“**DRS**”), which also adjusted Google Ads’ fixed take rate of 14% per impression to win more ad impressions, while still maintaining an average take rate of 14% per publisher. With DRS, Google would lower its take rate to zero in some instances but, in contrast to Project Bernanke, never lower than zero.

to other ad exchanges. It also meant that publishers were being given distorted market signals in that in some cases the prices that they were receiving for their inventory did not reflect advertisers' willingness to pay.

188. Internally, Google initially estimated that Project Bernanke would reduce the number of auctions rival ad buying tools won on AdX by 18% and rival spend on AdX by 8%. In practice, Google later realized that Project Bernanke was exceeding its expectations and had resulted in boosting Google Ads win rate by 20% (at the expense of rival buying tools).
189. Google Ads' use of negative take rates reduced price competition and the ability of rival ad buying tools to compete for and win ad impressions, making them less attractive to advertisers. By allowing Google Ads to win more high value impressions than it would have otherwise won, Project Bernanke reinforced Google Ads' market power and by extension, the market power of AdX and DFP.
190. Under the initial version of Project Bernanke, Google Ads targeted an average take rate on a per publisher basis. In a later version, called Global Bernanke, Google Ads began to target an average take rate across all AdX publishers, creating pools of "winning" publishers on whose inventory Google would charge a less than average a take rate and "losing" publishers on whose inventory Google would charge a more than average take rate. Through Global Bernanke, Google exploited captive publishers it deemed to be "non-competitive" due to their lower quality inventory by charging them take rates above average and using those funds to subsidize "competitive" publishers with higher quality inventory.
191. In 2019, the mechanics of Project Bernanke were adjusted to function in a first-price auction. Today, this updated form of Project Bernanke is referred to as The Alchemist. The Alchemist continues to target an average take rate and

continues to use negative take rates to advantage Google Ads relative to rival ad buying tools.

4. Google restricts publishers' ability to transact with rival exchanges on their own terms

192. In 2019, Google began leveraging its market power in the Publisher Ad Server market to reinforce its position in the Ad Exchange market by removing publishers' ability to set lower price floors for rival (i.e., non-Google) ad exchanges compared to AdX through a program called UPR. Google came to the realization that for the reasons set out below, publishers were setting higher price floors for AdX, which led to rival exchanges winning more impressions. To thwart their publisher customers initiative, Google unilaterally imposed UPR, forcing publishers to set the same price floor across all exchanges for any given impression.
193. Prior to UPR, DFP had offered functionality that allowed publishers to set different price floors for different ad exchanges and demand sources. Publishers valued and used this functionality for a number of reasons, including to adjust for ad quality, revenue diversity (i.e., not being overly reliant on Google) and to increase yield.
194. To limit the number of low-quality ads showing up on their websites, publishers could set a high price floor for certain exchanges associated with lower quality ads. Google was aware that publishers used high floors on AdX to reduce the risk of lower quality ads coming from Google Ads. As one Google executive described: "[a] publisher might set a lower floor for HB [header bidding] knowing that the risk of low-quality creatives coming through that channel is much lower than the risk of similar creatives coming through AdX (mostly because of AdWords)".
195. Google was also aware of publishers using price floors to diversify their revenue streams, promote competition and reduce their reliance on AdX. In

explaining why some publishers choose to place higher floors in AdX, one Google executive described: “[p]ubs are also rationale [sic] when they decide to diversify their source of revenues. It help [sic] them to keep Google at bay and put pressure on us (similar to any industry).”

196. Google adopted UPR knowing that it would be viewed as a loss of functionality by publishers and that it could negatively impact publisher revenue. Realizing this, Google decided to bundle its launch of UPR with other changes to make it more “stomachable” and mask the negative effects. Google was aware that the removal of its Last Look advantage was going to have a negative impact on AdX, so it bundled it with the launch of UPR to offset the effects.
197. As expected, publishers were unhappy with the loss of control resulting from UPR, but had little recourse as they could not afford to lose access to Google Ads demand and had no viable alternatives to DFP. Despite complaints from publishers – for example, due to an increase in bad ads (i.e., fraudulent and/or spam ads) – Google did not afford publishers the option to opt-out of UPR. Publishers were captive and Google knew it.
198. Through UPR, Google has abused its market power in the Publisher Ad Server market by degrading the quality of DFP and taking away a feature that publishers valued. Google did not improve AdX or reduce its take rate to better compete with rival ad exchanges. Google unilaterally restricted the ability for publishers using DFP to set different price floors for ad exchanges for its own gain.
199. UPR denies publishers the ability to prioritize their preferred ad exchanges and deprives rival ad exchanges of the ability to differentiate their services on non-price dimensions and gain scale. Google’s internal analysis confirmed that UPR had a negative effect on rival ad exchanges, which began losing share, and led to more spend flowing through AdX.

artificially suppressed the competitive process, depriving rival ad exchanges of scale and publishers of revenue.

212. In 2019, when Google finally got rid of its Last Look advantage, Google's internal analysis found that the elimination of Last Look would create a more competitive environment with third parties, whose share of ad spend would increase while AdX's share of spend would decrease, and increase publisher yield. For example, one internal analysis conducted by Google found that the removal of Last Look would result in a 7% decrease in impressions for AdX. However, the implementation of UPR together with the elimination of Last Look led to *more* ad impressions being diverted from other ad exchanges to AdX, all without AdX having to compete harder on price, quality or innovation and without the support of publishers. One internal analysis estimated a 32% increase in impressions won by AdX as a result of UPR.
213. Google's anti-competitive practice has resulted in price competition in the Ad Exchange market being significantly diminished. Despite efforts from rival ad exchanges to gain share by differentiating their services and/or lowering their take rates, AdX has been able to maintain a supra-competitive take rate all while continuing to gain share. Over time, as ad exchanges that reduce their take rate and/or innovate in order to win more impressions are unsuccessful in doing so, their incentive to continue to reduce their take rate and/or innovate is diminished, to the detriment of publishers and advertisers.
214. But for Google's practice, prices in the Ad Exchange market would be substantially lower and publishers and advertisers would be free to avail themselves of higher-quality or lower-priced alternatives.
215. Google's distortion of the competitive process via Dynamic Allocation, Project Bernanke and UPR has had and continues to have the effect of forcing more transactions through AdX than would otherwise prevail in a competitive

market. Those transactions are then subject to AdX's supra-competitive take rate, which means that advertisers pay more, and publishers receive less.

216. Google's internal predictions that header bidding would challenge the "must call" status of AdX and DFP (flowing from the tie with Google Ads) and drive down ad exchange fees to between 5-15% have not materialized because of actions taken by Google to blunt the competitive threat header bidding represented. AdX's take rate for open auction ad sales has remained remarkably stable at 20% and AdX continues to gain share. In 2022, AdX's market share was nearly 6 times higher than its next closest competitor. Google describes being at a "comfortable point when it comes to HB [Header Bidding]".
217. Google executives consistently describe AdX's take rate as significantly higher than its rivals and not justified based on AdX's functionality, with one Google executive describing that they are "continuing to extract irrationally high rent from the AdX". But for its exclusive access to Google Ads demand and ownership of the publisher ad server, AdX could not sustain a 20% take rate and publishers would shift spend to other ad exchanges. Internally, as Google acknowledges, AdX is more difficult to do business with than other ad exchanges and that without its exclusive access to Google Ads and privileged position within Google's ad stack, it would be forced to compete on service and would likely lose.

3. Advertiser Ad Network market

218. But for Google's practice of anti-competitive acts, barriers to entry and expansion in the Advertiser Ad Network market would have been lower, allowing new rival advertiser ad networks to enter the market and existing rivals to expand and gain the scale necessary to effectively compete and offer advertisers lower-priced and higher-quality services.
219. Google's practice has allowed Google Ads to entrench its dominance, making rival advertiser ad networks less attractive to advertisers.

220. Given that Google Ads is one of the largest buyers on AdX, the advantages enjoyed by AdX, such as First Look, Last Look and UPR, have also accrued to Google Ads. For example, the implementation of UPR resulted in the average price floor for Google Ads decreasing from over \$3.00 to just over \$1.00, thereby increasing the number of ad impressions Google Ads is eligible to bid on. This deprived rival advertiser ad networks of the ability to differentiate their services on non-price dimensions and gain scale, and restricted publishers' ability to use price floors to avoid low quality ads from Google Ads.
221. Project Bernanke, and particularly Google Ads' use of negative take rates, reinforced Google Ads' dominant market position. Google's distortion of the competitive process excluded rivals by reducing price competition with other advertiser buying tools. Google's use of negative take rates has allowed it to boost bids from Google Ads above its advertisers' maximum willingness to pay, allowing a Google Ads advertiser to win an impression that another advertiser, using a different advertiser buying tool, might value more highly. Google's records show that Project Bernanke increased Google Ads' win rate and "starved out some AdX buyers of growth". Google found that Bernanke would lead to a 23% reduction in impressions won by other buyers on AdX and a 10% reduction in spend.

E. CONCLUSION

222. An order of the Tribunal is necessary and appropriate in the circumstances, including for the following reasons:
- a) Google's practice has had, is having and is likely to have the effect of preventing or lessening competition substantially in the Advertiser Ad Network, Ad Exchange and Publisher Ad Server markets in Canada;
 - b) an order, and more particularly, the relief sought by the Commissioner herein, is reasonable and necessary to overcome the

D. Interpretation of the *Charter*

Found at **Tab 108(B)**,
Volume 20 of Google's
BOA.

1984 CarswellAlta 121
Supreme Court of Canada

Canada (Director of Investigation & Research,
Combines Investigation Branch) v. Southam Inc.

Affirming: 1983 ABCA 32

1984 CarswellAlta 121, 1984 CarswellAlta 415, [1984] 2 S.C.R. 145, [1984] 6
W.W.R. 577, [1984] A.W.L.D. 968, [1984] A.W.L.D. 969, [1984] A.W.L.D.
983, [1984] S.C.J. No. 36, 11 D.L.R. (4th) 641, 12 W.C.B. 437, 14 C.C.C.
(3d) 97, 27 B.L.R. 297, 2 C.P.R. (3d) 1, 33 Alta. L.R. (2d) 193, 41 C.R. (3d)
97, 55 A.R. 291, 55 N.R. 241, 84 D.T.C. 6467, 9 C.R.R. 355, J.E. 84-770

**Lawson A.W. Hunter, Director of Investigation and Research of the Combines
Investigation Branch, Michael J. Milton, Michael L. Murphy, J. Andrew McAlpine
and Antonio P. Marrocco, also known as Anthony P. Marrocco and Southam Inc.**

HUNTER, DIRECTOR OF INVESTIGATION AND RESEARCH OF
THE COMBINES INVESTIGATION BRANCH et al. v. SOUTHAM INC.

Laskin C.J.C. *, Ritchie, **Dickson**, Beetz, McIntyre, Lamer, Estey, Chouinard, and Wilson JJ.

As he then was

Heard: November 22-23, 1983

Judgment: September 17, 1984

Docket: No. 17569

Counsel: *E. A. Bowie, Q.C.*, and *I. C. Hutton, Q.C.*, for appellants
A. H. Lefever and *F. S. Kozak*, for respondent

Subject: Corporate and Commercial

Headnote

**Trade and commerce --- Combines and competition legislation — Constitutional issues —
Charter of Rights and Freedoms**

Trade and commerce — Combines legislation — Constitutionality — Combines Investigation Act
— Search provisions in [ss. 10\(1\)](#) and [10\(3\)](#) inconsistent with guarantee against unreasonable search
and seizure provided in [s. 8 of Charter of Rights and Freedoms](#) — Provisions of no force or effect.

**Constitutional law --- Charter of Rights and Freedoms — Unreasonable search and seizure:
Combines Investigation Act**

**Commercial law --- Trade and commerce — Competition and combines legislation —
Constitutional issues — Charter of Rights and Freedoms**

Search and seizure provisions under Act not requiring prior authorization of judge or other person
capable of acting judicially — Such provisions also failing to set "reasonable and probable

to advance its goals, notably those of law enforcement.

Appeal from judgment of Alberta Court of Appeal, *Canada (Director of Investigation & Research, Combines Investigation Branch) v. Southam Inc.* (1983), 147 D.L.R. (3d) 420, [1983] 3 W.W.R. 385, 42 A.R. 93, 3 C.C.C. (3d) 497, 32 C.R. (3d) 141, 4 C.R.R. 368, 24 Alta. L.R. (2d) 307, 1983 CarswellAlta 27, 72 C.P.R. (2d) 145 (Alta. C.A.), allowing appeal from judgment of Cavanagh J., *Canada (Director of Investigation & Research, Combines Investigation Branch) v. Southam Inc.* (1982), 20 Alta. L.R. (2d) 144, 42 A.R. 109, 68 C.C.C. (2d) 356, 65 C.P.R. (2d) 80, 2 C.R.R. 264, 136 D.L.R. (3d) 133, [1982] 4 W.W.R. 673, 1982 CarswellAlta 94 (Alta. Q.B.), dismissing application for interim injunction pending trial.

Dickson J.:

1 The Constitution of Canada, which includes the *Canadian Charter of Rights and Freedoms*, is the supreme law of Canada. Any law inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect. *Section 52(1) of the Constitution Act, 1982* so mandates. The constitutional question posed in this appeal is whether s. 10 (3), and by implication s. 10 (1), of the *Combines Investigation Act*, R.S.C. 1970, c.C-23 (the "Act") are inconsistent with s. 8 of the *Charter* by reason of authorizing unreasonable searches and seizures and are therefore of no force and effect.

I Background

2 Subsections 10(1) and 10(3) of the *Combines Investigation Act* provide:

10(1) Subject to subsection (3) in any inquiry under this Act the Director [of Investigation and Research of the Combines Investigation Branch] or any representative authorized by him may enter any premises on which the Director believes there may be evidence relevant to the matters being inquired into and may examine any thing on the premises and may copy or take away for further examination or copying any book, paper, record or other document that in the opinion of the Director or his authorized representative, as the case may be, may afford such evidence.

10.(3) Before exercising the power conferred by subsection (1), the Director or his representative shall produce a certificate from a member of the [Restrictive Trade Practices] Commission, which may be granted on the *ex parte* application of the Director, authorizing the exercise of such power.

3 On April 13, 1982, in the course of an inquiry under *the Act*, the appellant Lawson A.W. Hunter, Director of Investigation and Research of the Combines Investigation Branch, authorized the other appellants, Messrs. Milton, Murphy, McAlpine and Marroco, all Combines Investigation officers, to exercise his authority under s. 10 of the *Act* to enter and examine documents and other

authorize "unreasonable" search or seizure. Further, the appellants argue, the wording of s. 10 does not prevent the R.T.P.C. member in appropriate cases from requiring, for instance, evidence under oath before he approves the Director's authorization. In any event, they maintain, it cannot be said that s. 10 is incapable of being applied in a manner which does not offend the Constitution, and it ought not, therefore, to be struck down. At most it ought to be read down so as to include any necessary procedural safeguards. In support, they cite the decision of Van Camp J. in *The Queen v. Metropolitan Toronto Pharmacists' Association* (unreported, Ont. H.C., May 4, 1983).

III "Unreasonable" Search or Seizure

14 At the outset it is important to note that the issue in this appeal concerns the constitutional validity of a statute authorizing a search and seizure. It does not concern the reasonableness or otherwise of the manner in which the appellants carried out their statutory authority. It is not the conduct of the appellants, but rather the legislation under which they acted, to which attention must be directed.

15 As is clear from the arguments of the parties as well as from the judgment of Prowse J.A., the crux of this case is the meaning to be given to the term "unreasonable" in the s.8 guarantee of freedom from unreasonable search or seizure. The guarantee is vague and open. The American courts have had the advantage of a number of specific prerequisites articulated in the Fourth Amendment to the United States Constitution, as well as a history of colonial opposition to certain Crown investigatory practices from which to draw out the nature of the interests protected by that Amendment and the kinds of conduct it proscribes. There is none of this in s. 8. There is no specificity in the section beyond the bare guarantee of freedom from "unreasonable" search and seizure; nor is there any particular historical, political or philosophic context capable of providing an obvious gloss on the meaning of the guarantee.

16 It is clear that the the meaning of "unreasonable" cannot be determined by recourse to a dictionary, nor for that matter, by reference to the rules of statutory construction. The task of expounding a constitution is crucially different from that of construing a statute. A statute defines present rights and obligations. It is easily enacted and as easily repealed. A constitution, by contrast, is drafted with an eye to the future. Its function is to provide a continuing framework for the legitimate exercise of governmental power and, when joined by a *Bill* or a *Charter of Rights*, for the unremitting protection of individual rights and liberties. Once enacted, its provisions cannot easily be repealed or amended. It must, therefore, be capable of growth and development over time to meet new social, political and historical realities often unimagined by its framers. The judiciary is the guardian of the constitution and must, in interpreting its provisions, bear these considerations in mind. Professor Paul Freund expressed this idea aptly when he admonished the American courts "not to read the provisions of the Constitution like a last will and testament lest it become one".

17 The need for a broad perspective in approaching constitutional documents is a familiar theme in Canadian constitutional jurisprudence. It is contained in Viscount Sankey's classic formulation in *Edwards v. Attorney General for Canada*, [1930] A.C. 124 at 136-37, cited and applied in countless Canadian cases:

The *British North America Act* planted in Canada a living tree capable of growth and expansion within its natural limits. The object of the *Act* was to grant a Constitution to Canada... Their Lordships do not conceive it to be the duty of this Board -- it is certainly not their desire -- to cut down the provisions of the *Act* by a narrow and technical construction, but rather to give it a large and liberal interpretation.

18 More recently, in *Minister of Home Affairs v. Fisher*, [1980] A.C. 319, dealing with the Bermudian Constitution, Lord Wilberforce reiterated at p. 321 that a constitution is a document "*sui generis* calling for principles of interpretation of its own, suitable to its character", and that as such, a constitution incorporating a *Bill of Rights* calls for:

a generous interpretation avoiding what has been called "the austerity of tabulated legalism" suitable to give individuals the full measure of the fundamental rights and freedoms referred to.

Such a broad, purposive analysis, which interprets specific provisions of a constitutional document in the light of its larger objects is also consonant with the classical principles of American constitutional construction enunciated by Chief Justice Marshall in *M'Culloch v. Maryland* (1819), 17 U.S. (4 Wheat.) 316. It is, as well, the approach I intend to take in the present case.

19 I begin with the obvious. The *Canadian Charter of Rights and Freedoms* is a purposive document. Its purpose is to guarantee and to protect, within the limits of reason, the enjoyment of the rights and freedoms it enshrines. It is intended to constrain governmental action inconsistent with those rights and freedoms; it is not in itself an authorization for governmental action. In the present case this means, as Prowse J.A. pointed out, that in guaranteeing the right to be secure from unreasonable searches and seizures, s. 8 acts as a limitation on whatever powers of search and seizure the federal or provincial governments already and otherwise possess. It does not in itself confer any powers, even of "reasonable" search and seizure, on these governments. This leads, in my view, to the further conclusion that an assessment of the constitutionality of a search and seizure, or of a statute authorizing a search or seizure, must focus on its "reasonable" or "unreasonable" impact on the subject of the search or the seizure, and not simply on its rationality in furthering some valid government objective.

20 Since the proper approach to the interpretation of the *Charter of Rights and Freedoms* is a purposive one, before it is possible to assess the reasonableness or unreasonableness of the impact

Found at **Tab 64, Volume 12** of Google's BOA.

1985 CarswellAlta 316
Supreme Court of Canada

R. v. Big M Drug Mart Ltd.

1985 CarswellAlta 316, 1985 CarswellAlta 609, [1985] 1 S.C.R. 295, [1985] 3 W.W.R. 481, [1985] A.W.L.D. 610, [1985] A.W.L.D. 635, [1985] A.W.L.D. 638, [1985] S.C.J. No. 17, 13 C.R.R. 64, 14 W.C.B. 157, 18 D.L.R. (4th) 321, 18 C.C.C. (3d) 385, 37 Alta. L.R. (2d) 97, 58 N.R. 81, 60 A.R. 161, 85 C.L.L.C. 14,023, J.E. 85-405

R. v. BIG M DRUG MART LTD.

Ritchie, * **Dickson**, Beetz, McIntyre, Chouinard, Lamer and Wilson JJ.

As he then was

Heard: March 6 and 7, 1984

Judgment: April 24, 1985

Docket: No. 18125

Counsel: *W. Henkel, Q.C.* , and *I. Freund* , for appellant.

J. J. Boyle and *W. S. Klym* , for respondent.

J. A. Isaac, Q.C. , and *V. L. Davies* , for intervener the Attorney General of Canada.

R. Speight , for intervener the Attorney General of New Brunswick.

J. C. MacPherson , for intervener the Attorney General of Saskatchewan.

Subject: Criminal; Constitutional; Civil Practice and Procedure; Public

Headnote

Constitutional Law --- Charter of Rights and Freedoms — Scope of application — Who having rights under Charter — Corporations

Constitutional Law --- Procedure in constitutional challenges — Jurisdiction of courts — Under Charter of Rights and Freedoms

Sunday Observance and Public Holidays --- Federal legislation

Sunday Observance and Public Holidays --- Effect of Charter of Rights and Freedoms — Freedom of religion

Lord's Day Act unconstitutional.

After police witnessed several sales transactions at the accused store on a Sunday, the accused was charged with unlawfully carrying on the sale of goods contrary to the Lord's Day Act. An acquittal was granted at trial for two reasons: 1) the Act infringed the guarantee of religious freedom in the [Canadian Charter of Rights and Freedoms](#), and 2) it was no longer justified under the federal criminal law power in s. 91(27) of the Constitution Act, 1982. In dismissing a Crown appeal, the court held that the Act was valid criminal law legislation but agreed that it violated [the Charter](#). The Crown brought a further appeal.

the absence of coercion and constraint, and the right to manifest beliefs and practices. Freedom means that, subject to such limitations as are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others, no one is to be forced to act in a way contrary to his beliefs or his conscience.

Appeal from judgment of Alberta Court of Appeal, 28 Alta. L.R. (2d) 289, [1984] 1 W.W.R. 625, 9 C.C.C. (3d) 310, 5 D.L.R. (4th) 121, 7 C.R.R. 93, 49 A.R. 194, dismissing appeal from judgment of Stevenson Prov. J., 25 Alta. L.R. (2d) 195, [1983] 4 W.W.R. 54, 5 C.R.R. 281.

The judgment of the court was delivered by Dickson J. (Beetz, McIntyre, Chouinard and Lamer JJ. concurring):

1 Big M Drug Mart Ltd. was charged with unlawfully carrying on the sale of goods, on Sunday, 30th May 1982, in the city of Calgary, Alberta, contrary to the Lord's Day Act, R.S.C. 1970, c. L-13.

2 Big M has challenged the constitutionality of the Lord's Day Act, both in terms of the division of powers and the Canadian Charter of Rights and Freedoms. Such challenge places in issue before this court, for the first time, one of the fundamental freedoms protected by the Charter, the guarantee of "freedom of conscience and religion" entrenched in s. 2.

3 The constitutional validity of Sunday observance legislation has in the past been tested largely through the division of powers provided in ss. 91 and 92 of the Constitution Act, 1867. Freedom of religion has been seen to be a matter falling within federal legislative competence. Today, following the advent of the Constitution Act, 1982, we must address squarely the fundamental issues raised by individual rights and freedoms enshrined in the Charter, as well as those concerned with legislative powers.

I

The Facts and the Legislation

4 On Sunday, 30th May 1982, police officers of the city of Calgary attended at premises owned by Big M and open to the public. They witnessed several transactions including the sale of groceries, plastic cups and a bicycle lock. Big M was charged with a violation of s. 4 of the Lord's Day Act.

(A) The Lord's Day Act

5 An understanding of the scheme of that Act and its basic purpose and effect is integral to any analysis of its constitutional validity. Section 2 defines, inter alia, the Lord's Day:

114 The basis of the majority's interpretation in *Robertson* is the fact that the language of the Bill of Rights is merely declaratory: by s. 1 of the Bill of Rights, certain existing freedoms are "recognized and declared", including freedom of religion. For Ritchie J. this language dramatically narrowed the possible interpretation of the rights and freedoms enunciated by the Canadian Bill of Rights (at p. 654):

It is to be noted at the outset that the *Canadian Bill of Rights* is not concerned with "human rights and fundamental freedoms" in any abstract sense, but rather with such "rights and freedoms" as they existed in Canada immediately before the statute was enacted ... It is therefore the "religious freedom" then existing in this country that is safe-guarded by the provisions of s. 2 ...

It is on this basis that the excerpts from *Chaput v. Romain* and *Saumur v. Quebec (City)* were seen to be significant, since they articulate descriptions of religious freedom that, in the words of the majority "were recognized by this Court as existing in Canada before the *Canadian Bill of Rights* and notwithstanding the provisions of the *Lord's Day Act* " (at p. 655).

115 It is not necessary to reopen the issue of the meaning of freedom of religion under the Canadian Bill of Rights, because whatever the situation under that document, it is certain that the *Canadian Charter of Rights and Freedoms* does not simply "recognize and declare" existing rights as they were circumscribed by legislation current at the time of *the Charter's* entrenchment. The language of *the Charter* is imperative. It avoids any reference to existing or continuing rights but rather proclaims in the ringing terms of s. 2 that:

2. Everyone has the following fundamental freedoms:

(a) freedom of conscience and religion ...

116 I agree with the submission of the respondent that *the Charter* is intended to set a standard upon which *present as well as future* legislation is to be tested. Therefore the meaning of the concept of freedom of conscience and religion is not to be determined solely by the degree to which that right was enjoyed by Canadians prior to the proclamation of *the Charter*. For this reason, *Robertson* , supra, cannot be determinative of the meaning of "freedom of conscience and religion" under *the Charter*. We must look, rather, to the distinctive principles of constitutional interpretation appropriate to expounding the supreme law of Canada.

(iii) The Purpose of Protecting Freedom of Conscience and Religion

117 This court has already, in some measure, set out the basic approach to be taken in interpreting *the Charter*. In *Hunter v. Southam Inc.* (decision rendered 17th September 1984 [now reported *Hunter, Dir. of Investigation & Research, Combines Investigation Branch v. Southam Inc.*, [1984] 2 S.C.R. 145, 33 Alta. L.R. (2d) 193, (sub nom. *Dir. of Investigations & Research, Combines*

Investigation Branch v. Southam Inc.) [1984] 6 W.W.R. 577, 41 C.R. 97, 27 B.L.R. 297, (sub nom. *Hunter v. Southam Inc.*) 14 C.C.C. (3d) 97, 2 C.P.R. (3d) 1, 11 D.L.R. (4th) 641, 84 D.T.C. 6467, 55 A.R. 291, 9 C.R.R. 355]) this court expressed the view that the proper approach to the definition of the rights and freedoms guaranteed by the Charter was a purposive one. The meaning of a right or freedom guaranteed by the Charter was to be ascertained by an analysis of the purpose of such a guarantee; it was to be understood, in other words, in the light of the interests it was meant to protect.

118 In my view this analysis is to be undertaken, and the purpose of the right or freedom in question is to be sought, by reference to the character and the larger objects of the Charter itself, to the language chosen to articulate the specific right or freedom, to the historical origins of the concepts enshrined, and where applicable, to the meaning and purpose of the other specific rights and freedoms 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 *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, 53 N.R. 169, 3 O.A.C. 321, illustrates, be placed in its proper linguistic, philosophic and historical contexts.

119 With regard to freedom of conscience and religion, the historical context is clear. As they are relevant to the Charter, the origins of the demand for such freedom are to be found in the religious struggles in post-Reformation Europe. The spread of new beliefs, the changing religious allegiance of kings and princes, the shifting military fortunes of their armies and the consequent repeated redrawing of national and imperial frontiers led to situations in which large numbers of people — sometimes even the majority in a given territory — found themselves living under rulers who professed faiths different from, and often hostile to, their own and subject to laws aimed at enforcing conformity to religious beliefs and practices they did not share.

120 English examples of such laws, passed during the Tudor and Stuart periods, have been alluded to in the discussion above of the criminal law character of Sunday observance legislation. Opposition to such laws was confined at first to those who upheld the prohibited faiths and practices, and was designed primarily to avoid the disabilities and penalties to which these specific adherents were subject. As a consequence, when history or geography put power into the hands of these erstwhile victims of religious oppression, the persecuted all too often became the persecutors.

121 Beginning, however, with the Independent faction within the Parliamentary party during the Commonwealth or Interregnum, many, even among those who shared the basic beliefs of the ascendant religion, came to voice opposition to the use of the state's coercive power to secure obedience to religious precepts and to extirpate non-conforming beliefs. The basis of this

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
condamnés — Garanties légales ne permettant l'utili-
sation de la banque de données génétiques qu'à des fins
d'identification — Le prélèvement sur les catégories de
condamnés désignées d'échantillons d'ADN destinés à
la banque est-il abusif? — Les dispositions relatives à
la banque de données génétiques établissent-elles un
juste équilibre entre l'intérêt qu'a la société à ce que
soient dûment identifiées les personnes déclarées cou-
pables d'infractions graves et le droit du particulier à
l'intégrité physique et à la communication à son gré de
renseignements le concernant? — Charte canadienne
des droits et libertés, art. 8 — Code criminel, L.R.C.
1985, ch. C-46, art. 487.055.*

*Droit constitutionnel — Charte des droits — Justice
fondamentale — Équité procédurale — Audition ex*

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,

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,

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).

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.

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.

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*.

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):

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) :

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

[TRANSDUCTION] 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.

18



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.

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.

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.

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*.

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.

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. 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:

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* :

Donnohue Grant *Appellant*

v.

Her Majesty The Queen *Respondent*

and

**Director of Public Prosecutions of Canada,
Attorney General of British Columbia,
Canadian Civil Liberties Association
and Criminal Lawyers' Association
(Ontario)** *Interveners*

INDEXED AS: R. v. GRANT

Neutral citation: 2009 SCC 32.

File No.: 31892.

2008: April 24; 2009: July 17.

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

ON APPEAL FROM THE COURT OF APPEAL FOR
ONTARIO

Constitutional law — Charter of Rights — Arbitrary detention — Right to counsel — Encounter between accused and police going from general neighbourhood policing to situation where police effectively took control over accused and attempted to elicit incriminating information — Whether police conduct would cause a reasonable person in accused's position to conclude that he or she was not free to go and had to comply with police demand — Whether accused arbitrarily detained — Whether accused's right to counsel infringed — Meaning of "detention" in ss. 9 and 10 of Canadian Charter of Rights and Freedoms.

Constitutional law — Charter of Rights — Enforcement — Exclusion of evidence — Firearm discovered as result of accused's statements taken in breach of his right against arbitrary detention and right to counsel — Firearm admitted into evidence at trial and accused convicted of five firearms offences — Whether admission of firearm bringing administration of justice into

Donnohue Grant *Appellant*

c.

Sa Majesté la Reine *Intimée*

et

**Directeur des poursuites pénales du
Canada, procureur général de la Colombie-
Britannique, Association canadienne
des libertés civiles et Criminal Lawyers'
Association (Ontario)** *Intervenants*

RÉPERTORIÉ : R. c. GRANT

Référence neutre : 2009 CSC 32.

N° du greffe : 31892.

2008 : 24 avril; 2009 : 17 juillet.

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

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

Droit constitutionnel — Charte des droits — Détention arbitraire — Droit à l'assistance d'un avocat — Contact entre l'accusé et les policiers relevant de services de police communautaire devenu un interrogatoire visant à obtenir des renseignements incriminants dans une situation où l'accusé était bel et bien contrôlé par les policiers — La conduite policière inciterait-elle une personne raisonnable placée dans la même situation que l'accusé à conclure qu'elle n'est pas libre de partir et qu'elle doit obtempérer à la sommation de la police? — L'accusé a-t-il été détenu arbitrairement? — A-t-il été porté atteinte au droit de l'accusé d'avoir recours à l'assistance d'un avocat? — Sens du mot « détention » pour l'application des art. 9 et 10 de la Charte canadienne des droits et libertés.

Droit constitutionnel — Charte des droits — Réparation — Exclusion d'éléments de preuve — Arme à feu découverte par suite de déclarations de l'accusé obtenues en violation de ses droits de ne pas être détenu arbitrairement et d'avoir recours à l'assistance d'un avocat — Arme à feu utilisée en preuve au procès et accusé déclaré coupable de cinq infractions relatives

Michael Brundrett and Margaret A. Mereigh, for the intervener the Attorney General of British Columbia.

Don Stuart and Graeme Norton, for the intervener the Canadian Civil Liberties Association.

Marlys A. Edwardh and Jessica R. Orkin, for the intervener the Criminal Lawyers' Association (Ontario).

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

THE CHIEF JUSTICE AND CHARRON J. —

I. Overview

[1] Mr. Grant appeals his convictions on a series of firearms offences, relating to a gun seized by police during an encounter on a Toronto sidewalk. The gun was entered as evidence against Mr. Grant and formed the basis of his convictions. The question on this appeal is whether that evidence was obtained in breach of Mr. Grant's *Charter* rights, and if so, whether the evidence should have been excluded under s. 24(2) of the *Canadian Charter of Rights and Freedoms*.

[2] Resolving these questions requires us to revisit two important and contentious areas of criminal law *Charter* jurisprudence. The first is the definition of "detention" under ss. 9 and 10 of the *Charter*. The second is the test for exclusion of evidence obtained in violation of the *Charter* pursuant to s. 24(2).

[3] The submissions before us reveal that existing jurisprudence on the issues of detention and

Michael Brundrett et Margaret A. Mereigh, pour l'intervenant le procureur général de la Colombie-Britannique.

Don Stuart et Graeme Norton, pour l'intervenante l'Association canadienne des libertés civiles.

Marlys A. Edwardh et Jessica R. Orkin, pour l'intervenante Criminal Lawyers' Association (Ontario).

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

LA JUGE EN CHEF ET LA JUGE CHARRON —

I. Aperçu

[1] Monsieur Grant interjette appel des déclarations de culpabilité prononcées contre lui quant à une série d'infractions relatives aux armes à feu. Les accusations portées contre lui découlaient de la saisie d'un revolver survenue à l'occasion d'un contact entre des policiers et lui sur un trottoir de Toronto. Les déclarations de culpabilité reposant sur le dépôt en preuve du revolver, il faut déterminer en l'espèce si cet élément de preuve a été obtenu par suite de la violation de droits garantis à M. Grant par la *Charte canadienne des droits et libertés* et, le cas échéant, s'il y avait lieu de l'exclure en application du par. 24(2) de la *Charte*.

[2] Pour répondre aux questions en litige dans le présent pourvoi, nous devons revoir deux points importants et controversés de la jurisprudence relative à la *Charte* en matière de droit criminel. Le premier point concerne la définition du mot « détention » pour l'application des art. 9 et 10 de la *Charte*. Le deuxième point concerne le test applicable, dans le contexte d'une demande fondée sur le par. 24(2), pour décider de l'exclusion des éléments de preuve obtenus en violation de la *Charte*.

[3] Les arguments qui nous ont été soumis démontrent que la jurisprudence relative à la détention et

own safety while asking him some questions. The Crown says that the officers were engaging in community policing, which involves a dynamic interaction between the police and the citizens they serve. The Crown contends that preliminary, non-coercive questioning pursuant to police policy is a legitimate exercise of investigative police powers, is essential to the effective fulfilment of the police's duty to enforce the law, and does not amount to detention triggering the right to counsel.

(b) *Interpretative Principles*

[15] As for any constitutional provision, the starting point must be the language of the section. Where questions of interpretation arise, a generous, purposive and contextual approach should be applied.

[16] Constitutional guarantees such as ss. 9 and 10 should be interpreted in a “generous rather than . . . legalistic [way], aimed at fulfilling the purpose of the guarantee and securing for individuals the full benefit of the *Charter's* protection” (*R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295, at p. 344). Unduly narrow, technical approaches to *Charter* interpretation must be avoided, given their potential to “subvert the goal of ensuring that right holders enjoy the full benefit and protection of the *Charter*” (*Doucet-Boudreau v. Nova Scotia (Minister of Education)*, 2003 SCC 62, [2003] 3 S.C.R. 3, at para. 23).

[17] While the twin principles of purposive and generous interpretation are related and sometimes conflated, they are not the same. The purpose of a right must always be the dominant concern in its interpretation; generosity of interpretation is subordinate to and constrained by that purpose (P. W. Hogg, *Constitutional Law of Canada* (5th ed. Supp.), vol. 2, at pp. 36-30 and 36-31). While a narrow approach risks impoverishing a *Charter*

la liberté de l'appelant, mais plutôt à assurer leur propre sécurité pendant qu'ils lui posaient des questions. Le ministère public affirme que les policiers s'acquittaient de tâches relevant des services de police communautaire, qui supposent une interaction dynamique entre les policiers et les citoyens qu'ils servent. Toujours selon le ministère public, l'interrogatoire préliminaire, non coercitif et conforme à une politique de la police, constitue un exercice légitime de pouvoirs d'enquête policiers, est essentielle à l'accomplissement efficace du devoir des policiers d'appliquer la loi et n'équivaut pas à une détention donnant ouverture au droit d'avoir recours à l'assistance d'un avocat.

b) *Les principes d'interprétation*

[15] Comme chaque fois qu'il s'agit d'analyser une disposition constitutionnelle, il faut tout d'abord se pencher sur son libellé, dont l'interprétation, si elle n'est pas manifeste, doit être tirée par suite de l'application d'une méthode téléologique, libérale et contextuelle.

[16] L'interprétation de garanties constitutionnelles comme celles énoncées aux art. 9 et 10 « doit être libérale plutôt que formaliste » et doit « viser à réaliser l'objet de la garantie et à assurer que les citoyens bénéficient pleinement de la protection accordée par la *Charte* » (*R. c. Big M Drug Mart Ltd.*, [1985] 1 R.C.S. 295, p. 344). Il faut éviter les méthodes d'interprétation de la *Charte* trop étroites ou formalistes, car elles sont « susceptible[s] de contrecarrer l'objectif qui est d'assurer aux titulaires de droits l'entier bénéfice et la pleine protection de la *Charte* » (*Doucet-Boudreau c. Nouvelle-Écosse (Ministre de l'Éducation)*, 2003 CSC 62, [2003] 3 R.C.S. 3, par. 23).

[17] Bien que les principes d'interprétation téléologique et d'interprétation libérale soient apparentés et même parfois confondus, ils ne sont pas identiques. L'objet du droit doit demeurer la principale préoccupation; la libéralité de l'interprétation est restreinte par cet objet et elle y est subordonnée (P. W. Hogg, *Constitutional Law of Canada* (5^e éd. suppl.), vol. 2, p. 36-30 et 36-31). Si une interprétation étroite risque d'appauvrir un droit garanti par

right, an overly generous approach risks expanding its protection beyond its intended purposes. In brief, we must construe the language of ss. 9 and 10 in a generous way that furthers, without overshooting, its purpose: *Big M Drug Mart*, at p. 344.

[18] To interpret “detention” in ss. 9 and 10 generously, yet purposively, we must consider the context in which it is embedded — in other words, the role it plays in conjunction with related protections in the *Charter*.

(c) *The Purpose of the Rights Linked to Detention*

[19] Detention represents a limit on the broad right to liberty enjoyed by everyone in Canada at common law and by virtue of s. 7 of the *Charter*, which guarantees that liberty will only be curtailed in accordance with the principles of fundamental justice. Section 9 of the *Charter* establishes that “[e]veryone has the right not to be arbitrarily detained or imprisoned”. Section 10 accords certain rights to people who are arrested or detained, including the right to retain and instruct counsel.

[20] The purpose of s. 9, broadly put, is to protect individual liberty from unjustified state interference. As recognized by this Court in *Blencoe v. British Columbia (Human Rights Commission)*, 2000 SCC 44, [2000] 2 S.C.R. 307, “liberty”, for *Charter* purposes, is not “restricted to mere freedom from physical restraint”, but encompasses a broader entitlement “to make decisions of fundamental importance free from state interference” (para. 49). Thus, s. 9 guards not only against unjustified state intrusions upon physical liberty, but also against incursions on mental liberty by prohibiting the coercive pressures of detention and imprisonment from being applied to people without adequate justification. The detainee’s interest in being able to make an informed choice whether to walk away or speak to the police is unaffected by the manner in which the detention is brought about.

la *Charte*, une interprétation trop libérale risque d’étendre la garantie au-delà de l’objet visé. Bref, il faut interpréter le texte des art. 9 et 10 d’une façon libérale qui permette la réalisation de son objet sans en excéder la portée : *Big M Drug Mart*, p. 344.

[18] Pour interpréter le mot « détention » qui figure aux art. 9 et 10 de façon non seulement libérale, mais également téléologique, il faut en examiner le contexte, c’est-à-dire le rôle par rapport aux protections connexes garanties par la *Charte*.

c) *L’objet des droits se rattachant à la détention*

[19] La détention constitue une limite au vaste droit à la liberté dont chacun jouit au Canada, droit reconnu par la common law et par l’art. 7 de la *Charte*, lequel garantit qu’il n’y sera porté atteinte qu’en conformité avec les principes de justice fondamentale. L’article 9 de la *Charte* énonce que « [c]hacun a droit à la protection contre la détention ou l’emprisonnement arbitraires », tandis que l’article 10 confère certains droits aux personnes arrêtées ou détenues, dont celui d’avoir recours à l’assistance d’un avocat.

[20] De façon générale, l’art. 9 vise à protéger la liberté individuelle contre l’ingérence injustifiée de l’État. Comme notre Cour l’a reconnu dans *Blencoe c. Colombie-Britannique (Human Rights Commission)*, 2000 CSC 44, [2000] 2 R.C.S. 307, la « liberté », pour l’application de la *Charte*, ne s’entend pas « uniquement de l’absence de toute contrainte physique », mais correspond au droit plus large « de prendre des décisions d’importance fondamentale sans intervention de l’État » (par. 49). Il s’ensuit que l’art. 9 protège non seulement contre les atteintes injustifiées de l’État à la liberté physique, mais aussi contre les atteintes à la liberté psychologique, en lui interdisant de recourir sans justification appropriée aux moyens coercitifs que représentent la détention et l’emprisonnement. La façon dont la détention intervient n’influe pas sur le droit d’une personne détenue de décider en toute connaissance de cause si elle s’en va ou si elle parle à la police.

Found at **Tab 32, Volume 4**
of Google's BOA.



SUPREME COURT OF CANADA

CITATION: Canada (Attorney
General) v. Power, 2024 SCC 26

APPEAL HEARD: December 7,
2023

JUDGMENT RENDERED: July 19,
2024

DOCKET: 40241

BETWEEN:

Attorney General of Canada
Appellant

and

Joseph Power
Respondent

- and -

**Attorney General of Ontario, Attorney General of Quebec, Attorney General
of Nova Scotia, Attorney General of New Brunswick, Attorney General of
Manitoba, Attorney General of British Columbia, Attorney General of Prince
Edward Island, Attorney General of Saskatchewan, Attorney General of
Alberta, Attorney General of Newfoundland and Labrador, Fisher River Cree
Nation, Sioux Valley Dakota Nation, Manto Sipi Cree Nation, Lake Manitoba
First Nation, Quebec Native Women Inc., Speaker of the Senate, David Asper
Centre for Constitutional Rights, Canadian Civil Liberties Association,
Canadian Constitution Foundation, Queen's Prison Law Clinic, John Howard
Society of Canada, British Columbia Civil Liberties Association, West Coast
Prison Justice Society and Speaker of the House of Commons**
Intervenors

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

JOINT REASONS Wagner C.J. and Karakatsanis J. (Martin, O'Bonsawin and
FOR JUDGMENT: Moreau JJ. concurring)
(paras. 1 to 119)

REASONS Jamal J. (Kasirer J. concurring)
DISSENTING IN
PART:
(paras. 120 to 253)

DISSENTING Rowe J. (Côté J. concurring)
REASONS:
(paras. 254 to
383)

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has dealt with these principles in the context of s. 24(1), most notably in *Mackin*. Next, we explain why the high threshold established in *Mackin* should not be overturned. We conclude by clarifying this threshold.

A. *Constitutional Provisions and Principles*

[24] Canada and Mr. Power advance opposing views on how to interpret and apply s. 24(1) in the context of a claim for damages for unconstitutional legislation that violates a *Charter* right. Canada submits that important constitutional principles require an absolute immunity for such damages. Mr. Power submits that the government is only entitled to a limited immunity.

(1) Charter Interpretation

[25] We start with the proper approach to *Charter* interpretation.

[26] The *Charter* must be given a generous and expansive interpretation; not a narrow, technical or legalistic one (*Hunter v. Southam Inc.*, [1984] 2 S.C.R. 145, at p. 156). *Charter* provisions must be “interpreted in a broad and purposive manner and placed in their proper linguistic, philosophic, and historical contexts” (*Reference re Senate Reform*, 2014 SCC 32, [2014] 1 S.C.R. 704, at para. 25).

[27] A purposive approach considers constitutional principles. Indeed, “the Constitution must be interpreted with a view to discerning the structure of government

that it seeks to implement. The assumptions that underlie the text and the manner in which the constitutional provisions are intended to interact with one another must inform our interpretation, understanding, and application of the text” (*Reference re Senate Reform*, at para. 26).

(2) Section 32(1): Application of the *Charter*

[28] With this approach in mind, we turn to the applicability of the *Charter* to the legislative branch of government.

[29] Section 32(1) of the *Charter* states that it applies to “the Parliament and government of Canada in respect of all matters within the authority of Parliament” and “to the legislature and government of each province in respect of all matters within the authority of the legislature of each province”.

[30] Clearly, the federal and provincial legislatures are subject to *Charter* scrutiny. As this Court has explained, the words of s. 32(1) express that “the *Charter* is essentially an instrument for checking the powers of government over the individual” (*McKinney v. University of Guelph*, [1990] 3 S.C.R. 229, at p. 261). The *Charter* “is intended to constrain governmental action inconsistent with those rights and freedoms” (*Hunter*, at p. 156). As explained further below, ss. 32(1) and 24 of the *Charter*, along with s. 52(1) of the *Constitution Act, 1982*, entrench the court’s role in holding the government to account for *Charter* violations (M. L. Pilkington, “Damages as a

Found at **Tab 48, Volume 9**
of Google's BOA.



SUPREME COURT OF CANADA

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

APPEAL HEARD: October 8 and
9, 2024

JUDGMENT RENDERED: March
14, 2025

DOCKET: 40608

BETWEEN:

John Howard Society of Saskatchewan
Appellant

and

Government of Saskatchewan (Attorney General for Saskatchewan)
Respondent

- and -

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

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

REASONS FOR

JUDGMENT:

(paras. 1 to 99)

Wagner C.J. (Karakatsanis, Martin, Kasirer, O'Bonsawin and Moreau JJ. concurring)

DISSENTING

REASONS:

(paras. 100 to 297)

Côté J. (Rowe and Jamal JJ. concurring)

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

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

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

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

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

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



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

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

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

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

(2) Legal Status of *Shubley*

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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



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

(a) *Meaning of “Imprisonment”*

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

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

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

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

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

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

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

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

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

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

E. Issue Ripe for Determination

1982. The Attorney General submitted that only a court of superior jurisdiction has the prerogative powers to make a declaratory order under s. 52.

37 Standing and jurisdiction to challenge the validity of a law pursuant to which one is being prosecuted is the same regardless of whether that challenge is with respect to ss. 91 and 92 of the [Constitution Act, 1867](#), or with respect to the limits imposed on the legislatures by the [Constitution Act, 1982](#).

38 Section 24(1) sets out a remedy for individuals (whether real persons or artificial ones such as corporations) whose rights under the [Charter](#) have been infringed. It is not, however, the only recourse in the face of unconstitutional legislation. Where, as here, the challenge is based on the unconstitutionality of the legislation, recourse to s. 24 is unnecessary and the particular effect on the challenging party is irrelevant.

39 Section 52 sets out the fundamental principle of constitutional law that the [Constitution](#) is supreme. The undoubted corollary to be drawn from this principle is that no one can be convicted of an offence under an unconstitutional law. The respondent did not come to court voluntarily as an interested citizen asking for a prerogative declaration that a statute is unconstitutional. If it had been engaged in such "public interest litigation" it would have had to fulfil the status requirements laid down by this court in the trilogy of "standing" cases (*Thorson v. A.G. Can.*, [1975] 1 S.C.R. 138, 43 D.L.R. (3d) 1, 1 N.R. 225 ; *N.S. Bd. of Censors v. McNeil*, [1976] 2 S.C.R. 265, 32 C.R.N.S. 376, 55 D.L.R. (3d) 632, 12 N.S.R. (2d) 85, 5 N.R. 43 ; and *Min. of Justice of Can. v. Borowski*, [1981] 2 S.C.R. 575, [1982] 1 W.W.R. 97, 24 C.R. (3d) 352, 24 C.P.C. 62, 64 C.C.C. (2d) 97, 130 D.L.R. (3d) 588, 12 Sask. R. 420, 39 N.R. 331) but that was not the reason for its appearance in court.

40 Any accused, whether corporate or individual, may defend a criminal charge by arguing that the law under which the charge is brought is constitutionally invalid. Big M is urging that the law under which it has been charged is inconsistent with s. 2(a) of the [Charter](#) and by reason of s. 52 of the [Constitution Act, 1982](#), it is of no force or effect.

41 Whether a corporation can enjoy or exercise freedom of religion is therefore irrelevant. The respondent is arguing that the legislation is constitutionally invalid because it impairs freedom of religion — if the law impairs freedom of religion it does not matter whether the company can possess religious belief. An accused atheist would be equally entitled to resist a charge under the Act. The only way this question might be relevant would be if s. 2(a) were interpreted as limited to protecting only those persons who could prove a genuinely held religious belief. I can see no basis to so limit the breadth of s. 2(a) in this case.

42 The argument that the respondent, by reason of being a corporation, is incapable of holding religious belief and therefore incapable of claiming rights under s. 2(a) of the [Charter](#), confuses the nature of this appeal. A law which itself infringes religious freedom is, by that reason alone,

inconsistent with s. 2(a) of the Charter and it matters not whether the accused is a Christian, Jew, Muslim, Hindu, Buddhist, atheist, agnostic or whether an individual or a corporation. It is the nature of the law, not the status of the accused, that is in issue. As Laycraft J.A. observed in the Alberta Court of Appeal (at p. 636):

The task of the court is to see whether all or part of the Lord's Day Act is inconsistent with freedom of conscience and religion and therefore of no force or effect. It does not affect that task that a person charged has no religion or even that he has no feelings of conscience.

Cartwright J., dissenting in *Robertson v. R.*, supra, though not in conflict with the majority of the court on this point, stated at p. 661:

It was argued that, in any event, in the case at bar the appeal must fail because there is no evidence that the appellants do not hold the religious belief that they are under no obligation to observe Sunday. In my view such evidence would be irrelevant. The task of the Court is to determine whether s. 4 of the Act infringes freedom of religion. This does not depend on the religious persuasion, if any, of the individual prosecuted but on the nature of the law. To give an extreme example, a law providing that every person in Canada should, on pain of fine or imprisonment, attend divine service in an Anglican Church on at least one Sunday in every month would, in my opinion, infringe the religious freedom of every Anglican as well as that of every other citizen.

43 As the respondent submits, if the legislation under review had a secular purpose and the accused was claiming that it interfered with his religious freedom, the status of the accused and the nature of his belief might be relevant: it is one thing to claim that the legislation is itself unconstitutional, it is quite another to claim a "constitutional exemption" from otherwise valid legislation which offends one's religious tenets.

44 In my view there can be no question that the respondent is entitled to challenge the validity of the Lord's Day Act on the basis that it violates the Charter guarantee of freedom of conscience and religion.

45 The second objection is to the jurisdiction of the Provincial Court regarding the exercise of a prerogative power to declare legislation invalid. It must also be rejected. There are two prevailing views as to the meaning of "court of competent jurisdiction" in s. 24(1) of the Charter. On one view, the competent court in which to bring a constitutional challenge is the court with jurisdiction over the remedy sought: Gibson, "Enforcement of the Canadian Charter of Rights and Freedoms" in Tarnopolsky and Beaudoin (eds.), *The Canadian Charter of Rights and Freedoms: Commentary* (1982), at p. 500. In contrast is the view that the competent court is that which has jurisdiction over the subject matter being litigated: Hogg, *Canada Act, 1982, Annotated* (1982), at p. 65.

R. v. Goltz

Supreme Court Reports

Supreme Court of Canada

Present: Lamer C.J. and La Forest, L'Heureux-Dubé, Sopinka, Gonthier, Cory, McLachlin, Stevenson and Iacobucci JJ.

1991: June 7 / 1991: November 14.

File No.: 21826.

[1991] 3 S.C.R. 485 | [\[1991\] 3 R.C.S. 485](#) | [\[1991\] S.C.J. No. 90](#) | [\[1991\] A.C.S. no 90](#)

Her Majesty The Queen, appellant; v. Willy Arthur Goltz, respondent, and The Attorney General for Ontario and the Attorney General of Manitoba, interveners.

George H. Copley, for the appellant. Kathryn Ford and Jack Thorhaug, for the respondent. W.J. Blacklock, for the intervener, the Attorney General for Ontario. Lawrence McInnes and V.E. Toews, for the intervener, the Attorney General of Manitoba.

Solicitor for the appellant: The Ministry of the Attorney General, Victoria. Solicitor for the respondent: Kathryn Ford, New Westminster. Solicitor for the intervener, the Attorney General for Ontario: The Ministry of the Attorney General, Toronto. Solicitor for the intervener, the Attorney General of Manitoba: The Department of Justice, Winnipeg.

The judgment of La Forest, L'Heureux-Dubé, Sopinka, Gonthier, Cory and Iacobucci JJ. was delivered by

GONTHIER J.

1 The issue in the present appeal is whether s. 12 of the Canadian Charter of Rights and Freedoms is violated by the minimum sentence prescribed by s. 88(1)(c) of the Motor Vehicle Act, R.S.B.C. 1979, c. 288, in its application to s. 88(1)(a) and s. 86(1)(a)(ii) of that Act.

I -- Statement of Facts

2 On May 25, 1987, Willy Goltz was prohibited from driving by the B.C. Superintendent of Motor Vehicles, for a three-month period, pursuant to s. 86(1)(a)(ii) of the Motor Vehicle Act ("the Act"). The respondent had accumulated numerous penalty points for a variety of driving infractions, causing the Superintendent to deem the respondent's driving record unsatisfactory and to declare that the public interest required that he be prohibited from driving. In pertinent part, the notice of prohibition sent by the Superintendent to the respondent read:

punishment whose effects are grossly or excessively disproportionate to the particular wrongdoing in a given case.

The Two Aspects of an Analysis of the Application of s. 12

39 The Court in *Smith* employed a hypothetical example which illustrated the potential unfairness of the minimum penalty of seven years' imprisonment for importing narcotics under s. 5(1) of the Narcotic Control Act. It painted a picture of a tourist returning to Canada from another country with one marijuana cigarette, and contrasted this "small offender" with a serious hard drug dealer convicted of importing a large quantity of heroin (at pp. 1056 and 1078). It held that the challenged sentence would be grossly disproportionate to the appropriate sentence in the case of that imaginary small offender. Thus, irrespective of the possible appropriateness of a seven-year prison term for the actual offender in *Smith* -- a 27-year-old with two previous convictions, caught returning from Bolivia in possession of cocaine worth more than \$100,000 on the street, and who had [page505] pleaded guilty to the charge -- the provision cast too wide a net. It was invalid because its potential effects were so excessive as to outrage decency.

40 In this appeal also, the British Columbia Court of Appeal turned its mind, in an abstract fashion, to hypothetical circumstances before deciding that s. 88(1)(c) of the Act is invalid under s. 12. Although I am of the view that the approach of the Court of Appeal was in some respects mistaken, nonetheless it was appropriate for the Court of Appeal to contemplate hypothetical circumstances.

41 There are two aspects to the analysis of invalidity under s. 12. One aspect involves the assessment of the challenged penalty or sanction from the perspective of the person actually subjected to it, balancing the gravity of the offence in itself with the particular circumstances of the offence and the personal characteristics of the offender. If it is concluded that the challenged provision provides for and would actually impose on the offender a sanction so excessive or grossly disproportionate as to outrage decency in those real and particular circumstances, then it will amount to a *prima facie* violation of s. 12 and will be examined for justifiability under s. 1 of the Charter. There may be no need to examine hypothetical situations or imaginary offenders. This was not the case in *Smith*, and for that reason the Court was obliged to examine other reasonably imaginable circumstances in which the challenged law might violate s. 12.

42 If the particular facts of the case do not warrant a finding of gross disproportionality, there may remain another aspect to be examined, namely a Charter challenge or constitutional question as to the validity of a statutory provision on grounds of gross disproportionality [page506] as evidenced in reasonable hypothetical circumstances, as opposed to far-fetched or marginally imaginable cases. (See generally C. Robertson, "The Judicial Search for Appropriate Remedies Under the Charter: The Examples of Overbreadth and Vagueness" in R. Sharpe, *Charter Litigation* (1987).)

43 The section 12 analysis must now be undertaken as to both aspects. In the "particularized" section of analysis, the considerations of gravity of the offence, the particular circumstances of the case, the personal characteristics of the offender, and the effects of the sentence must be examined in light of the facts of the instant appeal.

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

v.

Minister of National Revenue (Respondent)

and

Modern Wood Fabricators (M.W.F.) Inc. (Appellant)

v.

Minister of National Revenue (Respondent)

and

Snapshot Theatrical Productions Inc. (Appellant)

v.

Minister of National Revenue (Respondent)

INDEXED AS: KLIGMAN v. M.N.R. (C.A.)

**Paras. 4-6 per
Létourneau J.A.**

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

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

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

Les Plastiques Algar (Canada) Ltée et al. (appellante)

c.

Ministre du Revenu national (intimé)

et

Modern Wood Fabricators (M.W.F.) Inc. (appellante)

c.

Ministre du Revenu national (intimé)

et

Snapshot Theatrical Productions Inc. (appellante)

c.

Ministre du Revenu national (intimé)

RÉPERTORIÉ: KLIGMAN c. M.R.N. (C.A.)

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

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

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

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

AUTHORS CITED

Canada. Department of National Revenue. Taxation. Information Circular No. 73-10R3. "Tax Evasion" (February 13, 1987).
Sopinka, John and Mark A. Gelowitz. *The Conduct of an Appeal*, 2nd ed. Toronto: Butterworths, 2000.

DOCTRINE

Canada. Ministère du Revenu national. Impôt. Circulaire d'information no 73-10R3. «Évasion fiscale» (13 février 1987).
Sopinka, John and Mark A. Gelowitz. *The Conduct of an Appeal*, 2nd ed. Toronto: Butterworths, 2000.

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

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

APPEARANCES:

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

ONT COMPARU:

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

SOLICITORS OF RECORD:

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

AVOCATS INSCRITS AU DOSSIER:

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

The following are the reasons for judgment rendered in English by

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

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

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

Availability of judicial review proceedings

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

Possibilité d'un contrôle judiciaire

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

Supp.), c. 1 (Act).

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

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

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

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

[3] Je n'accepte pas la prétention de l'intimé selon laquelle les appelantes devraient se conformer aux demandes péremptoires et, comme on l'a fait dans l'affaire *R. c. Jarvis*, [2002] 3 R.C.S. 757, s'opposer par la suite à l'admissibilité en preuve des renseignements ainsi fournis. Dans l'affaire *Jarvis*, les documents avaient déjà été obtenus et la seule possibilité qui s'offrait à l'accusé dans son procès criminel pour fraude fiscale était de s'opposer à l'admissibilité de ces documents. Selon la prétention de l'intimé, il serait interdit au contribuable de faire valoir à titre préventif le droit à la protection contre les fouilles, les perquisitions et les saisies abusives qui lui est reconnu par la Charte [*Charte canadienne des droits et libertés*, qui constitue la partie I de la *Loi constitutionnelle de 1982*, annexe B, *Loi de 1982 sur le Canada*, 1982, ch. 11 (R.-U.) [L.R.C. (1985), appendice II, n° 44]] et d'empêcher la violation imminente de ce droit. Le contribuable pourrait uniquement demander une réparation discrétionnaire en vertu du paragraphe 24(2) de la Charte, ce qui minerait sérieusement l'effet bénéfique protecteur de la Charte.

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

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

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

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

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

In our view, where the predominant purpose of a particular inquiry is the determination of penal liability, CCRA officials must relinquish the authority to use the inspection and requirement powers under ss. 231.1(1) and 231.2(1).

...

Put another way, the requirement powers of ss. 231.1(1) and 231.2(1) cannot be used to compel oral statements or written production for the purpose of advancing the criminal investigation.

In summary, wherever the predominant purpose of an inquiry or question is the determination of penal liability, criminal investigatory techniques must be used. As a corollary, all *Charter* protections that are relevant in the criminal context must apply. [My emphasis.]

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

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

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

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

À notre avis, lorsqu'un examen dans un cas particulier a pour objet prédominant d'établir la responsabilité pénale du contribuable, les fonctionnaires de l'ADRC doivent renoncer à leur faculté d'utiliser les pouvoirs d'inspection et de demande péremptoire que leur confèrent les par. 231.1(1) et 231.2(1).

[...]

En d'autres termes, les pouvoirs de contrainte conférés par les par. 231.1(1) et 231.2(1) ne peuvent être exercés pour obtenir des déclarations verbales ou la production de documents écrits dans le but de faire progresser une enquête criminelle.

En bref, dès qu'un examen ou une question a pour objet prédominant d'établir la responsabilité pénale du contribuable, il faut utiliser les techniques d'enquête criminelle. À titre corollaire, toutes les garanties prévues par la *Charte*, pertinentes dans le contexte criminel, s'appliquent obligatoirement. [Non souligné dans l'original.]

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

investigation or prosecution. This rule was originally stated in *Irwin Toy Ltd. v. Québec (Attorney General)*, [1989] 1 S.C.R. 927. The rule has been reiterated in *Thomson, supra*, and *British Columbia Securities Commission, supra*. It therefore remains only to be determined whether section 8 can be applied in respect of the corporate applicants.

...

Although the corporate applicants in the case at bar are not publicly traded companies like the company in question in *British Columbia Securities Commission, supra*, they still have records that they must maintain for regulatory purposes, including purposes related to the ITA. The privacy interest in these records will be minimal.

The privacy interests of corporate entities are substantially limited compared to those of individuals. The values on which the privacy interests of individuals rest, including recognition of, and respect for, the physical and psychological integrity of human beings, are simply not present in the case of corporate entities. Accordingly, I find that neither section 7 nor section 8 of the Charter would be violated by compelling the corporate applicants to comply with the requirements as issued by the CCRA.

[75] The Motions Judge then applied subsection 24(1) of the Charter and, in doing so, he quashed the requirements received by the individuals but upheld those received by the corporate appellants. He said, at paragraphs 110 and 111 of his reasons:

Subsection 24(1) allows me to provide “such remedy as the court considers appropriate and just in the circumstances” in the event of a breach of the Charter. Technically, a Charter breach has not yet occurred since the evidence has not yet been delivered. However, I have found that the Charter rights of Kligman and Sandler will be violated if they are compelled to provide the materials sought by CCRA. It is possible to order that they provide what they have been told to provide by the requirements, and leave it to the presiding judge to make a decision as to the exclusion or admission of that evidence in the event that Kligman and Sandler are charged with tax evasion. **However, Iacobucci and Major JJ. addressed this hypothesis in *Jarvis, supra*, at paragraph 91:**

Although the respondent argued that such situations could be remedied by the courts, we view it as preferable that such situations be avoided rather than remedied.

droit pour se protéger d’une enquête criminelle ou de poursuites criminelles. Cette règle a été énoncée à l’origine dans l’arrêt *Irwin Toy Ltd. c. Québec (Procureur général)*, [1989] 1 R.C.S. 927. La règle a été réitérée dans les arrêts *Thomson* et *British Columbia Securities Commission*, précités. Il reste donc uniquement à se demander si l’article 8 peut s’appliquer ici aux sociétés demandereses.

[...]

Dans la présente affaire, les sociétés demandereses ne sont pas des sociétés cotées en bourse, contrairement à celle dont il était question dans l’arrêt *British Columbia Securities Commission*, précité, mais elles tiennent néanmoins des registres qu’elles doivent conserver à des fins administratives, notamment aux fins de la LIR. Le droit à la vie privée en ce qui a trait à ces registres sera minime.

Le droit des personnes morales à la vie privée est notablement restreint par comparaison au droit correspondant des particuliers. Les valeurs sur lesquelles repose le droit des particuliers à la vie privée sont la reconnaissance et le respect de l’intégrité physique et psychologique des êtres humains. Ces valeurs sont tout simplement absentes dans le cas des personnes morales. Par conséquent, je suis d’avis que ni l’article 7 ni l’article 8 de la Charte ne seront transgressés si les sociétés demandereses sont contraintes de se conformer aux directives émises par l’ADRC.

[75] Le juge des requêtes a ensuite appliqué le paragraphe 24(1) de la Charte et, ce faisant, il a annulé les demandes péremptoires que les particuliers avaient reçues, mais il a confirmé celles reçues par les sociétés. Aux paragraphes 110 et 111 de ses motifs, il a dit ce qui suit:

Le paragraphe 24(1) me permet d’accorder «la réparation que le tribunal estime convenable et juste eu égard aux circonstances», pour le cas où il y aurait contravention à la Charte. Sur le plan technique, il n’y a pas eu violation de la Charte puisque les éléments de preuve n’ont pas encore été communiqués. Cependant, je suis arrivé à la conclusion que les droits de Kligman et Sandler au regard de la Charte seront niés s’ils sont contraints de produire les pièces demandées par l’ADRC. Il est possible de leur ordonner de produire ce que les directives les ont priés de produire et de laisser au président du tribunal le soin de décider s’il convient d’écarter ou d’admettre cette preuve pour le cas où Kligman et Sandler seraient accusés de fraude fiscale. Cependant, les juges Iacobucci et Major se sont penchés sur cette hypothèse dans l’arrêt *Jarvis*, précité, au paragraphe 91:

Bien que l’intimée ait soutenu que les tribunaux pourraient remédier à de telles situations, nous estimons préférable de les éviter plutôt que d’y remédier.



I agree. Accordingly, I exercise my discretion under subsection 24(1) of the Charter to quash the requirements issued personally to Sandler and Kligman. As I have found no breach of the Charter in respect of the requirements issued to the corporate applicants, these requirements shall be upheld.

III. The position of the parties

[76] The three corporate appellants claim that, having made the finding that the predominant purpose of the inquiry conducted by the SI division was to determine the corporate appellants' penal liability, the full panoply of their rights under sections 7 and 8 of the Charter applied and that, as a result, the requirements should have been quashed.

[77] The respondent claims that the reviewing judge exceeded his jurisdiction in finding that the *Jarvis* and *Ling* analyses, which were developed in the context of a criminal trial, applied to pre-charge proceedings such as a judicial review application to quash the requirements to produce tax records. The respondent further claims that the Motions Judge erred in finding that the predominant purpose of CCRA's requirements was to determine the corporate appellants' penal liability. He submits that, notwithstanding these errors, the reviewing judge correctly held that section 7 of the Charter does not apply to corporate entities and that the use of the requirements to compel the corporate appellants to produce pre-existing banking and business records did not violate their rights under section 8 of the Charter.

IV. The relevant statutory provisions

[78] The Act provides the following [section 231.1(3) (as am. by S.C. 1994, c. 21, s. 107)]:

Part XV ADMINISTRATION AND ENFORCEMENT

...

231.1 (1) An authorized person may, at all reasonable times, for any purpose related to the administration or enforcement of this Act,

Je partage cet avis. Par conséquent, j'exerce le pouvoir discrétionnaire que me confère le paragraphe 24(1) de la Charte, et j'annule les directives signifiées personnellement à Sandler et Kligman. Comme je n'ai constaté aucune contravention à la Charte en ce qui concerne les directives émises aux sociétés demandresses, lesdites directives sont confirmées.

III. La position des parties

[76] Les trois sociétés appelantes allèguent qu'étant donné qu'il a été conclu que l'examen effectué par la section des ES avait pour objet prédominant d'établir leur responsabilité pénale, la panoplie complète des droits qui leur sont garantis aux articles 7 et 8 de la Charte s'appliquait et les demandes péremptoires auraient donc dû être annulées.

[77] L'intimé affirme que le juge de révision a excédé sa compétence en concluant que les analyses préconisées dans les arrêts *Jarvis* et *Ling*, lesquelles ont été élaborées dans le contexte d'un procès criminel, s'appliquaient aux procédures préalables aux accusations telles qu'une demande de contrôle judiciaire visant l'annulation des demandes péremptoires de production de documents fiscaux. L'intimé affirme en outre que le juge des requêtes a commis une erreur en concluant que les demandes péremptoires de l'ADRC avaient pour objet prédominant d'établir la responsabilité pénale des sociétés. Il soutient que, malgré ces erreurs, le juge de révision a correctement statué que l'article 7 de la Charte ne s'applique pas aux personnes morales et que le recours aux demandes péremptoires en vue de contraindre les sociétés appelantes à produire des documents bancaires et des documents commerciaux préexistants ne portait pas atteinte aux droits qui leur étaient reconnus à l'article 8 de la Charte.

IV. Les dispositions législatives pertinentes

[78] La Loi prévoit ce qui suit [article 231.1(3) (mod. par L.C. 1994, ch. 21, art. 107)]:

Partie XV APPLICATION ET EXÉCUTION

[...]

231.1 (1) Une personne autorisée peut, à tout moment raisonnable, pour l'application et l'exécution de la présente loi, à la fois:

Michael Esty Ferguson *Appellant*

v.

Her Majesty The Queen *Respondent*

and

**Attorney General of Canada, Attorney
General of Ontario, Attorney General
of Quebec and Canadian Civil Liberties
Association** *Interveners*

INDEXED AS: **R. v. FERGUSON**

Neutral citation: **2008 SCC 6.**

File No.: 31692.

2007: November 13; **2008: February 29.**

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

ON APPEAL FROM THE COURT OF APPEAL FOR
ALBERTA

*Constitutional law — Charter of Rights — Cruel and
unusual punishment — Detainee being held in cell at
RCMP detachment shot by police officer during alter-
cation — Police officer convicted of manslaughter com-
mitted with use of firearm — Criminal Code providing
for mandatory minimum four-year sentence — Whether
minimum sentence constitutes cruel and unusual pun-
ishment in circumstances of this case — If so, whether
trial judge entitled to grant constitutional exemption
from four-year minimum and impose lesser sentence —
Constitution Act, 1982, s. 52 — Canadian Charter of
Rights and Freedoms, ss. 12, 24(1) — Criminal Code,
R.S.C. 1985, c. C-46, s. 236(a).*

*Constitutional law — Charter of Rights — Remedy
— Constitutional exemption — Availability — Whether
constitutional exemption under s. 24(1) of Canadian
Charter of Rights and Freedoms available to accused as
remedy in particular case where minimum sentence of
imprisonment found to be cruel and unusual punishment
contrary to s. 12 of Charter — Whether appropriate
remedy is declaration pursuant to s. 52 of Constitution*

Michael Esty Ferguson *Appelant*

c.

Sa Majesté la Reine *Intimée*

et

**Procureur général du Canada, procureur
général de l'Ontario, procureur général du
Québec et Association canadienne des
libertés civiles** *Intervenants*

RÉPERTORIÉ : **R. c. FERGUSON**

Référence neutre : **2008 CSC 6.**

N° du greffe : 31692.

2007 : 13 novembre; 2008 : 29 février.

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

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

*Droit constitutionnel — Charte des droits — Peine
cruelle et inusitée — Détenu incarcéré dans une cellule
du détachement de la GRC abattu par un policier au
cours d'une altercation — Policier déclaré coupable
d'homicide involontaire coupable avec usage d'une
arme à feu — Peine minimale obligatoire de quatre ans
prescrite par le Code criminel — La peine minimale
constitue-t-elle une peine cruelle et inusitée dans les
circonstances de l'affaire? — Dans l'affirmative, le juge
du procès peut-il accorder une exemption constitution-
nelle écartant l'emprisonnement minimal de quatre ans
et infliger une peine moins sévère? — Loi constitution-
nelle de 1982, art. 52 — Charte canadienne des droits
et libertés, art. 12, 24(1) — Code criminel, L.R.C. 1985,
ch. C-46, art. 236a).*

*Droit constitutionnel — Charte des droits — Répara-
tion — Exemption constitutionnelle — Possibilité d'ob-
tenir une exemption — Un accusé peut-il obtenir une
exemption constitutionnelle en vertu de l'art. 24(1) de la
Charte canadienne des droits et libertés à titre de répa-
ration dans une situation particulière où la peine d'em-
prisonnement minimale est jugée constituer une peine
cruelle et inusitée interdite par l'art. 12 de la Charte?*

Fuller, Lon L. *The Morality of Law*, 2nd ed. New Haven: Yale University Press, 1969.

Rosenberg, Morris, and Stéphane Perrault. “Ifs and Buts in Charter Adjudication: The Unruly Emergence of Constitutional Exemptions in Canada” (2002), 16 *S.C.L.R.* (2d) 375.

Sankoff, Peter. “Constitutional Exemptions: Myth or Reality?” (1999-2000), 11 *N.J.C.L.* 411.

APPEAL from a judgment of the Alberta Court of Appeal (Fruman, Paperny and O’Brien J.J.A.) (2006), 65 Alta. L.R. (4th) 44, 397 A.R. 1, 384 W.A.C. 1, 212 C.C.C. (3d) 161, 41 C.R. (6th) 97, 145 C.R.R. (2d) 309, [2006] 12 W.W.R. 1, [2006] A.J. No. 1150 (QL), 2006 CarswellAlta 1216, 2006 ABCA 261, varying the sentence imposed by Hawco J. (2004), 39 Alta. L.R. (4th) 166, 372 A.R. 309, [2005] 4 W.W.R. 737, [2004] A.J. No. 1535 (QL), 2004 CarswellAlta 1780, 2004 ABQB 928. Appeal dismissed.

Noel C. O’Brien, Q.C., for the appellant.

Richard A. Saull and Michael Conner, for the respondent.

Robert J. Frater and Nancy Dennison, for the intervener the Attorney General of Canada.

David Finley and Kimberley Crosbie, for the intervener the Attorney General of Ontario.

Jean-Vincent Lacroix and Gilles Laporte, for the intervener the Attorney General of Quebec.

Andrew K. Lokan and Caroline V. Jones, for the intervener the Canadian Civil Liberties Association.

The judgment of the Court was delivered by

THE CHIEF JUSTICE —

I. Introduction

[1] This appeal raises two questions. First, does imposition of the four-year mandatory minimum sentence for manslaughter with a firearm constitute cruel and unusual punishment contrary to s. 12

Fuller, Lon L. *The Morality of Law*, 2nd ed. New Haven : Yale University Press, 1969.

Rosenberg, Morris, and Stéphane Perrault. « Ifs and Buts in Charter Adjudication : The Unruly Emergence of Constitutional Exemptions in Canada » (2002), 16 *S.C.L.R.* (2d) 375.

Sankoff, Peter. « Constitutional Exemptions : Myth or Reality? » (1999-2000), 11 *R.N.D.C.* 411.

POURVOI contre un arrêt de la Cour d’appel de l’Alberta (les juges Fruman, Paperny et O’Brien) (2006), 65 Alta. L.R. (4th) 44, 397 A.R. 1, 384 W.A.C. 1, 212 C.C.C. (3d) 161, 41 C.R. (6th) 97, 145 C.R.R. (2d) 309, [2006] 12 W.W.R. 1, [2006] A.J. No. 1150 (QL), 2006 CarswellAlta 1216, 2006 ABCA 261, modifiant la peine infligée par le juge Hawco (2004), 39 Alta. L.R. (4th) 166, 372 A.R. 309, [2005] 4 W.W.R. 737, [2004] A.J. No. 1535 (QL), 2004 CarswellAlta 1780, 2004 ABQB 928. Pourvoi rejeté.

Noel C. O’Brien, c.r., pour l’appelant.

Richard A. Saull et Michael Conner, pour l’intimée.

Robert J. Frater et Nancy Dennison, pour l’intervenant le procureur général du Canada.

David Finley et Kimberley Crosbie, pour l’intervenant le procureur général de l’Ontario.

Jean-Vincent Lacroix et Gilles Laporte, pour l’intervenant le procureur général du Québec.

Andrew K. Lokan et Caroline V. Jones, pour l’intervenante l’Association canadienne des libertés civiles.

Version française du jugement de la Cour rendu par

LA JUGE EN CHEF —

I. Introduction

[1] Le pourvoi soulève deux questions. Premièrement, infliger la peine minimale obligatoire de quatre ans d’emprisonnement prévue pour un homicide involontaire coupable avec usage

of the *Charter* and s. 52(1) of the *Constitution Act, 1982*.

[59] When a law produces an unconstitutional effect, the usual remedy lies under s. 52(1), which provides that the law is of no force or effect to the extent that it is inconsistent with the *Charter*. A law may be inconsistent with the *Charter* either because of its purpose or its effect: *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295; *R. v. Edwards Books and Art Ltd.*, [1986] 2 S.C.R. 713. Section 52 does not create a personal remedy. A claimant who otherwise has standing can generally seek a declaration of invalidity under s. 52 on the grounds that a law has unconstitutional effects either in his own case or on third parties: *Big M*; see also P. Sankoff, “Constitutional Exemptions: Myth or Reality?” (1999-2000), 11 *N.J.C.L.* 411, at pp. 432-34; M. Rosenberg and S. Perrault, “Ifs and Buts in Charter Adjudication: The Unruly Emergence of Constitutional Exemptions in Canada” (2002), 16 *S.C.L.R.* (2d) 375, at pp. 380-82. The jurisprudence affirming s. 52(1) as the appropriate remedy for laws that produce unconstitutional effects is based on the language chosen by the framers of the *Charter*: see Sankoff, at p. 438.

[60] Section 24(1), by contrast, is generally used as a remedy, not for unconstitutional laws, but for unconstitutional government acts committed under the authority of legal regimes which are accepted as fully constitutional: see *Eldridge v. British Columbia (Attorney General)*, [1997] 3 S.C.R. 624; *Multani v. Commission scolaire Marguerite-Bourgeoys*, [2006] 1 S.C.R. 256, 2006 SCC 6. The acts of government agents acting under such regimes are not the necessary result or “effect” of the law, but of the government agent’s applying a discretion conferred by the law in an unconstitutional manner. Section 52(1) is thus not applicable. The appropriate remedy lies under s. 24(1).

violation de la *Charte* sont régies par les par. 24(1) de la *Charte* et 52(1) de la *Loi constitutionnelle de 1982*.

[59] Lorsqu’une disposition produit un effet inconstitutionnel, la réparation relève habituellement du par. 52(1), qui prévoit que les dispositions incompatibles avec la *Charte* sont inopérantes. Une disposition peut être incompatible avec la *Charte* soit à cause de son objet soit à cause de son effet : *R. c. Big M Drug Mart Ltd.*, [1985] 1 R.C.S. 295; *R. c. Edwards Books and Art Ltd.*, [1986] 2 R.C.S. 713. L’article 52 ne crée pas un recours personnel. Un demandeur qui a par ailleurs qualité pour agir peut généralement solliciter une déclaration d’invalidité en application de l’art. 52 au motif qu’une disposition a des effets inconstitutionnels pour lui-même ou pour des tiers : *Big M*; voir également P. Sankoff, « Constitutional Exemptions : Myth or Reality? » (1999-2000), 11 *R.N.D.C.* 411, p. 432-434; M. Rosenberg et S. Perrault, « Ifs and Buts in *Charter* Adjudication : The Unruly Emergence of Constitutional Exemptions in Canada » (2002), 16 *S.C.L.R.* (2d) 375, p. 380-382. La jurisprudence selon laquelle le par. 52(1) est le recours approprié pour les dispositions qui ont des effets inconstitutionnels repose sur les termes choisis par les rédacteurs de la *Charte* : voir Sankoff, p. 438.

[60] Par contre, on a généralement recours au par. 24(1) pour accorder réparation non pas lorsque des dispositions législatives sont inconstitutionnelles, mais lorsque des actes gouvernementaux inconstitutionnels sont commis en vertu de régimes légaux reconnus comme parfaitement constitutionnels : voir *Eldridge c. Colombie-Britannique (Procureur général)*, [1997] 3 R.C.S. 624; *Multani c. Commission scolaire Marguerite-Bourgeoys*, [2006] 1 R.C.S. 256, 2006 CSC 6. Les actes des mandataires du gouvernement qui agissent en vertu de ces régimes ne sont pas le résultat ou l’« effet » obligatoire de la loi, mais plutôt du fait que les mandataires du gouvernement ont exercé d’une manière inconstitutionnelle le pouvoir discrétionnaire que leur conférait la loi. Le paragraphe 52(1) ne s’applique donc pas. Le recours approprié est prévu au par. 24(1).

[72] The divergence between the law on the books and the law as applied — and the uncertainty and unpredictability that result — exacts a price paid in the coin of injustice. First, it impairs the right of citizens to know what the law is in advance and govern their conduct accordingly — a fundamental tenet of the rule of law. Second, it risks over-application of the law; as Le Dain J. noted in *Smith*, the assumed validity of the law may prejudice convicted persons when judges must decide whether to apply it in particular cases. Third, it invites duplication of effort. The matter of constitutionality would not be resolved once and for all as under s. 52(1); in every case where a violation is suspected, the accused would be obliged to seek a constitutional exemption. In so doing, it creates an unnecessary barrier to the effective exercise of the convicted offender's constitutional rights, thereby encouraging uneven and unequal application of the law.

[73] A final cost of constitutional exemptions from mandatory minimum sentence laws is to the institutional value of effective law making and the proper roles of Parliament and the courts. Allowing unconstitutional laws to remain on the books deprives Parliament of certainty as to the constitutionality of the law in question and thus of the opportunity to remedy it. Legislatures need clear guidance from the courts as to what is constitutionally permissible and what must be done to remedy legislation that is found to be constitutionally infirm. In granting constitutional exemptions, courts would be altering the state of the law on constitutional grounds without giving clear guidance to Parliament as to what the Constitution requires in the circumstances: Rosenberg and Perrault, at p. 391. Bad law, fixed up on a case-by-case basis by the courts, does not accord with the role and responsibility of Parliament to enact constitutional laws for the people of Canada.

[72] La divergence entre la disposition figurant dans le corpus législatif et la règle de droit appliquée — ainsi que l'incertitude et l'imprévisibilité qui en découlent — a pour conséquence de créer l'injustice. Premièrement, il y a atteinte au droit des citoyens de savoir d'avance ce que prévoit la loi et de se comporter en conséquence — un principe fondamental de la primauté du droit. Deuxièmement, une trop grande application de la loi risque de survenir. En effet, ainsi que l'a mentionné le juge Le Dain dans *Smith*, la présomption de validité de la loi peut avoir des effets préjudiciables sur les personnes déclarées coupables lorsque le juge doit décider s'il doit l'appliquer dans un cas particulier. Troisièmement, il y a ouverture à un dédoublement des efforts. La question de la constitutionnalité n'est pas tranchée une fois pour toute en application du par. 52(1); dans chaque cas où l'on soupçonne qu'il y a eu violation, l'accusé est obligé de demander une exemption constitutionnelle. Il en résulte un obstacle inutile à l'exercice efficace des droits constitutionnels d'un contrevenant déclaré coupable, ce qui encourage une application inégale de la loi.

[73] Enfin, les exemptions constitutionnelles à l'égard des dispositions prescrivant une peine minimale obligatoire porteraient atteinte à la valeur institutionnelle de l'action législative efficace et aux rôles véritables du législateur et des tribunaux. Permettre que des dispositions législatives inconstitutionnelles demeurent dans le corpus législatif empêche le législateur de savoir avec certitude si la disposition législative en cause est constitutionnelle et, partant, le prive de la possibilité de la corriger. Les assemblées législatives ont besoin que les cours de justice leur indiquent clairement ce qui est permis sur le plan constitutionnel et ce qui doit être fait pour corriger une loi jugée inconstitutionnelle. En accordant des exemptions constitutionnelles, les cours de justice modifieraient l'état du droit pour des motifs constitutionnels sans indiquer clairement au législateur ce que la Constitution exige dans les circonstances : Rosenberg et Perrault, p. 391. De mauvaises lois, auxquelles les cours de justice remédient au cas par cas, ne sont pas compatibles avec le rôle et la responsabilité du législateur d'édicter des règles législatives constitutionnelles pour le peuple canadien.



Paul Conway *Appellant*

v.

Her Majesty The Queen and Person in charge
of the Centre for Addiction and Mental
Health *Respondents*

and

Attorney General of Canada, Ontario Review
Board, Mental Health Legal Committee and
Mental Health Legal Advocacy Coalition,
British Columbia Review Board, Criminal
Lawyers' Association and David Asper Centre
for Constitutional Rights, and Community
Legal Assistance Society *Interveners*

INDEXED AS: **R. v. CONWAY**

2010 SCC 22

File No.: 32662.

2009: October 22; **2010: June 11.**

Present: McLachlin C.J. and Binnie, LeBel, Deschamps,
Fish, Abella, Charron, Rothstein and Cromwell JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR
ONTARIO

Constitutional law — Charter of Rights — Remedies — Accused not criminally responsible by reason of mental disorder detained in mental health facility — Accused alleging violations of his constitutional rights and seeking absolute discharge as remedy under s. 24(1) of Canadian Charter of Rights and Freedoms — Accused also seeking as remedy order directing mental health facility to provide him with particular treatment — Whether Review Board has jurisdiction to grant remedies under s. 24(1) of Charter — If so, whether accused entitled to remedies sought — Criminal Code, R.S.C. 1985, c. C-46, ss. 672.54, 672.55.

Constitutional law — Charter of Rights — Remedies — Court of competent jurisdiction — Remedial

Paul Conway *Appelant*

c.

**Sa Majesté la Reine et Responsable du Centre
de toxicomanie et de santé mentale** *Intimés*

et

Procureur général du Canada, Commission
ontarienne d'examen, Mental Health
Legal Committee et Mental Health Legal
Advocacy Coalition, British Columbia Review
Board, Criminal Lawyers' Association
et David Asper Centre for Constitutional
Rights, et Community Legal Assistance
Society *Intervenants*

RÉPERTORIÉ : **R. c. CONWAY**

2010 CSC 22

N° du greffe : 32662.

2009 : 22 octobre; 2010 : 11 juin.

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

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

Droit constitutionnel — Charte des droits — Réparations — Accusé non responsable criminellement pour cause de troubles mentaux détenu dans un établissement de santé mentale — Accusé ayant allégué la violation de ses droits constitutionnels et demandé sa libération inconditionnelle en guise de réparation fondée sur l'art. 24(1) de la Charte canadienne des droits et libertés — Accusé ayant également demandé, à titre de réparation, qu'il soit ordonné à l'établissement de santé mentale de lui offrir un traitement en particulier — La commission d'examen a-t-elle compétence pour accorder des réparations en application de l'art. 24(1) de la Charte? — Dans l'affirmative, l'accusé a-t-il droit aux réparations demandées? — Code criminel, L.R.C. 1985, ch. C-46, art. 672.54, 672.55.

Droit constitutionnel — Charte des droits — Réparations — Tribunal compétent — Pouvoir de réparation

(4th) 729, 235 O.A.C. 341, 231 C.C.C. (3d) 429, 169 C.R.R. (2d) 314, [2008] O.J. No. 1588 (QL), 2008 CarswellOnt 2352, allowing in part an appeal from a decision of the Ontario Review Board. Appeal dismissed.

Marlys A. Edwardh, Delmar Doucette, Jessica Orkin and Michael Davies, for the appellant.

Hart M. Schwartz and Amanda Rubaszek, for the respondent Her Majesty the Queen.

Janice E. Blackburn and Ioana Bala, for the respondent the Person in charge of the Centre for Addiction and Mental Health.

Simon Fothergill, for the intervener the Attorney General of Canada.

Stephen J. Moreau and Elichai Shaffir, for the intervener the Ontario Review Board.

Paul Burststein and Anita Szigeti, for the interveners the Mental Health Legal Committee and the Mental Health Legal Advocacy Coalition.

Joseph J. Arvay, Q.C., Mark G. Underhill and Alison Latimer, for the intervener the British Columbia Review Board.

Cheryl Milne, for the interveners the Criminal Lawyers' Association and the David Asper Centre for Constitutional Rights.

David W. Mossop, Q.C., and Diane Nielsen, for the intervener the Community Legal Assistance Society.

The judgment of the Court was delivered by

[1] **ABELLA J.** — The specific issue in this appeal is the remedial jurisdiction of the Ontario Review Board under s. 24(1) of the *Canadian Charter of Rights and Freedoms*. The wider issue is the relationship between the *Charter*, its remedial provisions and administrative tribunals generally.

[2] There are two provisions in the *Charter* dealing with remedies: s. 24(1) and s. 24(2). Section

(4th) 729, 235 O.A.C. 341, 231 C.C.C. (3d) 429, 169 C.R.R. (2d) 314, [2008] O.J. No. 1588 (QL), 2008 CarswellOnt 2352, qui a accueilli en partie l'appel d'une décision de la Commission ontarienne d'examen. Pourvoi rejeté.

Marlys A. Edwardh, Delmar Doucette, Jessica Orkin et Michael Davies, pour l'appelant.

Hart M. Schwartz et Amanda Rubaszek, pour l'intimée Sa Majesté la Reine.

Janice E. Blackburn et Ioana Bala, pour l'intimé le Responsable du Centre de toxicomanie et de santé mentale.

Simon Fothergill, pour l'intervenant le procureur général du Canada.

Stephen J. Moreau et Elichai Shaffir, pour l'intervenante la Commission ontarienne d'examen.

Paul Burststein et Anita Szigeti, pour les intervenants Mental Health Legal Committee et Mental Health Legal Advocacy Coalition.

Joseph J. Arvay, c.r., Mark G. Underhill et Alison Latimer, pour l'intervenante British Columbia Review Board.

Cheryl Milne, pour les intervenants Criminal Lawyers' Association et David Asper Centre for Constitutional Rights.

David W. Mossop, c.r., et Diane Nielsen, pour l'intervenante Community Legal Assistance Society.

Version française du jugement de la Cour rendu par

[1] LA JUGE ABELLA — La question précise que soulève le présent pourvoi est celle de la compétence de la Commission ontarienne d'examen pour accorder réparation sur le fondement du par. 24(1) de la *Charte canadienne des droits et libertés*. La question plus large est celle de l'interaction entre la *Charte*, ses dispositions réparatrices et les tribunaux administratifs en général.

[2] Deux dispositions de la *Charte* portent sur les mesures réparatrices, à savoir les par. 24(1) et

they must act consistently with the *Charter* and its values when exercising their statutory functions. It strikes me as somewhat unhelpful, therefore, to subject every such tribunal from which a *Charter* remedy is sought to an inquiry asking whether it is “competent” to grant a particular remedy within the meaning of s. 24(1).

[79] Over two decades of jurisprudence has confirmed the practical advantages and constitutional basis for allowing Canadians to assert their *Charter* rights in the most accessible forum available, without the need for bifurcated proceedings between superior courts and administrative tribunals (*Douglas College*, at pp. 603-4; *Weber*, at para. 60; *Cooper*, at para. 70; *Martin*, at para. 29). **The denial of early access to remedies is a denial of an appropriate and just remedy, as Lamer J. pointed out in *Mills*, at p. 891.** And a scheme that favours bifurcating claims is inconsistent with the well-established principle that an administrative tribunal is to decide all matters, including constitutional questions, whose essential factual character falls within the tribunal’s specialized statutory jurisdiction (*Weber*; *Regina Police Assn.*; *Quebec (Commission des droits de la personne et des droits de la jeunesse)*; *Quebec (Human Rights Tribunal)*; *Vaughan*; *Okwuobi*. See also *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190, at para. 49.).

[80] If, as in the *Cuddy Chicks* trilogy, expert and specialized tribunals with the authority to decide questions of law are in the best position to decide constitutional questions when a remedy is sought under s. 52 of the *Constitution Act, 1982*, there is no reason why such tribunals are not also in the best position to assess constitutional questions when a remedy is sought under s. 24(1) of the *Charter*. As McLachlin J. said in *Weber*, “[i]f an arbitrator can find a law violative of the *Charter*, it would seem he or she can determine whether conduct in the administration of the collective agreement violates the *Charter* and likewise grant remedies”

lieu, il doit agir conformément à la *Charte* et aux valeurs qui la sous-tendent en s’acquittant de ses fonctions légales. Il m’apparaît donc quelque peu inutile de soumettre tout tribunal de ce type auquel réparation est demandée sur le fondement de la *Charte* à un examen visant à déterminer s’il est « compétent » au sens du par. 24(1) pour accorder la réparation sollicitée.

[79] Depuis plus de deux décennies, la jurisprudence confirme les avantages pratiques et le fondement constitutionnel de la solution qui consiste à permettre aux Canadiens de faire valoir les droits et les libertés que leur garantit la *Charte* devant le tribunal qui est le plus à leur portée sans qu’ils aient à fractionner leur recours et saisir à la fois une cour supérieure et un tribunal administratif (*Douglas College*, p. 603-604; *Weber*, par. 60; *Cooper*, par. 70; *Martin*, par. 29). Comme le signale le juge Lamer dans l’arrêt *Mills*, empêcher le demandeur d’obtenir rapidement réparation équivaut à lui refuser une réparation convenable et juste (p. 891). Et le régime qui favorise le fractionnement des recours est incompatible avec le principe bien établi selon lequel un tribunal administratif se prononce sur toutes les questions, y compris celles de nature constitutionnelle, dont le caractère essentiellement factuel relève de la compétence spécialisée que lui confère la loi (*Weber*; *Regina Police Assn.*; *Québec (Commission des droits de la personne et des droits de la jeunesse)*; *Québec (Tribunal des droits de la personne)*; *Vaughan*; *Okwuobi*. Voir également l’arrêt *Dunsmuir c. Nouveau-Brunswick*, 2008 CSC 9, [2008] 1 R.C.S. 190, par. 49.).

[80] Si, comme dans les affaires de la trilogie *Cuddy Chicks*, le tribunal spécialisé doté du pouvoir de se prononcer sur des questions de droit est le mieux placé pour trancher une question constitutionnelle lorsque réparation est sollicitée sur le fondement de l’art. 52 de la *Loi constitutionnelle de 1982*, rien ne s’oppose à ce qu’il soit également le mieux placé pour se pencher sur une question constitutionnelle lorsque réparation est demandée en application du par. 24(1) de la *Charte*. Dans l’arrêt *Weber*, la juge McLachlin dit que « [s]i un arbitre peut conclure qu’une loi porte atteinte à la *Charte*, il semble qu’il puisse déterminer si un



Her Majesty The Queen *Appellant*

v.

Hussein Jama Nur *Respondent*

- and -

Attorney General of Canada *Appellant*

v.

Hussein Jama Nur *Respondent*

and

**Attorney General of Quebec,
Attorney General of British Columbia,
Attorney General of Alberta,
Pivot Legal Society,
John Howard Society of Canada,
Canadian Civil Liberties Association,
British Columbia Civil Liberties Association,
Advocates’ Society,
Canadian Bar Association,
Canada’s National Firearms Association,
Canadian Association for Community
Living and African Canadian
Legal Clinic** *Interveners*

- and -

Her Majesty The Queen *Appellant*

v.

Sidney Charles *Respondent*

- and -

Attorney General of Canada *Appellant*

v.

Sa Majesté la Reine *Appelante*

c.

Hussein Jama Nur *Intimé*

- et -

Procureur général du Canada *Appellant*

c.

Hussein Jama Nur *Intimé*

et

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

- et -

Sa Majesté la Reine *Appelante*

c.

Sidney Charles *Intimé*

- et -

Procureur général du Canada *Appellant*

c.

Sidney Charles *Respondent*

and

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

INDEXED AS: **R. v. NUR**

2015 SCC 15

File Nos.: 35678, 35684.

2014: November 7; **2015: April 14.**

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

ON APPEAL FROM THE COURT OF APPEAL FOR
ONTARIO

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

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

Sidney Charles *Intimé*

et

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

RÉPERTORIÉ : **R. c. NUR**

2015 CSC 15

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

2014 : 7 novembre; 2015 : 14 avril.

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

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

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

N et C ont été déclarés coupables de possession d'armes à feu prohibées chargées, une infraction prévue au par. 95(1) du *Code criminel*. Condamnés en application des sous-al. 95(2)a)(i) et (ii), lesquels prévoient des peines minimales obligatoires de trois et cinq ans, les deux accusés ont reçu respectivement des peines de

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

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

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

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

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

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

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

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

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

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

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

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

THE CHIEF JUSTICE —

I. Overview

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

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

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

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

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

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

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

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

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

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

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

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

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

LA JUGE EN CHEF —

I. Aperçu

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

[56] Ce sont les trois seuls arrêts qui portent directement sur les situations ou les « hypothèses » que le tribunal doit considérer pour statuer sur la constitutionnalité — au regard de l’art. 12 — d’une disposition prévoyant une peine minimale obligatoire¹. À mon sens, ils ne permettent pas de conclure que les décisions rendues en la matière sont « inconciliables entre elles ». Une notion est commune aux deux seuls arrêts — *Goltz* et *Morrissey* — qui approfondissent le sujet : la prévisibilité raisonnable. Dans *Goltz*, le juge Gonthier renvoie

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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



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

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

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

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

unconstitutionality by prosecutorial discretion to proceed by another route.

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

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

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

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

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

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

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

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



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

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

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

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

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

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

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

Francis Anthonimuthu Appulonappa
Appellant

v.

Her Majesty The Queen *Respondent*

- and -

Hamalraj Handasamy *Appellant*

v.

Her Majesty The Queen *Respondent*

- and -

Jeyachandran Kanagarajah *Appellant*

v.

Her Majesty The Queen *Respondent*

- and -

Vignarajah Thevarajah *Appellant*

v.

Her Majesty The Queen *Respondent*

and

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

INDEXED AS: **R. v. APPULONAPPA**
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Francis Anthonimuthu Appulonappa
Appelant

c.

Sa Majesté la Reine *Intimée*

- et -

Hamalraj Handasamy *Appelant*

c.

Sa Majesté la Reine *Intimée*

- et -

Jeyachandran Kanagarajah *Appelant*

c.

Sa Majesté la Reine *Intimée*

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c.

Sa Majesté la Reine *Intimée*

et

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

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

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

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

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

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

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

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

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

The judgment of the Court was delivered by

THE CHIEF JUSTICE —

I. Introduction

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

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

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

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

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

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

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

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

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

Version française du jugement de la Cour rendu par

LA JUGE EN CHEF —

I. Introduction

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

a) *L’objet de l’art. 117 de la LIPR*

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

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

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

COURT OF APPEAL FOR BRITISH COLUMBIA

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

Between: **Leave to appeal refused:**
2018 CanLII 48394 (SCC)

Date: 20171201
Docket: CA43961

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

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

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.

[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

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

Attorney General of Ontario *Appellant*

v.

G *Respondent*

and

**Attorney General of Canada,
Criminal Lawyers' Association (Ontario),
Canadian Civil Liberties Association,
David Asper Centre for Constitutional Rights,
Empowerment Council and
Canadian Mental Health Association, Ontario**
Intervenors

INDEXED AS: ONTARIO (ATTORNEY GENERAL)
v. G

2020 SCC 38

File No.: 38585.

2020: February 20; **2020: November 20.**

Present: Wagner C.J. and Abella, Moldaver,
Karakatsanis, Côté, Brown, Rowe, Martin and
Kasirer JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR
ONTARIO

Constitutional law — Charter of Rights — Right to equality — Discrimination based on mental or physical disability — Ontario's sex offender registry regime requiring that individuals either convicted or found not criminally responsible on account of mental disorder ("NCRMD") of sexual offences have their personal information added to registry and report to police station at least once a year to keep information up to date — Opportunities for exemption from requirements available to individuals found guilty of sexual offences but not to those found NCRMD who have been granted absolute discharge — Whether provincial sex offender registry regime infringes right to equality of such NCRMD individuals — If so, whether infringement justified — Canadian Charter of Rights and Freedoms, ss. 1, 15(1) — Christopher's Law (Sex Offender Registry), 2000, S.O. 2000, c. 1.

Procureur général de l'Ontario *Appelant*

c.

G *Intimé*

et

**Procureur général du Canada,
Criminal Lawyers' Association (Ontario),
Association canadienne des libertés civiles,
David Asper Centre for Constitutional Rights,
Empowerment Council et
Association canadienne pour la santé mentale,
Ontario** *Intervenants*

**RÉPERTORIÉ : ONTARIO (PROCUREUR
GÉNÉRAL) c. G**

2020 CSC 38

N° du greffe : 38585.

2020 : 20 février; 2020 : 20 novembre.

Présents : Le juge en chef Wagner et les juges Abella,
Moldaver, Karakatsanis, Côté, Brown, Rowe, Martin et
Kasirer.

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

Droit constitutionnel — Charte des droits — Droit à l'égalité — Discrimination fondée sur une déficience mentale ou physique — Régime d'enregistrement des délinquants sexuels de l'Ontario exigeant que soient consignés au registre les renseignements personnels des personnes déclarées coupables ou non responsables criminellement pour cause de troubles mentaux à l'égard d'infractions sexuelles et que ces personnes se présentent au poste de police au moins une fois par année pour mettre leurs renseignements à jour — Possibilités d'être dispensé des exigences offertes aux personnes déclarées coupables d'infractions sexuelles, mais non aux personnes déclarées non responsables criminellement pour cause de troubles mentaux qui ont bénéficié d'une libération inconditionnelle — Le régime provincial d'enregistrement des délinquants sexuels porte-t-il atteinte au droit à l'égalité de ces personnes déclarées non responsables criminellement pour cause de troubles mentaux? — Dans l'affirmative, l'atteinte est-elle justifiée? — Charte canadienne des droits et libertés, art. 1, 15(1) — Loi Christopher de 2000 sur le registre des délinquants sexuels, L.O. 2000, c. 1.

The judgment of Wagner C.J. and Abella, Moldaver, Karakatsanis, Martin and Kasirer J.J. was delivered by

KARAKATSANIS J. —

I. Introduction

[1] People with mental illnesses face persistent stigma and prejudicial treatment in Canadian society, which has imposed profound and widespread social, political, and legal disadvantage on them. In particular, discriminatory perceptions that those with mental illnesses are inherently and indefinitely dangerous persist. These perceptions have served to support some of the most unjust treatment of those with mental illnesses. As this case demonstrates, such perceptions still find some expression in legislation.

[2] Section 15 of the *Canadian Charter of Rights and Freedoms* prevents such discrimination from being given the force of law. This appeal requires the Court to apply the equality guarantee to the manner in which those found not criminally responsible on account of mental disorder (NCRMD) of sexual offences are treated by Ontario's sex offender registry regime. It also provides an opportunity to set out a consistent set of principles applicable to granting remedies for legislation that violates the *Charter*.

[3] In Ontario, *Christopher's Law (Sex Offender Registry)*, 2000, S.O. 2000, c. 1 (*Christopher's Law*), requires those who are either convicted or found NCRMD of a sexual offence to physically report to a police station to have their personal information added to the province's sex offender registry. They must continue to report in person at least once a year to keep their information up to date. They must also report every time certain information changes. Even when individuals are no longer required to report

Version française du jugement du juge en chef Wagner et des juges Abella, Moldaver, Karakatsanis, Martin et Kasirer rendu par

LA JUGE KARAKATSANIS —

I. Introduction

[1] Les personnes souffrant de troubles mentaux font l'objet d'une stigmatisation continue et d'un traitement préjudiciable dans la société canadienne, de sorte qu'elles sont grandement et largement défavorisées sur les plans social, politique et juridique. Plus particulièrement, il subsiste à leur égard des perceptions discriminatoires suivant lesquelles elles sont en soi dangereuses et elles présenteront toujours un danger. Ces perceptions ont d'ailleurs servi à justifier certains des traitements les plus injustes que subissent ces personnes. Comme le démontre la présente affaire, de telles perceptions discriminatoires se manifestent encore à l'occasion dans les textes législatifs.

[2] L'article 15 de la *Charte canadienne des droits et libertés* empêche que ce type de discrimination se voit conférer force de loi. Dans le présent pourvoi, notre Cour est appelée à appliquer la garantie d'égalité à la manière dont sont traitées les personnes qui sont déclarées non responsables criminellement pour cause de troubles mentaux à l'égard d'infractions sexuelles par le régime d'enregistrement des délinquants sexuels de l'Ontario. Le présent pourvoi donne également à notre Cour l'occasion d'établir un ensemble cohérent de principes qui s'appliqueront à l'octroi de réparations lorsque des textes législatifs violent la *Charte*.

[3] En Ontario, la *Loi Christopher de 2000 sur le registre des délinquants sexuels*, L.O. 2000, c. 1 (*Loi Christopher*), exige des personnes déclarées coupables ou non responsables criminellement pour cause de troubles mentaux à l'égard d'une infraction sexuelle qu'elles se présentent en personne à un poste de police pour fournir leurs renseignements personnels afin que ceux-ci soient consignés au registre des délinquants sexuels de la province. Elles doivent continuer de se présenter en personne

the *Charter* and the manner in which it fails to be justified under s. 1” (*Schachter*, at p. 702) in crafting tailored remedies. (While this general guideline remains useful, courts should bear in mind that the *Oakes* test has evolved since *Schachter* was decided, such that it now focuses on justifying the infringing measure rather than the law as a whole (compare *Schachter*, at pp. 703-5 and *RJR-MacDonald*, at para. 144).) The nature and extent of the underlying *Charter* violation lays the foundation for the remedial analysis because the breadth of the remedy ultimately granted will reflect at least the extent of the breach.

adaptées, les tribunaux devraient garder à l’esprit « de quelle façon la loi en question viole la *Charte* et pourquoi cette violation ne peut être justifiée en vertu de l’article premier » (*Schachter*, p. 702). (Bien que cette ligne directrice générale demeure utile, les tribunaux devraient garder à l’esprit que le critère de l’arrêt *Oakes* a évolué depuis le prononcé de l’arrêt *Schachter* et qu’il met maintenant l’accent sur la justification de la mesure attentatoire plutôt que de la loi dans son ensemble (comparer l’arrêt *Schachter*, p. 703-705, à l’arrêt *RJR-MacDonald*, par. 144).) L’analyse de la réparation qu’il convient d’accorder repose sur la nature et l’étendue de la violation sous-jacente de la *Charte*, car la portée de la réparation qui est finalement accordée dépend notamment de l’étendue de la violation.

[109] Defining the extent of the constitutional defect by reference to the substantive violation of the *Charter* safeguards the rights of all those directly affected by ensuring that the law is cured of all its constitutional defects. It also serves the broader public interest in having government act in accordance with the Constitution. These remedies reach beyond the claimant — and can even be granted when the claimant is not directly affected by the law — because “[n]o one should be subjected to an unconstitutional law” (*Nur*, at para. 51; see also *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295, at p. 313). This step of the analysis therefore reflects the *Charter*’s rights-protecting purpose, the public’s interest in constitutional compliance, and the text of s. 52(1) — the law is of no force or effect to the full extent of its inconsistency with the Constitution.

[109] Définir l’étendue de l’inconstitutionnalité en fonction de la violation substantielle de la *Charte* permet de protéger les droits de toutes les personnes directement touchées en veillant à ce que tous les vices constitutionnels qu’elle renferme soient supprimés. Cela sert également l’intérêt général du public de veiller à ce que les actes de l’État soient conformes à la Constitution. Ce type de réparation va au-delà du demandeur — et peut même être accordé lorsque le demandeur n’est pas directement touché par la loi — parce que « [n]ul ne doit être soumis à une loi inconstitutionnelle » (*Nur*, par. 51; voir aussi *Big M Drug Mart Ltd.*, [1985] 1 R.C.S. 295, p. 313). Cette étape de l’analyse tient donc compte de l’objectif de protection des droits que vise la *Charte*, de l’intérêt qu’a le public à ce que les lois soient conformes à la Constitution, et du libellé du par. 52(1) — la loi est inopérante dans la pleine mesure de son incompatibilité avec la Constitution.

[110] For example, in some cases where a criminal offence’s effects on particular groups of people or in certain circumstances have been found unconstitutional, all of those people and circumstances have been exempted from criminal liability (see, e.g., *Carter v. Canada (Attorney General)*, 2015 SCC 5, [2015] 1 S.C.R. 331; *R. v. Sharpe*, 2001 SCC 2, [2001] 1 S.C.R. 45, as interpreted in *R. v. Barabash*, 2015 SCC 29, [2015] 2 S.C.R. 522; *R. v. Appulonappa*, 2015 SCC 59, [2015] 3 S.C.R. 754, as interpreted in *R. v. Rajaratnam*, 2019 BCCA 209, 376 C.C.C. (3d) 181; *R. v. Smith*, 2015 SCC 34, [2015] 2 S.C.R. 602). The same is true for mandatory

[110] Par exemple, lorsque les effets d’une infraction criminelle sur certains groupes de personnes ou dans certaines situations sont jugés inconstitutionnels, l’ensemble de ces personnes, quelle que soit la situation, ont été dégagées de toute responsabilité criminelle (voir, p. ex., *Carter c. Canada (Procureur général)*, 2015 CSC 5, [2015] 1 R.C.S. 331; *R. c. Sharpe*, 2001 CSC 2, [2001] 1 R.C.S. 45, tel qu’interprété dans *R. c. Barabash*, 2015 CSC 29, [2015] 2 R.C.S. 522; *R. c. Appulonappa*, 2015 CSC 59, [2015] 3 R.C.S. 754, tel qu’interprété dans *R. c. Rajaratnam*, 2019 BCCA 209, 376 C.C.C. (3d) 181; *R. c. Smith*, 2015 CSC 34, [2015] 2 R.C.S. 602). Il en va de même des dispositions qui



SUPREME COURT OF CANADA

CITATION: **R. v. Hills, 2023 SCC**
2

APPEAL HEARD: March 22,
2022

JUDGMENT RENDERED:
January 27, 2023

DOCKET: 39338

BETWEEN:

Jesse Dallas Hills
Appellant

and

His Majesty The King
Respondent

- and -

**Director of Public Prosecutions, Attorney General of Ontario, Attorney
General of Nova Scotia, Attorney General of Saskatchewan, British Columbia
Civil Liberties Association, Criminal Lawyers' Association (Ontario),
Canadian Bar Association and Canadian Civil Liberties Association**
Intervenors

CORAM: Wagner C.J. and Moldaver, Karakatsanis, Côté, Brown, Rowe, Martin,
Kasirer and Jamal JJ.

REASONS FOR
JUDGMENT: **Martin J.** (Wagner C.J. and Moldaver, Karakatsanis, Brown,
Rowe, Kasirer and Jamal JJ. concurring)
(paras. 1 to 175)

Emily MacKinnon, Amanda G. Manasterski and Stephen Armstrong, for the intervener the British Columbia Civil Liberties Association.

Janani Shanmuganathan and Laura Metcalfe, for the intervener the Criminal Lawyers' Association (Ontario).

Eric V. Gottardi, K.C., and Chantelle van Wiltenburg, for the intervener the Canadian Bar Association.

Nader R. Hasan and Ryann Atkins, for the intervener the Canadian Civil Liberties Association.

The judgment of Wagner C.J. and Moldaver, Karakatsanis, Brown, Rowe, Martin, Kasirer and Jamal JJ. was delivered by

MARTIN J. —

I. Introduction

[1] This appeal, and the companion appeal of *R. v. Hilbach*, 2023 SCC 3, provide the Court with an opportunity to clarify the legal principles that govern when the constitutionality of a mandatory minimum sentencing provision is challenged under s. 12 of the *Canadian Charter of Rights and Freedoms*. At issue in both appeals are three different offences under the *Criminal Code*, R.S.C. 1985, c. C-46, which involve the use of a firearm. In this appeal, the appellant, Jesse Dallas Hills, was convicted of

discharging a firearm into or at a home under s. 244.2(1)(a). Mr. Hills challenges the four-year mandatory minimum sentence previously imposed by s. 244.2(3)(b) for this offence. The mandatory minimum sentence prescribed in s. 244.2(3)(b) was repealed after this appeal was heard. Despite this legislative change, the reasons examine the impugned mandatory minimum as previously enacted. In the companion case, *Ocean William Storm Hilbach and Curtis Zwozdesky* were convicted of armed robbery. They challenge, respectively, the five-year mandatory minimum for robbery with a restricted or prohibited firearm under s. 344(1)(a)(i) and the former four-year mandatory minimum for robbery with a firearm under s. 344(1)(a.1). The mandatory minimum sentence set out in s. 344(1)(a.1) was also repealed after the *Hilbach* appeal was heard.

[2] In both appeals, the offenders argue that the prescribed mandatory minimum sentences constitute cruel and unusual punishment contrary to s. 12 of the *Charter*. They claim that these automatic sentences, which impose a stated minimum term of imprisonment, are grossly disproportionate to what would be a fit and appropriate punishment and therefore offend the *Charter*. Mr. Hills and Mr. Zwozdesky admit that the minimum sentences were warranted based on the facts of their cases, but nevertheless challenge the law based on how the sentencing provisions could reasonably apply to others for whom they claim the minimum penalties imposed would be constitutionally infirm punishments.

[3] This is not the first time the constitutionality of mandatory minimum sentences has been before this Court. While these appeals reveal some of the challenges

faced when determining whether a punishment is grossly disproportionate, there is no reason to upset sound and settled law and adopt the new approaches advocated by some parties, interveners and judges of the Alberta Court of Appeal. The principles for assessing whether a punishment is cruel and unusual are well established and were recently and unanimously affirmed in *R. v. Bissonnette*, 2022 SCC 23. In this decision, the Court seeks to provide further guidance, direction and clarity. These reasons offer a framework in response to submissions in both this appeal and in *Hilbach*. As such, I will not distinguish between submissions from counsel in both cases addressing suggested changes to the s. 12 framework.

[4] In this appeal, I first set out the generally applicable framework and foundational principles for the s. 12 analysis and then apply them to Mr. Hills and, in *Hilbach*, to Mr. Hilbach and Mr. Zwozdesky. Whether a mandatory minimum is grossly disproportionate will depend upon the scope and reach of the offence, the effects of the punishment on the offender, and the penalty and its objectives.

[5] In respect of Mr. Hills, I conclude that s. 244.2(3)(b) is grossly disproportionate. Here, the evidence showed that numerous air-powered rifles constituted “firearms”, including air-powered devices like paintball guns, even though they could not perforate the wall of a typical residence. It is also reasonably foreseeable that a young person could intentionally discharge such a “firearm” into or at a place of residence. This provision therefore applies to an offence that captures a wide spectrum of conduct, ranging from acts that present little danger to the public to those that pose

a grave risk. Its effect at the low end of the spectrum is severe. The mandatory minimum cannot be justified by deterrence and denunciation alone, and the punishment shows a complete disregard for sentencing norms. The mandatory prison term would have significant deleterious effects on a youthful offender and it would shock the conscience of Canadians to learn that an offender can receive four years of imprisonment for firing a paintball gun at a home. As a result, s. 244.2(3)(b) imposes a mandatory minimum of four years' imprisonment for a much less grave type of activity such that it is grossly disproportionate and amounts to cruel and unusual punishment. The Crown did not argue that s. 244.2(3)(b) could be saved under s. 1 of the *Charter*. Accordingly, I would allow the appeal. I address s. 344(1)(a)(i) and (a.1) in the companion case of *Hilbach*.

II. Legislative Background

A. *The Challenged Mandatory Minimum*

[6] Mr. Hills was subject to the mandatory minimum at issue after he pled guilty to the offence in s. 244.2(1)(a):

244.2 (1) Every person commits an offence

(a) who intentionally discharges a firearm into or at a place, knowing that or being reckless as to whether another person is present in the place; or

(b) who intentionally discharges a firearm while being reckless as to the life or safety of another person.

773, at para. 6; *Reference re Firearms Act (Can.)*, 2000 SCC 31, [2000] 1 S.C.R. 783).

This legislation forms the background to this appeal and given its complexity, it is important to appreciate its operation before turning to Mr. Hills' challenge.

[11] To start, s. 244.2(1)(a) incorporates the *Criminal Code* definition of a firearm. Section 2 of the *Criminal Code* generally defines a "firearm" as "a barrelled weapon from which any shot, bullet or other projectile can be discharged and that is capable of causing serious bodily injury or death to a person, and includes any frame or receiver of such a barrelled weapon and anything that can be adapted for use as a firearm". While firearms are defined as "weapons", they do not need to meet the *Criminal Code* definition of a weapon (*R. v. Dunn*, 2013 ONCA 539, 117 O.R. (3d) 171, at para. 66, aff'd 2014 SCC 69, [2014] 3 S.C.R. 490).

[12] Courts rely on the "pig's eye test" to determine whether a barrelled weapon is capable of causing serious bodily injury or death and thus meets the definition of a "firearm" in the *Criminal Code* (*Dunn*, at paras. 8 and 40). The test asks whether a projectile fired from the device can rupture a pig's eye, which is physiologically similar to a human eye (para. 8). Since a ruptured eye is a "serious bodily injury", a "firearm" is any barrelled, projectile-firing device capable of putting someone's eye out (paras. 8 and 40). As the expert evidence on this appeal establishes, some air-powered devices, like BB guns, airsoft guns, and paintball guns, are capable of firing projectiles with enough velocity to rupture a pig's eye. As a result, they can be classified as firearms under the *Criminal Code*.

[13] However, some air-powered devices that are “firearms” for the purposes of the *Criminal Code* are not subject to the *Firearms Act*’s licensing and registration regime. Indeed, the *Criminal Code* exempts some “firearms” from the *Firearms Act*. Specifically, at issue in this appeal is the exemption in s. 84(3)(d)(i):

(3) For the purposes of sections 91 to 95, 99 to 101, 103 to 107 and 117.03 of this Act and the provisions of the *Firearms Act*, the following weapons are deemed not to be firearms:

...

(d) any other barrelled weapon, where it is proved that the weapon is not designed or adapted to discharge

(i) a shot, bullet or other projectile at a muzzle velocity exceeding 152.4 m per second or at a muzzle energy exceeding 5.7 Joules . . .

[14] Under s. 84(3)(d)(i), some air-powered devices that meet the pig’s eye test and constitute firearms under the *Criminal Code* are nevertheless exempted from the *Firearms Act*, since their muzzle velocity falls at or below 152.4 metres per second. As a result, even though they are “firearms” for the purposes of the *Criminal Code*, they can be freely possessed without a firearms licence.

[15] The implication for this appeal is that some air-powered devices, which can be freely possessed in Canada, are “firearms” for the purposes of s. 244.2(1)(a). Put simply, an offender could be convicted under s. 244.2(1)(a) for firing a BB gun or a paintball gun at a shed. This offender would then be subject to the four-year mandatory minimum. While s. 244.2(1)(a) may typically apply where an ordinary firearm is used (like Mr. Hills’ hunting rifle), it is possible for an offender to be

convicted for using devices that are not known to inflict deadly force, like paintball guns. As I explain, this possibility underlies the constitutional frailty of the mandatory minimum at issue here.

III. Facts and Judicial History

[16] During an incident on May 6, 2014, Mr. Hills attacked two vehicles and a residence. In the hours prior to the incident, Mr. Hills consumed a large volume of prescription medication and alcohol. Around midnight, while intoxicated, he left his home in Lethbridge, Alberta with a loaded .303 Enfield bolt action rifle and a baseball bat. The rifle was designed for big game hunting.

[17] Mr. Hills proceeded to swing his bat at a passing car before firing a shot at it. The driver called 9-1-1. Before police arrived, Mr. Hills turned his attention to an unoccupied parked car, and smashed its windows with the bat. Mr. Hills then approached a new target: a residential home. He fired a round that went through the home's living room window and through a wall into a computer room before it stopped in a drywall stud and bookcase.

[18] At the time Mr. Hills fired his shots, the home was occupied by two parents and their two children. The father was sitting in the computer room when Mr. Hills fired his first shot. The father left the computer room to investigate and heard another shot. He ran to alert the mother and pressed the panic alarm on his security system. He then heard what sounded like Mr. Hills trying to break through the front door. The

father opened the door and yelled at Mr. Hills to get away. As the father grabbed an axe to defend himself, Mr. Hills fired again.

[19] The father managed to retreat and call 9-1-1. He went to the basement with the rest of his family where they waited for police to arrive. When police arrived, they discovered several rounds had penetrated the home. The rounds were fired into areas of the home where a person could have been standing and hit.

[20] After a preliminary inquiry, Mr. Hills pled guilty to four offences: discharging a firearm into or at a house contrary to s. 244.2(1)(a) of the *Criminal Code*, pointing a firearm at the occupant of a car, possession of a firearm without a licence, and mischief to property under \$5,000. Mr. Hills was unable to recollect the events or the motive for his actions.

A. *Alberta Court of Queen's Bench, 2018 ABQB 945, 79 Alta. L.R. (6th) 161*

[21] At sentencing, Mr. Hills brought a challenge under s. 12 of the *Charter* to the mandatory minimum sentence of four years of imprisonment for intentionally discharging a non-restricted firearm into or at a house imposed by s. 244.2(3)(b). He argued that such a mandatory minimum sentence was grossly disproportionate in reasonably foreseeable scenarios and, therefore, constituted cruel and unusual punishment.

[26] Justice Antonio concluded the expert evidence was insufficient to establish the low gravity of the scenario considered by the sentencing judge. The expert did not exclude the possibility that rounds fired from an air-powered pistol or rifle could travel through a door or window. Nor had the sentencing judge accounted for the psychological harms flowing from the scenario. Regardless of the physical risk, psychological and social harm was inherent in the reckless use of a firearm. She distinguished *Nur*, reasoning that if it was not grossly disproportionate to impose a 40-month sentence on a 19-year-old who possessed a loaded firearm in public, it was surely not grossly disproportionate to impose a 4-year sentence where a firearm was actually discharged. In re-sentencing Mr. Hills, she concluded that the sentencing judge had underestimated the gravity of the offence and concluded an appropriate sentence was four and a half years of imprisonment. She, however, reduced the sentence to the minimum of four years to account for the time spent on appeal. She stayed the execution of the post-appeal portion of his sentence.

[27] Justice O’Ferrall agreed with Antonio J.A. that s. 244.2(3)(b) complied with the *Charter* and with Antonio J.A.’s decision to impose the minimum sentence. Justice O’Ferrall added that this Court’s s. 12 jurisprudence ought to be revisited. He was troubled with the “air of unreality” associated with the use of “reasonable hypotheticals” and reasoned the s. 12 analysis should proceed based solely on the offender before the court (para. 103). Further, he questioned whether a grossly disproportionate sentence was an adequate measure of cruel and unusual punishment.

Proportionality is not the fundamental purpose of sentencing and it is foreseeable that a grossly disproportionate sentence could sometimes be justified.

[28] Justice Wakeling joined O’Ferrall J.A. in calling for the Court to revisit its s. 12 jurisprudence. Justice Wakeling concluded s. 12 protects only against cruel *and* unusual punishment. Put differently, it does not protect against “usual” punishments, like imprisonment. Consequently, a “grossly disproportionate” prison sentence cannot engage s. 12. He criticized reasonable hypotheticals, reasoning that since s. 12 protects against an offender being *subjected* to cruel and unusual punishment, its plain language means an offender can only challenge the particular sentence to which they are subject. He added the method of reasonable hypotheticals would leave Canadians “aghast” that adjudicators rely on “make-believe” scenarios to evaluate the constitutionality of a sentencing provision (para. 263). Justice Wakeling went on to note that the results of Canadian sentencing are irrational and indefensible, which militate in favour of a narrow construction of s. 12. Applying his own personal method of fixing sentences, he would have sentenced Mr. Hills to approximately 5.9 years of imprisonment.

IV. Issues

[29] This appeal raises two questions. First, whether the mandatory minimum sentence mandated by s. 244.2(3)(b) of the *Criminal Code* constitutes cruel and unusual punishment such that it violates s. 12 of the *Charter*. Second, whether the Alberta Court of Appeal erred in failing to consider Mr. Hills’ *Gladue* report and his Métis status in re-sentencing him.

type of punishment is the same: imprisonment. Such cases ask decision makers to engage in normative reasoning and make a judgment call about when a sentence is so long it becomes grossly disproportionate.

[49] I do not accept that these challenges and complexities mean that the established framework has always been fundamentally flawed or has become unworkable. Indeed, many of the arguments accepted by O’Ferrall and Wakeling JJ.A. and advanced before us by the Attorney General of Ontario and others were also forcefully argued and firmly rejected by this Court in 2015 in *Nur*. Like the Court in that case, in my view, the jurisprudence continues to provide a principled approach to assess when the effects of a penalty are so undermining of human dignity that the penalty qualifies as cruel and unusual punishment. Elaborating on the multiple, sometimes nuanced, questions and normative standards that are/may be considered within the framework, should help bring an end to the “exaggerated debate” sometimes applied to s. 12 (para. 61, per McLachlin C.J.). While no major methodological shifts are warranted, the Court seeks to provide greater clarity and more guidance.

C. *Stage One: Determining a Fit and Proportionate Sentence*

[50] In this section I outline the first stage of the s. 12 inquiry, which is how to determine a fit and appropriate sentence. I begin by addressing the situation in which the constitutional challenge involves the particular offender before the court. This will involve a familiar task: a full consideration of all relevant sentencing provisions in the applicable legislation and jurisprudence. Since proportionality in sentencing relates to

[65] Precision and certainty about the legal penalty is required because all must know exactly what punishment was imposed and when it will end. Similarly, if the mandatory minimum falls, the sentence affixed by the judge at the first stage of *Nur* will be applied to the offender. Scrupulously selecting a precise and defined sentence also supports an analytically fair and principled result at the second stage of the s. 12 inquiry.

[66] When Lamer J. in *Smith*, at p. 1073, wrote that a court must first consider “the particular circumstances of the case in order to determine what range of sentences would have been appropriate to punish, rehabilitate or deter this particular offender”, he was talking about how to assess gross disproportionality at the second stage of the analysis — not how to conduct a sentencing hearing. He did not say that setting the fit and proportionate sentence at the first stage could involve a “range of sentences” as urged upon us by some interveners. Even reasonably foreseeable offenders, for whom there is greater latitude, call for careful calibration of discretion and as specific a sentence as required in a traditional and typical sentencing proceeding.

(2) Sentencing Reasonably Foreseeable Offenders and the Use of Reasonable Hypotheticals

[67] In other cases, the courts will be asked to consider the circumstances of reasonably foreseeable offenders not before them. In these cases, the constitutional analysis will be supplemented by or conducted on the basis of reasonable hypothetical scenarios that raise realistic issues about the scope of the mandatory minimum and its

application to everyone. Justices O’Ferrall and Wakeling propose that this Court abandon the use of reasonably foreseeable scenarios. In my opinion, this proposal runs counter to the jurisprudence of this Court and lacks merit. In this section, I explain that reasonably foreseeable hypotheticals are an accepted and appropriate tool to identify the scope and thus explore the constitutionality of an impugned provision. I address how to construct a reasonably foreseeable hypothetical; discuss why personal characteristics, including Indigeneity, are not excluded from consideration; and suggest that the hypothetical should be reasonable and is best tested through the adversarial process.

(a) *Reasonably Foreseeable Hypotheticals Are an Accepted and Appropriate Analytical Tool*

[68] As s. 12 jurisprudence has developed, this Court has consistently accepted that punishments can be impugned not only on the basis that they infringe the s. 12 rights of a particular offender, but also on the basis that they infringe those of a reasonably foreseeable offender. Beginning in *Smith*, this Court established the use of a reasonable hypothetical in assessing whether a punishment is grossly disproportionate. The majority in that case struck down a mandatory minimum of seven years for importing narcotics because such a sentence would be grossly disproportionate if applied to a hypothetical young person driving home to Canada with a small amount of marijuana.

[69] Since *Smith*, reasonable hypothetical situations have been either expressly used by this Court to invalidate sentencing provisions (see *Nur*, at paras. 82-83; *Lloyd*, at paras. 32-33; *Boudreault*, at para. 55), or affirmed as a matter of principle where they were not relied upon (see *Goltz*, at p. 515; *Morrisey*, at paras. 31 and 51-53; *Ferguson*, at para. 30; *Bissonnette*, at para. 63). Importantly, in the three cases in which this Court has struck down mandatory minimums, it has done so on the basis of a reasonable hypothetical offender (*Smith*, *Nur* and *Lloyd*).

[70] Beyond s. 12, the assessment of a law's scope based on reasonable hypotheticals is an accepted analytical inquiry in *Charter* challenges more generally. They have been relied upon as an analytical tool in s. 7 jurisprudence, resulting in successful *Charter* challenges (*R. v. Heywood*, [1994] 3 S.C.R. 761, at p. 799; *R. v. Appulonappa*, 2015 SCC 59, [2015] 3 S.C.R. 754, at paras. 29-30 and 72-75; *R. v. Ndhlovu*, 2022 SCC 38, at paras. 87-88).

[71] This Court in *Nur* set out certain binding principles about the use of reasonable hypotheticals. Chief Justice McLachlin said the use of reasonable hypotheticals was “at the heart of th[e] case” (para. 47) and placed them at the protected core of the s. 12 analysis. This Court firmly and clearly rejected the argument that reasonable hypotheticals should be abandoned and that the primary or exclusive focus ought to be on the offender before the court (paras. 48-64; see also C. Fehr, “Tying Down the Tracks: Severity, Method, and the Text of Section 12 of the Charter” (2021), 25 *Can. Crim. L.R.* 235, at p. 240). Even as early as 2015, it was recognized that

“excluding consideration of reasonably foreseeable applications of a mandatory minimum sentencing law would run counter to the settled authority of this Court and artificially constrain the inquiry into the law’s constitutionality” (*Nur*, at para. 49).

[72] Foreclosing the consideration of the reasonably foreseeable impacts of an impugned law “would dramatically curtail the reach of the *Charter* and the ability of the courts to discharge their duty to scrutinize the constitutionality of legislation and maintain the integrity of the constitutional order” (*Nur*, at para. 63). Because it is the “nature of the law” that is at issue, not the claimant’s status, it suffices for a claimant to allege unconstitutional effects in their case or on third parties (para. 51, quoting *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295, at p. 314). In crafting reasonable hypotheticals, a court is examining the scope of the impugned law and “not merely the justice of a particular sentence imposed by a judge at trial” (*Goltz*, at p. 503; see *Big M Drug Mart*, at p. 314; *Nur*, at para. 60). Further, “[i]f the only way to challenge an unconstitutional law were on the basis of the precise facts before the court, bad laws might remain on the books indefinitely” (*Nur*, at para. 51).

[73] The effective use of judicial resources also favours the use of reasonable hypotheticals as they allow one judge to consider an impugned mandatory minimum from multiple vantage points and they help reduce the number of challenges that will be heard in or among jurisdictions. Importantly, they promote the rule of law by underscoring how no one should be convicted or sentenced under an unconstitutional law (*Lloyd*, at para. 16). Hence, “allowing accused to employ reasonable hypothetical

scenarios is more likely to further the purpose of the *Charter*: protecting citizens from abuse of state power” (Fehr, at p. 236).

[74] It is for these reasons that, to repeat McLachlin C.J., “[t]his Court has consistently held that a challenge to a law under s. 52 of the *Constitution Act, 1982* does not require that the impugned provision contravene the rights of the claimant” (*Nur*, at para. 51; see also *Goltz*, at pp. 503-4). Under well-established case law, there is no need to wait for a “real” offender to appear to impugn the constitutionality of a provision of general application.

[75] Justices O’Ferrall and Wakeling’s desire to excise the use of reasonably foreseeable scenarios from this Court’s s. 12 framework is thus completely contrary to both precedent and principle. They rely upon certain parts of dissenting judgments from this Court and fail to follow the repeated authoritative statements that reasonable hypotheticals are an established device courts use to measure whether a legislatively mandated sentence is cruel and unusual punishment under s. 12 (*S. Chaster*, “Cruel, Unusual, and Constitutionally Infirm: Mandatory Minimum Sentences in Canada” (2018), 23 *Appeal* 89, at p. 96).

(b) *Defining the Parameters of a Reasonably Foreseeable Hypothetical*

[76] A reasonable hypothetical scenario needs to be constructed with care. While it may be tempting to allow the word “hypothetical” to overwhelm, it is the *reasonableness* of the scenario that must be underscored (*Nur*, at para. 57). While

earlier case law did not often explain or explore what went into the construction of a reasonable hypothetical, or tended to consider hypotheticals more narrowly and at a higher level of generality, the more recent analytical approach in *Nur*, *Lloyd*, and *Boudreault* is broader and permits more detailed hypotheticals.

[77] The characteristics of a reasonable hypothetical include the following:

- (i) The hypothetical must be reasonably foreseeable;
- (ii) Reported cases may be considered in the analysis;
- (iii) The hypothetical must be reasonable in view of the range of conduct in the offence in question;
- (iv) Personal characteristics may be considered as long as they are not tailored to create remote or far-fetched examples; and
- (v) Reasonable hypotheticals are best tested through the adversarial process.

(i) The Hypothetical Must Be Reasonably Foreseeable

[78] Throughout the case law there is a legitimate concern that the hypotheticals must be reasonable. They ought not to be “far-fetched or marginally imaginable cases”, nor should they be “remote or extreme examples” (*Morrissey*, at para. 30, quoting *Goltz*,

at pp. 506 and 515). In *Goltz*, the Court focussed on circumstances that “could commonly arise in day-to-day life” (p. 516).

[79] Greater flexibility was introduced in *Nur* when the Court held that the appropriate approach is to construct a reasonably foreseeable offender with characteristics and in circumstances that are reasonably foreseeable based on judicial experience and common sense (para. 62). *Nur*’s selection and use of reasonable foreseeability is significant and goes beyond whether a projected application of the law is common or likely:

The reasonable foreseeability test is not confined to situations that are likely to arise in the general day-to-day application of the law. Rather, it asks what situations may reasonably arise. It targets circumstances that are foreseeably captured by the minimum conduct caught by the offence. Only situations that are “remote” or “far-fetched” are excluded . . . [para. 68]

[80] Thus, what must be considered is how the provision impacts other persons who might reasonably be caught by it (*Nur*, at para. 47) and the reasonably foreseeable situations in which the law may apply.

(ii) Reported Cases May Be Considered in the Analysis

[81] In defining the scope of the hypothetical scenario and the qualities of a reasonably foreseeable offender, courts may rely on reported cases, as this Court did in *Boudreault*. While marginal cases may be excluded (*Morrissey*), in *Nur*, the Court affirmed that reported cases can be used because they not only illustrate the range of

John Howard Society per Wagner CJ.
Found at **Tab 48, Volume 9** of
Google's BOA.

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

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



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

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



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

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



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



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

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

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

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



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

(a) *Meaning of “Imprisonment”*

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

F. Legislative History

FILED / PRODUIT

Date: August 22, 2025

CT- 2024-010

Grainne Gannon Dubroy for / pour
REGISTRAR / REGISTRAIRE

CT-2024-010

OTTAWA, ONT.

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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*.

BETWEEN:

COMMISSIONER OF COMPETITION

Applicant

-and-

GOOGLE CANADA CORPORATION AND GOOGLE LLC

Respondents

MEMORANDUM OF FACT AND LAW

(GOOGLE'S CONSTITUTIONAL CHALLENGE)

APPENDIX D: HISTORICAL FINES UNDER THE *COMPETITION ACT*

STATUTE	YEAR	PROVISION	MAXIMUM FINE
<i>Act for the Prevention and Suppression of Combinations formed in restraint of Trade</i> , S.C. 1889, c. 41	1889	1. Every person who conspires, combines, agrees or arranges with any other person, or with any railway, steamship, steamboat or transportation company, unlawfully,— (a) To unduly limit the facilities for transporting, producing, manufacturing, supplying, storing or dealing in any article or commodity which may be a subject of trade or commerce; or— (b) To restrain or injure trade or commerce in relation to any such article or commodity;— (c) To unduly prevent, limit, or lessen the manufacture or production of any such article or commodity, or to unreasonably enhance the price thereof; or— (d) To unduly prevent or lessen competition in the production, manufacture, purchase, barter, sale, transportation or supply of any such article or commodity, or in the price of insurance upon person or property,— Is guilty of a misdemeanour and liable, on conviction, to a penalty not exceeding four thousand dollars and not less than two hundred dollars, or to imprisonment for any term not exceeding two years; and if a corporation, is liable on conviction to a penalty not exceeding ten thousand dollars and not less than one thousand dollars.	\$10,000

STATUTE	YEAR	PROVISION	MAXIMUM FINE
<i>The Criminal Code, 55-56 Victoria, c.29</i>	1892	520. Every one is guilty of an indictable offence and liable to a penalty not exceeding four thousand dollars and not less than two hundred dollars, or to two years' imprisonment, and if a corporation is liable to a <i>penalty not exceeding ten thousand dollars</i> and not less than one thousand dollars, who conspires, combines, agrees or arranges with any other person, or with any railway, steamship, steamboat or transportation company, unlawfully— (a) to unduly limit the facilities for transporting, producing, manufacturing, supplying, storing or dealing in any article or commodity which may be a subject of trade or commerce; or (b) to restrain or injure trade or commerce in relation to any such article or commodity; or (c) to unduly prevent, limit, or lessen the manufacture or production of any such article or commodity, or to unreasonably enhance the price thereof; or (d) to unduly prevent or lessen competition in the production, manufacture, purchase, barter, sale, transportation or supply of any such article or commodity, or in the price of insurance upon person or property.	\$4,000 \$10,000 for corporations
<i>The Combines Investigation Act, 1910</i>	1910	23. Any person reported by a Board to have been guilty of unduly limiting the facilities for transporting, producing, manufacturing, supplying, storing or dealing in any article which may be a subject	\$1,000 per day

STATUTE	YEAR	PROVISION	MAXIMUM FINE
		of trade or commerce; or of restraining or injuring trade or commerce in relation to any such article; or of unduly preventing, limiting or lessening the manufacture or production of any such article; or of unreasonably enhancing the price thereof; or of unduly preventing or lessening competition in the production, manufacture, purchase, barter, sale, transportation, storage or supply of any such article, and who thereafter continues so to offend, is guilty of an indictable offence and shall be liable to a <i>penalty not exceeding one thousand dollars</i> and costs for each day after the expiration of ten days, or such further extension of time as in the opinion of the Board may be necessary, from the date of the publication of the report of the Board in <i>The Canada Gazette</i> during which such person so continues to offend.	
<i>Combines And Fair Prices Act, 1919</i>	1919	11. (2) If, upon the hearing of any investigation, the Board shall be of opinion that a combine exists or is being formed and that the person complained of is a party thereto, it may issue and cause to be served on such person an order requiring him to cease or desist from the acts or practices actually proved against him, whether or not these are the same as those alleged in the complaint, and which in whole or in part constitute the operations of a combine or the processes of the formation of such, and to cease and desist as well from any other act or practice in pursuance of the operations of such combined or the formation thereof, to the extent to which the Board shall deem it reasonable or necessary to prohibit. (3) Any person whom the Board shall have so ordered to cease or desist from	\$1,000 if treated as an indictable offence

STATUTE	YEAR	PROVISION	MAXIMUM FINE
		any act or practice in pursuance of the operations of a combine or the formation thereof, and who thereafter shall omit or refuse to desist from such act or practice, shall be guilty of an indictable offence and liable to a penalty not exceeding one thousand dollars and costs for each day after the expiration of ten days or such further extension of time as in the opinion of the Board may be reasonable or necessary, from the date of the service upon such person of the Board's order, or to imprisonment for a term not exceeding two years; and any director or officer of a company or corporation who shall assent to or acquiesce in such omission or refusal by his company or corporation shall be guilty of such offence personally, and cumulatively with his company or corporation and with his co-directors or associate officers.	
<i>Combines Investigation Act</i> , S.C. 1923 c. 9	1923	26. (a) Every one is guilty of an indictable offence and liable to a penalty not less exceeding ten thousand dollars or to two years imprisonment, or if a corporation to a penalty not exceeding twenty-five thousand dollars , who is a party or privy to or knowingly assists in the formation or operation of a combine as defined in this Act. (b) No prosecution for any offence under this section shall be commenced, otherwise than at the instance of the Solicitor General of Canada or of the Attorney General of a province.	\$10,000 \$25,000 for corporations
<i>Combines Investigation Act</i> , S.C. 1952, c. 314	1952	32. (1) Every person who is a party or privy to or knowingly assists in the formation or operation of a combine is guilty	In the discretion of the Court

STATUTE	YEAR	PROVISION	MAXIMUM FINE
		of an indictable offence and liable on conviction to a <i>fine in the discretion of the court</i> or to imprisonment for a term not exceeding two years or to both.	
<i>Combines Investigation Act</i> , S.C. 1960, c. 45	1960	32. (1) Every one who conspires, combines, agrees or arranges with another person (a) to limit unduly the facilities for transporting, producing, manufacturing, supplying, storing or dealing in any article, (b) to prevent, limit or lessen, unduly, the manufacture or production of an article, or to enhance unreasonably the price thereof, (c) to prevent or lessen, unduly, competition in the production, manufacture, purchase, barter, sale, storage, rental, transportation or supply of an article, or in the price of insurance upon persons or property, or (d) to restrain or injure trade or commerce in relation to any article, is guilty of an <i>indictable offence and is liable to imprisonment for two years.</i> 33. Every person who is a party or privy to or knowingly assists in, or in the formation of, a merger or monopoly is guilty of an <i>indictable offence and is liable to imprisonment for two years.</i> 33A. (1) Every one engaged in a business who	Imprisonment for two years

STATUTE	YEAR	PROVISION	MAXIMUM FINE
		(a) is a party or privy to, or assists in, any sale that discriminates to his knowledge, directly or indirectly, against competitors of a purchaser of articles from him in that any discount, rebate, allowance, price concession or other advantage is granted to the purchaser over and above any discount, rebate, allowance, price concession or other advantage that, at the time the articles are sold to such purchaser, is available to such competitors in respect of a sale of articles of like quality and quantity; (b) engages in a policy of selling articles in any area of Canada at prices lower than those exacted by him elsewhere in Canada, having the effect or tendency of substantially lessening competition or eliminating a competitor in such part of Canada, or designed to have such effect; or (c) engages in a policy of selling articles at prices unreasonably low, having the effect or tendency of substantially lessening competition or eliminating a competitor, or designed to have such effect, is guilty of an <i>indictable offence and is liable to imprisonment for two years.</i>	
<i>Combines Investigation Act</i> , R.S.C. 1970, c. C-23	1970	32. (1) Every one who conspires, combines, agrees or arranges with another person	Imprisonment for two years

STATUTE	YEAR	PROVISION	MAXIMUM FINE
		(a) to limit unduly the facilities for transporting, producing, manufacturing, supplying, storing or dealing in any article, (b) to prevent, limit or lessen, unduly, the manufacture or production of an article, or to enhance unreasonably the price thereof, (c) to prevent, or lessen, unduly, competition in the production, manufacture, purchase, barter, sale, storage, rental, transportation or supply of an article, or in the price of insurance upon persons or property, or (d) to restrain or injure trade or commerce in relation to any article, is guilty of an <i>indictable offence and is liable to imprisonment for two years.</i> 33. Every person who is a party or privy to or knowingly assists in, or in the formation of, a merger or monopoly is guilty of an indictable offence and is liable to imprisonment for two years. 34. (1) Every one engaged in a business who (a) is a party or privy to, or assists in, any sale that discriminates to his knowledge, directly or indirectly, against competitors of a purchaser of articles from him in that any discount, rebate, allowance, price concession or other advantage is granted to the purchaser over and above any discount, rebate, allowance, price concession or other	

STATUTE	YEAR	PROVISION	MAXIMUM FINE
		advantage that, at the time the articles are sold to such purchaser, is available to such competitors in respect of a sale of articles of like quality and quantity; (b) engages in a policy of selling articles in any area of Canada at prices lower than those exacted by him elsewhere in Canada, having the effect or tendency of substantially lessening competition or eliminating a competitor in such part of Canada, or designed to have such effect; or (c) engages in a policy of selling articles at prices unreasonably low, having the effect or tendency of substantially lessening competition or eliminating a competitor, or designed to have such effect, is guilty of an indictable offence and is liable to imprisonment for two years.	
<i>Competition Act</i> , R.S.C. 1985, c. C-34	1986	51. (1) Where, on application by the Director, the Tribunal finds that (a) one or more persons substantially or completely control, throughout Canada or any area thereof, a class or species of business, (b) that person or those persons have engaged in or are engaging in a practice of anti-competitive acts, and	No financial penalty was included in this version of the <i>Competition Act</i> . The only available fines were prohibition or divestiture orders.

STATUTE	YEAR	PROVISION	MAXIMUM FINE
		(c) the practice has had, is having or is likely to have the effect of preventing or lessening competition substantially in a market, the Tribunal may make an order prohibiting all or any of those persons from engaging in that practice. (2) Where, on a an application, under subsection (1), the Tribunal finds that a practice of anti-competitive acts has had or is having the effect of preventing or lessening competition substantially in a market and that an order under subsection (1) is not likely to restore competition in that market, the Tribunal may, in addition to or in lieu of making an order under subsection (1), make an order directing any or all the persons against whom an order is sought to take such actions, including the divestiture of assets or shares, as are reasonable and as are necessary to overcome the effects of the practice in that market. (3) In making an order under subsection (2), the Tribunal shall make the order in such terms as will in its opinion interfere with the rights of any person to whom the order is directed or any other person affected by it only to the extent necessary to achieve the purpose of the order.	
<i>Competition Act</i>, R.S.C. 1985, c. C-34 (in force from 2009-03-12 to 2010-03-11)	2009	79 (1) Where, on application by the Commissioner, the Tribunal finds that a) one or more persons substantially or completely control, throughout Canada or any area thereof, a class or species of business,	\$10,000,000, and for each subsequent order under the abuse of dominance provisions, an amount not exceeding \$15,000,000.

STATUTE	YEAR	PROVISION	MAXIMUM FINE
		b) that person or those persons have engaged in or are engaging in a practice of anti-competitive acts, and c) the practice has had, is having or is likely to have the effect of preventing or lessening competition substantially in a market, the Tribunal may make an order prohibiting all or any of those persons from engaging in that practice. (2) Where, on an application under subsection (1), the Tribunal finds that a practice of anti-competitive acts has had or is having the effect of preventing or lessening competition substantially in a market and that an order under subsection (1) is not likely to restore competition in that market, the Tribunal may, in addition to or in lieu of making an order under subsection (1), make an order directing any or all the persons against whom an order is sought to take such actions, including the divestiture of assets or shares, as are reasonable and as are necessary to overcome the effects of the practice in that market. (3) In making an order under subsection (2), the Tribunal shall make the order in such terms as will in its opinion interfere with the rights of any person to whom the order is directed or any other person affected by it only to the extent necessary to achieve the purpose of the order. (3.1) If the Tribunal makes an order against a person under subsection (1) or (2), it may also order them to pay, in any manner that the Tribunal specifies, an administrative monetary <i>penalty in an</i>	

STATUTE	YEAR	PROVISION	MAXIMUM FINE
		<i>amount not exceeding \$10,000,000 and, for each subsequent order under either of those subsections, an amount not exceeding \$15,000,000.</i>	
<i>Competition Act,</i> R.S.C. 1985, c. C-34 (in force between 2022-06-23 and 2023-06-22)	2022	79 (1) If, on application by the Commissioner or a person granted leave under section 103.1, the Tribunal finds that (a) one or more persons substantially or completely control, throughout Canada or any area thereof, a class or species of business, (b) that person or those persons have engaged in or are engaging in a practice of anti-competitive acts, and (c) the practice has had, is having or is likely to have the effect of preventing or lessening competition substantially in a market, the Tribunal may make an order prohibiting all or any of those persons from engaging in that practice. (2) Where, on an application under subsection (1), the Tribunal finds that a practice of anti-competitive acts has had or is having the effect of preventing or lessening competition substantially in a market and that an order under subsection (1) is not likely to restore competition in that market, the Tribunal may, in addition to or in lieu of making an order under subsection (1), make an order directing any or all the persons against whom an order is sought to take such actions, including the divestiture of assets or shares, as are	\$10,000,000 for a first order (or \$15,000,000 for each subsequent order) or equal to three times the value of the benefit derived from the anti-competitive practice, or, if that amount cannot be reasonably determined, 3% of the person's annual worldwide gross revenues

STATUTE	YEAR	PROVISION	MAXIMUM FINE
		reasonable and as are necessary to overcome the effects of the practice in that market. (3) In making an order under subsection (2), the Tribunal shall make the order in such terms as will in its opinion interfere with the rights of any person to whom the order is directed or any other person affected by it only to the extent necessary to achieve the purpose of the order. (3.1) If the Tribunal makes an order against a person under subsection (1) or (2), it may also order them to pay, in any manner that the Tribunal specifies, an administrative monetary penalty in an amount not exceeding the greater of (a) <i>\$10,000,000 and, for each subsequent order under either of those subsections, an amount not exceeding \$15,000,000, and</i> (b) <i>three times the value of the benefit derived from the anti-competitive practice, or, if that amount cannot be reasonably determined, 3% of the person's annual worldwide gross revenues.</i>	
<i>Competition Act, R.S.C. 1985, c. C-34</i>	2023	79 (1) On application by the Commissioner or a person granted leave under section 103.1, if the Tribunal finds that one or more persons substantially or completely control a class or species of business throughout Canada or any area of Canada, it may make an order prohibiting the person or persons from engaging in a practice or conduct if it finds that the person or persons have engaged in or are engaging in	\$25,000,000 for a first order (or \$35,000,000 for each subsequent order) or equal to three times the value of the benefit derived from the anti-competitive practice, or, if that amount cannot be reasonably determined, 3% of

STATUTE	YEAR	PROVISION	MAXIMUM FINE
		(a) a practice of anti-competitive acts; or (b) conduct (i) that had, is having or is likely to have the effect of preventing or lessening competition substantially in a market in which the person or persons have a plausible competitive interest, and (ii) the effect is not a result of superior competitive performance. (2) If, on an application under subsection (1), the Tribunal finds that a practice of anti-competitive acts amounts to conduct that has had or is having the effect of preventing or lessening competition substantially in a market in which the person or persons have a plausible competitive interest and that an order under subsection (1) is not likely to restore competition in that market, the Tribunal may, in addition to or in lieu of making an order under subsection (1), make an order directing any or all persons against whom an order is sought to take actions, including the divestiture of assets or shares, that are reasonable and necessary to overcome the effects of the practice in that market. (3) In making an order under subsection (2), the Tribunal shall make the order in such terms as will in its opinion interfere with the rights of any person to whom the order is directed or any other person affected by it only to the extent necessary to achieve the purpose of the order.	the person's annual worldwide gross revenues

STATUTE	YEAR	PROVISION	MAXIMUM FINE
		(3.1) If the Tribunal finds that a person has engaged in or is engaging in a practice of anti-competitive acts that amounts to conduct that has had or is having the effect of preventing or lessening competition substantially in a market in which the person has a plausible competitive interest and it makes an order against the person under subsection (1) or (2), it may also order them to pay, in any manner that it specifies, an administrative monetary penalty in an amount not exceeding the greater of (a) <i>\$25,000,000 and, for each subsequent order under either of those subsections, an amount not exceeding \$35,000,000, and</i> (b) <i>three times the value of the benefit derived from the anti-competitive practice, or, if that amount cannot be reasonably determined, 3% of the person's annual worldwide gross revenues.</i>	

PUBLIC

2236
257
JOSEPH POPE

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of Google's Motion Record.

ACTS

OF THE

PARLIAMENT OF THE DOMINION OF CANADA

RELATING TO

CRIMINAL LAW,

TO

PROCEDURE IN CRIMINAL CASES

AND TO

EVIDENCE.

Compiled from the Revised Statutes of Canada, which were issued under authority of the Act 49 Vict., Chap 4, and brought into force on 1st MARCH, 1887, under proclamation dated 24th January, 1887; with marginal references to corresponding Imperial Acts; also Acts passed since the Consolidation relating to above subjects.



OTTAWA:

PRINTED BY BROWN CHAMBERLIN, PRINTER TO THE QUEEN'S MOST
EXCELLENT MAJESTY.

1891.



CHAPTER 41.

An Act for the Prevention and Suppression of Combinations formed in restraint of Trade.

[Assented to 2nd May, 1889.]

WHEREAS it is expedient to declare the law relating to **conspiracies and combinations formed in restraint of trade** Preamble.
and to provide penalties for the violation of the same : Therefore Her Majesty, by and with the advice and consent of the Senate and House of Commons of Canada, declares and enacts as follows :—

1. Every person who conspires, combines, agrees or arranges with any other person, or with any railway, steamship, steamboat or transportation company, unlawfully,— Combining for the purpose of unlawfully—

(a.) To unduly limit the facilities for transporting, producing, manufacturing, supplying, storing or dealing in any article or commodity which may be a subject of trade or commerce ; or— Limiting facilities for transportation, &c.

(b.) To restrain or injure trade or commerce in relation to any such article or commodity ; or— Restraining commerce.

(c.) To unduly prevent, limit, or lessen the manufacture or production of any such article or commodity, or to unreasonably enhance the price thereof ; or— Limiting production, &c.

(d.) To unduly prevent or lessen competition in the production, manufacture, purchase, barter, sale, transportation or supply of any such article or commodity, or in the price of insurance upon person or property,— Hindering competition.

Is guilty of a misdemeanour and liable, on conviction, to a **penalty not exceeding four thousand dollars and not less than two hundred dollars, or to imprisonment for any term not exceeding two years ; and if a corporation, is liable on conviction to a penalty not exceeding ten thousand dollars and not less than one thousand dollars.** Punishment.

2. In any prosecution under this Act the person accused shall be a competent witness on his own behalf. Evidence.

3. Section one hundred and forty of "*The Criminal Procedure Act*," is hereby amended by adding to the list of offences therein mentioned the offences provided against in this Act. S. 140 of R.S. C., c. 174 amended.

Option as to
mode of trial.

4. Where an indictment is found against any person for offences provided against in this Act, the defendant or person accused shall have the option to be tried before the judge presiding at the court at which such indictment is found, or the judge presiding at any subsequent sitting of such court, or at any court where the indictment comes on for trial, without the intervention of a jury ; and in the event of such option being exercised the proceedings subsequent thereto shall be regulated in so far as may be applicable by "*The Speedy Trials Act*."

Appeal if case
is tried with-
out a jury.

5. An appeal shall lie from any conviction under this Act by the judge without the intervention of a jury to the highest court of appeal in criminal matters in the province where such conviction shall have been made, upon all issues of law and fact ; and the evidence taken in the trial shall form part of the record in appeal, and for that purpose the court before which the case is tried shall take note of the evidence and of all legal objections thereto.

How Act
shall be con-
strued.
R.S.C., c. 131.

6. The foregoing provisions of this Act shall be construed as if section twenty-two of "*The Trade Unions Act*" had not been enacted.

Found at **Tab H(2), Volume 7** of
Google's Motion Record.

THE

CRIMINAL CODE, 1892

55-56 VICTORIA, CHAP. 29

TOGETHER WITH

AN ACT TO AMEND THE CANADA TEMPERANCE AMENDMENT ACT, 1888
BEING CHAPTER 26 OF THE SAME SESSION



OTTAWA

PRINTED BY SAMUEL EDWARD DAWSON
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The conveyance of cattle.

514. No railway company within Canada whose railway forms any part of a line of road over which cattle are conveyed from one province to another province, or from the United States to or through any province, or from any part of a province to another part of the same, and no owner or master of any vessel carrying or transporting cattle from one province to another province, or within any province, or from the United States through or to any province, shall confine the same in any car, or vessel of any description, for a longer period than twenty-eight hours without unloading the same for rest, water and feeding for a period of at least five consecutive hours, unless prevented from so unloading and furnishing water and food by storm or other unavoidable cause, or by necessary delay or detention in the crossing of trains.

2. In reckoning the period of confinement, the time during which the cattle have been confined without such rest, and without the furnishing of food and water, on any connecting railways or vessels from which they are received, whether in the United States or in Canada, shall be included.

3. The foregoing provisions as to cattle being unladen shall not apply when cattle are carried in any car or vessel in which they have proper space and opportunity for rest, and proper food and water.

4. Cattle so unloaded shall be properly fed and watered during such rest by the owner or person having the custody thereof or, in case of his default in so doing, by the railway company, or owner or master of the vessel transporting the same, at the expense of the owner or person in custody thereof; and such company, owner or master shall in such case have a lien upon such cattle for food, care and custody furnished and shall not be liable for any detention of such cattle.

5. Where cattle are unladen from cars for the purpose of receiving food, water and rest the railway company then having charge of the cars in which they have been transported shall, except during a period of frost, clear the floors of such cars, and litter the same properly with clean sawdust or sand before reloading them with live stock.

6. Every railway company, or owner or master of a vessel, having cattle in transit, or the owner or person having the custody of such cattle, as aforesaid, who knowingly and wilfully fails to comply with the foregoing provisions of this section, is liable for every such failure on summary conviction to a penalty not exceeding one hundred dollars. R.S.C., c. 172, ss. 8, 9, 10 and 11.

Search of premises; penalty for refusing admission to peace officer.

515. Any peace officer or constable may, at all times, enter any premises where he has reasonable grounds for supposing that any car, truck or vehicle, in respect whereof any company or person has failed to comply with the provisions of the next preceding section, is to be found, or enter

enter on board any vessel in respect whereof he has reasonable grounds for supposing that any company or person has, on any occasion, so failed.

2. Every one who refuses admission to such peace officer or constable is guilty of an offence and liable, on summary conviction, to a penalty not exceeding twenty dollars and not less than five dollars, and costs, and in default of payment, to thirty days' imprisonment. R.S.C., c. 171, s. 12.

PART XXXIX.

OFFENCES CONNECTED WITH TRADE AND BREACHES OF CONTRACT.

516. A conspiracy in restraint of trade is an agreement between two or more persons to do or procure to be done any unlawful act in restraint of trade. Conspiracies in restraint of trade.

517. The purposes of a trade union are not, by reason merely that they are in restraint of trade, unlawful within the meaning of the next preceding section. R.S.C., c. 131, s. 22. What acts done in restraint of trade are not unlawful.

518. No prosecution shall be maintainable against any person for conspiracy in refusing to work with or for any employer or workman, or for doing any act or causing any act to be done for the purpose of a trade combination, unless such act is an offence punishable by statute. 53 V., c. 37, s. 19. Prosecution for conspiracy.

519. The expression "trade combination" means any combination between masters or workmen or other persons for regulating or altering the relations between any persons being masters or workmen, or the conduct of any master or workman in or in respect of his business or employment, or contract of employment or service; and the expression "act" includes a default, breach or omission. R.S.C., c. 173, s. 13. Interpretation. Compare R.S.C. c. 131, s. 2.

News 520
Substituted
1900 c. 46
s. 3.
x 1899 c. 46 s. 1.
520. Every one is guilty of an indictable offence and liable to a penalty not exceeding four thousand dollars and not less than two hundred dollars, or to two years' imprisonment, and if a corporation is liable to a penalty not exceeding ten thousand dollars and not less than one thousand dollars, who conspires, combines, agrees or arranges with any other person, or with any railway, steamship, steamboat or transportation company, unlawfully—
(a.) to unduly limit the facilities for transporting, producing, manufacturing, supplying, storing or dealing in any article or commodity which may be a subject of trade or commerce; or

Combinations in restraint of trade.

As to mode of trial & appeal vide 52 V. c. 41, ss. 4 & 5 which are repealed by this Act. vide p. 383 post v. s. 981 & Schedule Two.

Vide 1897 c. 16, s. 18 (b.) "The Customs Tariff 1897 as to powers of Governor in Council to order an inquiry, and to put the article on the free list or to reduce the duty."

(b.) to restrain or injure trade or commerce in relation to any such article or commodity; or

x 1899, c. 46, s. 1.

(c.) to ~~unduly~~ prevent, limit, or lessen the manufacture or production of any such article or commodity, or to ~~un-~~reasonably enhance the price thereof; or

(d.) to ~~unduly~~ prevent or lessen competition in the production, manufacture, purchase, barter, sale, transportation or supply of any such article or commodity, or in the price of insurance upon person or property. 52 V., c. 41, s. 1.

Criminal
breaches of
contract.

521. Every one is guilty of an indictable offence and liable on indictment or on summary conviction before two justices of the peace, to a penalty not exceeding one hundred dollars or to three months' imprisonment, with or without hard labour, who—

(a.) wilfully breaks any contract made by him knowing, or having reasonable cause to believe, that the probable consequences of his so doing, either alone or in combination with others, will be to endanger human life, or to cause serious bodily injury, or to expose valuable property, whether real or personal, to destruction or serious injury; or

(b.) being, under any contract made by him with any municipal corporation or authority, or with any company, bound, agreeing or assuming to supply any city or any other place, or any part thereof, with electric light or power, gas or water, wilfully breaks such contract knowing, or having reasonable cause to believe, that the probable consequences of his so doing, either alone or in combination with others, will be to deprive the inhabitants of that city or place, or part thereof, wholly or to a great extent, of their supply of power, light, gas or water; or

(c.) being under any contract made by him with a railway company, bound, agreeing or assuming to carry Her Majesty's mails, or to carry passengers or freight, or with Her Majesty, or any one on behalf of Her Majesty, in connection with a Government railway on which Her Majesty's mails, or passengers or freight are carried, wilfully breaks such contract knowing, or having reason to believe that the probable consequences of his so doing, either alone or in combination with others, will be to delay or prevent the running of any locomotive engine, or tender, or freight or passenger train or car, on the railway.

2. Every municipal corporation or authority or company which, being bound, agreeing or assuming to supply any city, or any other place, or any part thereof, with electric light or power, gas or water, wilfully breaks any contract made by such municipal corporation, authority, or company, knowing or having reason to believe that the probable consequences of its so doing will be to deprive the inhabitants of that city or place or part thereof wholly, or to a great extent, of their supply of electric light or power, gas or water, is liable to a penalty not exceeding one thousand dollars.

3.

3. Every railway company which, being bound, agreeing or assuming to carry Her Majesty's mails, or to carry passengers or freight, wilfully breaks any contract made by such railway company, knowing or having reason to believe that the probable consequences of its so doing will be to delay or prevent the running of any locomotive engine or tender, or freight or passenger train or car on the railway is liable to a penalty not exceeding one hundred dollars

4. It is not material whether any offence defined in this section is committed from malice conceived against the person, corporation, authority or company with which the contract is made or otherwise. R.S.C., c. 173, ss. 15 and 17.

522. Every such municipal corporation, authority, or company, shall cause to be posted up at the electrical works, gas works, or water-works, or railway stations, as the case may be, belonging to such corporation, authority or company, a printed copy of this and the preceding section in some conspicuous place, where the same may be conveniently read by the public; and as often as such copy becomes defaced, obliterated or destroyed shall cause it to be renewed with all reasonable despatch.

Posting up
copies of pro-
visions re-
specting cri-
minal bre-
aches of con-
tract; defac-
ing same.

2. Every such municipal corporation, authority or company which makes default in complying with such duty is liable to a penalty not exceeding twenty dollars for every day during which such default continues.

3. Every person unlawfully injuring, defacing or covering up any such copy so posted up is liable, on summary conviction, to a penalty not exceeding ten dollars. R.S.C., c. 173, s. 19.

523. Every one is guilty of an indictable offence and liable, on indictment or on summary conviction before two justices of the peace, to a fine not exceeding one hundred dollars or to three months' imprisonment with or without hard labour who, wrongfully and without lawful authority, with a view to compel any other person to abstain from doing anything which he has a lawful right to do, or to do anything from which he has a lawful right to abstain—

(a.) uses violence to such other person, or his wife or children, or injures his property; or

(b.) intimidates such other person, or his wife or children, by threats of using violence to him, her or any of them, or of injuring his property; or

(c.) persistently follows such other person about from place to place; or

(d.) hides any tools, clothes or other property owned or used by such other person, or deprives him of, or hinders him in, the use thereof; or

(e.) with one or more other persons, follows such other person, in a disorderly manner, in or through any street or road; or

(f.)

*"at the option of the
accused"
1905, c. 9, s. 2.

Intimidation.
*Certain persons not
to act as magistrates
Vide R.S.C. c. 173.
s. 12, subs. 5 which
is repealed by
Crim. Code s. 981
and Schedule Two.

(f.) besets or watches the house or other place where such other person resides or works, or carries on business or happens to be. R.S.C., c. 173, s. 12.

Intimidation of any person to prevent him from working at any trade.

524. Every one is guilty of an indictable offence and liable to two years' imprisonment who, in pursuance of any unlawful combination or conspiracy to raise the rate of wages, or of any unlawful combination or conspiracy respecting any trade, business or manufacture, or respecting any person concerned or employed therein, unlawfully assaults any person, or, in pursuance of any such combination or conspiracy, uses any violence or threat of violence to any person, with a view to hinder him from working or being employed at such trade, business or manufacture. R.S.C., c. 173, s. 9.

Intimidation of any person to prevent him dealing in wheat, &c.; unlawfully preventing seamen from working.

525. Every one is guilty of an indictable offence and liable, on indictment or on summary conviction before two justices of the peace, to a fine not exceeding one hundred dollars, or to three months' imprisonment with or without hard labour, who—

(a.) beats or uses any violence or threat of violence to any person with intent to deter or hinder him from buying, selling or otherwise disposing of any wheat or other grain, flour, meal, malt or potatoes or other produce or goods, in any market or other place; or

(b.) beats or uses any such violence or threat to any person having the charge or care of any wheat or other grain, flour, meal, malt or potatoes, while on the way to or from any city, market, town or other place with intent to stop the conveyance of the same; or

(c.) by force or threats of violence, or by any form of intimidation whatsoever, hinders or prevents or attempts to hinder or prevent any seaman, stevedore, ship carpenter, ship labourer or other person employed to work at or on board any ship or vessel, or to do any work connected with the loading or unloading thereof, from working at or exercising any lawful trade, business, calling or occupation in or for which he is so employed; or with intent so to hinder or prevent, besets or watches such ship, vessel or employee; or

(d.) beats or uses any violence to, or makes any threat of violence against, any such person with intent to hinder or prevent him from working at or exercising the same, or on account of his having worked at or exercised the same. R.S.C., c. 173, s. 10; 50-51 V., c. 49.

Intimidation of any person to prevent him bidding for public lands.

526. Every person is guilty of an indictable offence and liable to a fine not exceeding four hundred dollars, or to two years' imprisonment, or to both, who, before or at the time of the public sale of any Indian lands, or public lands of Canada, or of any province of Canada, by intimidation, or illegal combination, hinders or prevents, or attempts to hinder or prevent, any person from bidding upon or purchasing any lands so offered for sale. R.S.C., c. 173, s. 14.

PART

Being of { 526-A. }
Trading { 526-B. } } Added by 1905, c. 9, s. 1.

PART XL.

Vide ss. 61-64.

ATTEMPTS—CONSPIRACIES—ACCESSORIES.

527. Every one is guilty of an indictable offence and liable to seven years' imprisonment who, in any case not hereinbefore provided for, conspires with any person to commit any indictable offence. *Conspiring to commit an indictable offence.*

528. Every one is guilty of an indictable offence and liable to seven years' imprisonment who attempts, in any case not hereinbefore provided for, to commit any indictable offence for which the punishment is imprisonment for life, or for fourteen years, or for any term longer than fourteen years. *Attempting to commit certain indictable offences. Vide s. 64 for definition of "attempt".*

529. Every one who attempts to commit any indictable offence for committing which the longest term to which the offender can be sentenced is less than fourteen years, and no express provision is made by law for the punishment of such attempt, is guilty of an indictable offence and liable to imprisonment for a term equal to one-half of the longest term to which a person committing the indictable offence attempted to be committed may be sentenced. *Attempting to commit other indictable offences. X X X*

530. Every one is guilty of an indictable offence and liable to one year's imprisonment who attempts to commit any offence under any statute for the time being in force and not inconsistent with this Act, or incites or attempts to incite any person to commit any such offence, and for the punishment of which no express provision is made by such statute. *Attempting to commit statutory offences.*

531. Every one is guilty of an indictable offence and liable to seven years' imprisonment who, in any case where no express provision is made by this Act for the punishment of an accessory, is accessory after the fact to any indictable offence for which the punishment is, on a first conviction, imprisonment for life, or for fourteen years, or for any term longer than fourteen years. *Accessories after the fact to certain indictable offences. Vide s. 63.*

532. Every one who is accessory after the fact to any indictable offence for committing which the longest term to which the offender can be sentenced is less than fourteen years, and no express provision is made for the punishment of such accessory, is guilty of an indictable offence and liable to imprisonment for a term equal to one-half of the longest term to which a person committing the indictable offence to which he is accessory may be sentenced. *Accessories after the fact to other indictable offences.*

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MLA 9th ed.

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AN EXAMINATION OF THE PROPOSED AMENDMENTS TO THE CANADIAN COMPETITION LAW: BILL C-91

INTRODUCTION

Recently, the Canadian Minister of Consumer and Corporate Affairs introduced Bill C-91 (the "Bill") into the House of Commons in an effort to amend Canada's competition laws.¹ The proposed amendments update the present Combines Investigation Act² in an attempt to create an effective and enforceable system governing competition and to underscore the need to expand on opportunities for competition in the Canadian marketplace.³ This article examines the Bill and its potential to resolve conflicts which presently exist among Canadian businesses. The first section reviews the background and history of earlier efforts to reform Canada's competition policy. The second section outlines major provisions of the Minister's Bill. Focus here is on the need for international competition, proper adjudication by a Competition Tribunal, decriminalization of all but conspiracy offenses, regulation of Crown corporations, and halting basic anti-competitive practices. The third section analyzes the amendments and discusses the benefits of incorporating them into law.

I. BACKGROUND AND HISTORY

Competition law in Canada has evolved over a period of

1. C-91, 33rd Parl., 1st Sess., 33-34 Eliz. 2, (1984-85) (Can.) (Intro. Dec. 17, 1985) [hereinafter cited as C-91]. Canada's competition laws are analogous to anti-trust laws in the United States. C. FLAVELL, CANADIAN COMPETITION LAW: A BUSINESS GUIDE xiii (1979) [hereinafter cited as FLAVELL, A BUSINESS GUIDE].

2. Combines Investigation Act, R.S., c. C-23 (1960), *amended by* ch. 76, 30th Parl., 1st Sess., 23-25 Eliz. 2, 1535 (1974-76).

3. See M. Cote, Remarks to the Press Regarding Competition Law Amendments 1-4 (Dec. 17, 1985) (speech made by Michel Cote, Minister of Consumer and Corporate Affairs of Canada, introducing Bill C-91 which is available under call number S-85-28) [hereinafter cited as Remarks to the Press].

approximately ninety years.⁴ In 1889, Canada's first Combines Investigation Act was incorporated into the Criminal Code.⁵ The Act addressed conspiracies and combines that "unduly prevented or limited competition" in production and commerce.⁶ In 1910, an "Act to Provide for the Investigation of Combines, Monopolies, Trusts and Mergers" was enacted to cure the deficiencies of the earlier Combines Investigation Act.⁷ This later Act was expanded to cover mergers and monopolies found to be detrimental to the interests of the public.⁸

By 1950 Canada had created a body of law for the investigation of anti-competitive behavior, whereby these laws allowed for the prosecution of combine offenses, as well as the ability to grant other special remedies when patents and custom duties were involved.⁹ Several years later, Canadian Criminal Code provisions relating to combines were consoli-

4. FLAVELL, A BUSINESS GUIDE, *supra* note 1, at 1-2. Canada's first Combines Investigation Act, enacted in 1889, was entitled "An Act for the Prevention and Suppression of Combinations Formed in Restraint of Trade." *Id.* It preceded any antitrust legislation in the United States. *Id.*

5. Campbell, *Canadian Combines Law: A Perspective on the Current Combines Investigation Act and Recent Case Law*, 5 N.C.J. INT'L L. & COM. REG. 57, 57 n.1 (1980) [hereinafter cited as *Canadian Combines Law*]. The Act of 1889 made it illegal to "conspire, combine, agree or arrange unlawfully" to unduly limit, prevent, lessen, or restrain activities involved with trade or commerce. *Id.*

6. *Id.*

7. *Id.* at 57. The procedure for investigation occurred when an application from six or more persons was made to a judge concerning the need for an investigation of alleged illegal combines. *Id.* The judge had the power to order an investigation. *Id.* at 57-58. If the judge found that the evidence warranted an investigation, an *ad hoc* board would be created to review the alleged violation and impose a fine on those parties involved in the combine. *Id.*

The Act of 1910 principally acted as a deterrent to combines and was supplemental to the Criminal Code which exacted penalties on the guilty parties. C. GOFF & C. REASONS, *CORPORATE CRIME IN CANADA: A CRITICAL ANALYSIS OF ANTI-COMBINES LEGISLATION* 54 (1978). The Act defined combines as:

any contract, agreement, arrangement or combination which has, or is designed to have, the effect of increasing or fixing the price or rental of any article of trade or commerce or . . . restricting competition to the detriment of consumers or producers of such article of trade or commerce . . . and also includes what is known as a trust, monopoly or merger.

Id.

8. FLAVELL, A BUSINESS GUIDE, *supra* note 1, at 2. This expansion, which took place between 1910-1925, defined illegal combines. *Id.*

9. See *Canadian Combines Law*, *supra* note 5, at 58-59 (discussing slow evolution of competition laws through 1960).

dated with the Combines Investigation Act.¹⁰ This did not fundamentally change the criminal basis of Canadian competition law, however, and most competition law problems continued to be addressed by penal solutions.¹¹

The current reform process of Canada's competition policy began in July, 1966.¹² The Canadian government initially requested the Economic Council of Canada to examine competition laws regarding combines, mergers, monopolies, and restraint of trade.¹³ The Council published a report which called for extensive revision of the Combines Investigation Act of 1960.¹⁴ Economic efficiency, as opposed to earlier concerns with criminality, was seen as the major foundation of future competition policy.¹⁵ Based on this report, the govern-

10. See *Canadian Combines Law*, *supra* note 5, at 59 (consolidation of combine offenses was due to duplications in Criminal Code).

11. See FLAVELL, A BUSINESS GUIDE, *supra* note 1, at 5 (stating that consolidation allowed new defenses for competitors as long as action did not unduly lessen competition). This slight detour from strict criminal law was an initial indication that the application of criminal law to fair competition in the marketplace was an outdated method of enforcement. *Id.*

12. See COMPETITION POLICY IN CANADA: STAGE II, BILL C-13 27 (J. Rowley & W. Stanbury eds. 1978) (reform needed due to economic and social developments) [hereinafter cited as COMPETITION POLICY]; see also FLAVELL, A BUSINESS GUIDE, *supra* note 1, at 6 (domestic economy jeopardized by domination of foreign firms). The Canadian government was concerned with corporate concentration among Canada's largest firms, many of which were foreign-owned. *Id.* The government recognized the need to deflate the rising oligopolistic nature of Canadian industries and sought to diffuse economic power by reforming Canada's competition laws. *Id.*

13. See COMPETITION POLICY, *supra* note 12, at 27 (report required of Economic Council); see also McDonald, *Canadian Competition Policy: Interim Report of the Economic Council of Canada*, 15 ANTITRUST BULLETIN 521, 521-22 (1970) (foundation for legislative program was based on governmental objective to protect public interest) [hereinafter cited as *Interim Report*].

14. See *Interim Report*, *supra* note 13, at 521 (*Interim Report on Competition Policy* published in Aug., 1969). The report broke new ground in its research on competition policy and stressed the particular needs of the Canadian economy. *Id.* at 522. The report's main goal was "the promotion of dynamic efficiency, flexibility, and good all-round performance in the Canadian economy." *Id.* at 523 n.2.

15. See *Interim Report*, *supra* note 13, at 523 (economic basis of report takes priority over political and social aspects). The report's proposal corresponds to five aspects of Canadian economic legislative policy: "full employment, a high rate of economic growth, reasonable stability of prices, a viable balance of international payments, and an equitable distribution of rising income." *Id.* at 523 n.2; see also FLAVELL, A BUSINESS GUIDE, *supra* note 1, at 6-7 (criminal law sanctions seen as burdensome under competition laws, the need to promote economic efficiency recognized). Subjecting certain activities, such as monopolies and mergers, to the

ment introduced the Competition Act of 1971 to revise its competition laws.¹⁶ Due to widespread criticism by the business community, however, the government decided to split the reform process into two stages.¹⁷

Stage I was conservatively packaged by the Department of Consumer and Corporate Affairs in 1973 and passed through the House of Commons in 1976.¹⁸ It provided for the revision and expansion of existing criminal provisions, allowed for civil review by an administrative tribunal, extended application of the Combines Investigation Act to include service industries, and established a framework for private civil damage actions.¹⁹ Although considered important changes, the most debatable provisions of the 1971 Competition Act were reserved for Stage II.²⁰

Stage II proposed a number of significant and controversial amendments to the Combines Investigation Act and reflected a general shift in the enforcement of the Act from criminal to civil law.²¹ The amendments specifically addressed monopoli-

realm of criminal law was found to be ineffective by the Economic Council. *Id.* at 7. The report recognized the need for partial decriminalization and urged review under civil legislation. *Id.* at 8.

16. See FLAVELL, A BUSINESS GUIDE, *supra* note 1, at 9 (introduction of Bill C-256 to replace Combines Investigation Act). Bill C-256 was introduced as the first Competition Act and attempted to implement the Economic Council's recommendations. *Id.*

17. See FLAVELL, A BUSINESS GUIDE, *supra* note 1, at 9-11 (Bill C-256 never passed first reading partially due to business community's view that represented it as unnecessary governmental intervention). The Bill opened the way for an appointed tribunal to investigate certain business practices that were not subject to review prior to this proposed legislation. *Id.* at 10. Due to tough standards of reform and intense criticism, the Bill was later redrafted into two phases. *Id.* at 11.

18. Stanbury & Reschenthaler, *Reforming Canadian Competition Policy: Once More Unto the Breach*, 5 CAN. BUS. L.J. 381, 383 (1981) [hereinafter cited as *Reforming Canadian Competition Policy*]. Stage I took the form of a series of amendments to the existing competition legislation. *Id.*

19. See FLAVELL, A BUSINESS GUIDE, *supra* note 1, at 11 (Stage I proposals for reform).

20. See *Reforming Canadian Competition Policy*, *supra* note 18, at 383 (Stage I entailed less controversial provisions raised earlier by Bill C-256). The more sensitive areas were reserved for further addition under Stage II. *Id.* at 383-84; see also *supra* note 16 and accompanying text (discussion of Bill C-256).

21. See Stanbury, *Dynamic Change and Accountability in a Canadian Market Economy: Summary and Critique*, 15 OSGOODE HALL L.J. 1, 47 (1977) (Skeoch and McDonald report providing proposals for Stage II and stressing the implemen-

zations, mergers, class actions, and the regulation of industries.²² Extensive changes proposed in early 1977 led to the withdrawal of the original bill and to the reintroduction of a second version of Stage II in November, 1977.²³ The revised bill provoked heavy debate and did not pass through Parliament.²⁴ Heavy lobbying from the business community resulted in the earlier Combines Investigation Act remaining intact except for the few changes that came into force under Stage I.²⁵

Canada's continued need to reform its outmoded competition policy led to the present legislation.²⁶ The proposal commenced with the Office of the Minister of Consumer and Corporate Affairs holding extensive consultations with business and legal communities, labor organizations, and consumers throughout the Canadian provinces.²⁷ This Bill is predicted to be more successful than previous attempts at legislation and has already gained the approval of the business community.²⁸

tation of civil procedures; advocating shift from criminal system to civil system) [hereinafter cited as *Dynamic Change*]. See generally Rochweg, *Proposed Stage II Amendments to Canadian Combines Legislation - Bill C-42*, 15 OSGOODE HALL L.J. 51 (1977) (summary of Stage II and proposed changes to Combines Investigation Act) [hereinafter cited as *Stage II Amendments*].

22. See *Stage II Amendments*, *supra* note 21, at 51-52 (specific matters left untouched by Stage I).

23. See *Canadian Combines Law*, *supra* note 5, at 60 (extensive changes proposed by initial Stage II and governmental turmoil led to reintroduction of second version of Stage II bill known as Bill C-13).

24. See *Reforming Canadian Competition Policy*, *supra* note 18, at 385-86 (Senate highly critical of revision causing premature withdrawal after its Third Session).

25. See *Reforming Canadian Competition Policy*, *supra* note 18, at 383-86 (Stage I passed; concerted opposition to reforms proposed in Stage II).

26. See *Canadian Government Unveils Proposal to Revamp Nation's Competition Laws*, [Jan.- June] 50 ANTITRUST & TRADE REG. REP. (BNA) No. 1246, 31 (Jan. 2, 1986) (most recent proposal to update Canada's competition laws) [hereinafter cited as *Canadian Government Unveils Proposal*]. The Combines Investigation Act continued to be seen as ineffective to deal with modern characteristics of the Canadian marketplace. *Id.*

27. Remarks to the Press, *supra* note 3, at 2.

28. *Canadian Government Unveils Proposal*, *supra* note 26, at 31-32. The Minister of Consumer and Corporate Affairs has indicated that a generally positive reaction by the business community to the proposed amendments presently exists. *Id.* However, support by the opposition parties in Parliament is still needed to secure quick passage of the Bill. *Id.*

Found at **Tab 75, Volume 14**
of Google's BOA.

R. v. Elliott

Ontario Judgments

Ontario Court of Appeal

Moss C.J.O., **Osler**, MacLennan, Garrow and MacLaren JJ.A.

January 23, 1905

[1905] O.J. No. 162 | 9 O.L.R. 648 | 9 C.C.C. 505

Rex v. Elliott

Note: The trial ruling is reproduced at paras. 8-37, and the Court of Appeal's substantive ruling begins at para. 38

Case Summary

Criminal Law — Combination in Restraint of Trade — Conspiracy to Prevent or Lessen Competition — Criminal Code, sec. 690, sub-sec. (d); sec. 930 — 52 Vict. ch. 41, sec. 5(D.).

Defendant was president and took an active interest in an association, one of the declared objects of which was the protection of its members who were dealers in coal, against the shipment of coal direct to consumers by producers. It was also formed to prevent members, including any local organization who had become members, from buying coal from any producer, who sold direct to consumers or to dealers who refused to maintain prices as fixed. When notified no member was permitted to purchase coal of any producer, etc., who sold direct to a consumer in any place where there was a member of the organization, or who sold to dealers who refused to maintain prices. For violations of these provisions, a claim for 50 cents a ton might be made for coal so irregularly sold, and if allowed and not paid by the defaulting member, after notice, any member dealing with the defaulter was liable to be expelled from the association. All these provisions and others having the same object were embodied in the printed constitution and bylaws of the organization, which were in force up to the time of the trial.

Evidence was given of sales having been refused to dealers, not members of the association, for that reason and that dealers could not become members as of right; that a list of members and non-members was published, the latter of whom were not allowed to purchase except at retail prices, and that the association was in effective and active operation according to its constitution and by-laws. By sec. 520, sub-sec. (d) of the Criminal Code, as amended, every one is guilty of an indictable offence, etc., who conspires, combines, agrees or arranges with any other person ... To unduly prevent or lessen competition in the production, manufacture, purchase, barter or sale, transportation or supply of any article or commodity which may be a subject of trade or commerce:

Held, that the defendant was rightly convicted of an offence under the sub-section, the

plain object of the association being to restrict and confine the sale of coal by retail to its own members, and to prevent anyone else from obtaining it for that purpose from the operators and shippers.

Held, also that, the offence being a continuing one, sec. 930 of the Code (if applicable to indictable offences) which limits the time for laying any information to within two years after the offence is committed did not apply.

Held, finally that a cross appeal by the Crown did not lie as sec. 5 of 52 Vict. ch. 41(D.), only gives an appeal from a conviction.

1 THIS was an appeal from the judgment of Meredith, J., at the trial.

2 The defendant was indicted and charged with offences under sub-sections (b), (c) and (d) of section 520 of the Criminal Code, 63 & 64 Vict., ch. 46(D.), and having elected to be tried without a jury, was tried at the Assizes in Brantford, on the 15th and 16th of April, 1903, before Meredith, J. [9 OLR Page649]

3 It appeared that the defendant was president of and took an active interest in the conduct of the affairs of "The Ontario Coal Association"; that that association had a formal constitution and by-laws, which declared that the object of the association was to protect its members against the shipment of coal direct to consumers by producers, miners, etc.: that any shareholder who had certain business facilities and was regularly engaged in the sale of coal was eligible for membership; that any organization of coal dealers was eligible for membership; that wholesale shippers might become honorary members; that charges, complaints and grievances were to be settled, in case amicable adjustment failed, by the executive board; that on notification, no member should buy coal of any producer, etc., who sold direct to any consumer in any town where there was a member, or to dealers who refused to maintain the prices fixed by the local organization; that any producer who did so, lost his standing in the association; that any member, doing business in the town where such sale was made, might claim fifty cents a ton on such sale; and if not paid by the offender, members were to be notified that he was not in good standing, and any member dealing with him after such notification might be expelled from the association; lists of members in good standing were to be published; operators and shippers not in good standing were to be so reported.

4 A list of members was published and distributed, as well as a "look-out list" addressed "To our wholesale friends;" of persons who were not regular dealers; according to the rules of the association, and sales to whom would cause injury and might result in trouble to the shipper.

5 There was evidence that coal dealers and shippers in Buffalo had refused to sell coal

wholesale friends," containing the names, according to the printed statement on the front page, of persons in various towns and cities in the Province "who are not regular dealers in coal according to the rules of eligibility of our association, and are not entitled to buy at wholesale under the rules of the trade; but who may seek to buy coal in carload lots at towns where our members are located; and sales made to them will cause an injury to our members and may result in trouble for the shipper. Our wholesale friends are requested to keep their list constantly on hand, as it will be a guide to them and a guard against irregular shipments;" etc.

53 There was evidence that coal-dealers and shippers in Buffalo, from where most of the anthracite coal used in the western part of the Province was procured, had refused to sell coal wholesale to persons in Ontario who were not members of the association, and for that reason; and that dealers in Ontario could not become members of the association as of right; and that at least one application had been refused, because the state of the coal business would not admit of additional competition; and also that persons on the "look out" list could not purchase except at retail or net ton prices from members of the association. In short, it was proved, perhaps unnecessarily, except for the purpose of shewing the continued existence of the agreement and of the objects of the association, as indicated by their constitution and by-laws, that it was in effective and active operation according to the terms therein set forth.

54 In Mr. Tremear's s useful edition of the Criminal Code, the various amendments of which section 520 has been the subject are well pointed out: p. 427.

55 As the section was originally framed, it simply imposed penalties in respect of a conspiracy to commit some unlawful act "unduly" in transactions of the nature of those mentioned in clauses (a), (c) and (d). What was or might be unlawful was left to be ascertained by the general law of the land on the subject, the limited scope of which, and the difficulty of its application, is well seen by such cases as *Mogul Steamship Co. v. McGregor, Gow & Co.*, [1892] A.C. 25, and *Bohn Manufacturing Co. v. W. G. Hollis*, 54 Minn. 223, and *Macauley Bros. v. Tierney*, 19 Rh. I. 255. [9 OLR Page661] When this was further qualified by the word "unduly," it might seem that Parliament had defeated its own object, whatever it may have been, and had made the section unintelligible and innocuous by attaching a penalty only to a conspiracy to do an unlawful act unduly.

56 The difficulty became partially evident to the legislators of 1899, when the word "unduly" was struck out of the sub-clauses (a), (c) and (d). This left the application of the general law untrammelled within its narrow limits; but in the session of 1900 Parliament shewed that it meant to go further, and did so, by striking the word "unlawfully" out of the section, and restoring the word "unduly" to the sub-clauses referred to. Thus we are no longer thrown back upon the general law to ascertain what is (a) an unlawful limitation of the facilities for transporting, etc., articles or commodities which may be the subject of trade or commerce; (c) unlawfully preventing the manufacture or production of such

article or commodity, or (d) unlawfully preventing or lessening competition in its production, purchase, etc. It is the conspiracy to do these things unduly which is now made unlawful and an offence within the meaning of the section. I agree with the construction which has been placed upon it by my learned brother Meredith in this respect, and the cases I have referred to are of no assistance, as they would not improbably have been different in their result had the law for the courts which decided them been like ours. What is "undue" with reference to the acts which are the subject of the conspiracy, combination, agreement, or arrangement is now a question of fact upon the circumstances of each particular case, and I am unable to say that my brother Meredith was wrong in holding that the conspiracy, or agreement, or combination, by whatever name it may be called, proved in the present case, was one to unduly prevent or lessen competition in the purchase, sale, or supply of anthracite coal, which is a subject of trade or commerce of vital necessity to every member of the community.

57 The right of competition is the right of every one, and Parliament has now shewn that its intention is to prevent oppressive and unreasonable restrictions upon the exercise of this right; that whatever may hitherto have been its full extent, it [9 OLR Page662] is no longer to be exercised by some to the injury of others. In other words, competition is not to be prevented or lessened unduly, that is to say, in an undue manner or degree, wrongly, improperly, excessively, inordinately, which it may well be in one or more of these senses of the word, if by the combination of a few the right of the many is practically interfered with by restricting it to the members of the combination.



58 The plain object of this association was to restrict and confine the sale of coal by retail to its own members, and to prevent any one else from obtaining it for that purpose from the operators and shippers.

59 That the laws of the association were in some, if not in large measure, effective in attaining this object by their pressure, as well upon the dealers in Buffalo, as upon those persons in this country who desired to procure coal, and the members of the association who infringed its rules, was amply shewn by the evidence.

60 It was contended that the combination was not, within the statute because it affected only the supply at the source in a foreign country, but that is not its whole scope or limit by any means. It strikes at competition in this country in the supply and sale of coal here, and it is immaterial that it affects the conduct of the foreign vendor also, when that has reference to and affects persons resident here: *State v. Lancashire Fire Ins. Co.* (1899), 66 Ark. 466, 477; and see *The People of the State of New York v. Sheldon* (1893), 139 N.Y. 251; 20 Am. & Eng. Ency., 2nd ed., 854, 855.

61 As regards the objection that the prosecution was too late, and is barred by section 930 of the Code, it may admit of doubt, whether that section can apply to a prosecution by indictment, but, if it does, the objection fails because the offence was a continuing

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1953 CarswellQue 16

Quebec Court of Queen's Bench [Appeal Side]

R. v. Eddy Match Co.

1953 CarswellQue 16, [1953] Q.J. No. 8, 109 C.C.C. 1, 18 C.R. 357, 20 C.P.R. 107

Eddy Match Company et al. v. The Queen

Bissonnette, McDougall, Gagne, Pratte and Casey JJ.

Judgment: November 30, 1953

Counsel: *H. Hansard, Q.C.* and *L. Gendron*, for accused corporations.
J.G. Ahern, Q.C., for the Crown.

Subject: Intellectual Property; Criminal; Property; Corporate and Commercial

Headnote

Trade and Commerce --- Combines and competition legislation — Competition offences

Trade and Commerce --- Combines and competition legislation — Investigation and prosecution — Evidence

Combine — Prosecution under The [Combines Investigation Act, R.S.C. 1927, c. 26](#), as amended — Trial by judge alone — Charge alleging formation or operation of a combine — Question whether charge irregular — Description of offence following wording of the statute — Words "formation or operation" constituting only one offence — Essential element of offence one of detriment to the public resulting from either formation or operation — Sufficiency of evidence to establish offence — Application of [s. 39A of The Combines Investigation Act](#), as enacted by 1949, 2nd Sess., c. 12, s. 3 — Retrospective effect of rules of evidence — Merger, trust or monopoly established — Accused convicted.

Accused corporations were charged with the formation or operation of a combine in the nature of a merger, trust or monopoly which operated or was likely to operate against the interest of the public contrary to The [Combines Investigation Act](#), as amended. The defence raised many points of law in connection with the prosecution including such matters as the regularity of the form of charge, the retrospective application of s. 39A of the Act and particularly in regard to the question whether the control exercised by the corporations had operated or was likely to operate to the detriment or against the interest of the public. Accused corporations maintained that control was exercised only to meet competition as it arose through competitors underselling at a low uneconomic price. The Crown maintained that it was exercised to eliminate all competition.

Held, the appeal should be dismissed and the conviction sustained.

1. Under The [Combines Investigation Act](#), Parliament sought to prevent an evil which might result from certain practices which operate or are likely to operate against the public interest. The words

of the statute are "which ... has operated or is likely to operate to the detriment or against the interest of the public ..."

2. The fundamental principle is that every one is entitled to the benefits that flow from free competition. Review of authorities. By enacting The [Combines Investigation Act](#) Parliament has given evidence of its acceptance of this fundamental principle. Only those which cause or are likely to cause detriment are forbidden.

3. Parliament has not enacted as a condition *sine qua non* that actual detriment be demonstrated. If it had intended to do so it would not have added the words "or is likely to". These words broaden the field of forbidden encroachments by bringing within that class those whose very nature creates a presumption that they will probably prejudice the public right.

Appeal by accused corporations from [13 C.R. 217](#), [104 C.C.C. 39](#), [17 C.P.R. 17](#), [1952 Can. Abr. 96](#).

The judgment of the Court was delivered by *Casey J.*:

1 These two appeals are from the conviction of the appellants on 29th October, 1952, on a charge reading as follows:

2 "That Eddy Match Company, Limited, Commonwealth Match Co. Ltd., Canada Match Co. Ltd., Federal Match Limited and Valcourt Company Ltd., all bodies corporate under the laws of Canada, between the 14th day of December, A.D. 1927 and the 8th day of September, A.D. 1950, at divers places in Canada, including the Province of Quebec and the District of Montreal, were parties or privies to or knowingly assisted in the formation or operation of a combine within the meaning of the [Combines Investigation Act](#), to wit: a merger, trust or monopoly which, during the said period, substantially or completely controlled throughout Canada, excluding Newfoundland, the class or species of business in which they were engaged, to wit: the business of producing, manufacturing, supplying or dealing in wooden matches, a commodity which may be and then was the subject of trade or commerce, which merger, trust or monopoly has operated or was likely to operate during the said period to the detriment or against the interest of the public, whether consumers, producers, or others", and from the sentences pronounced in consequence thereof.

3 Pursuant to the provisions of the Act under which they were charged ([The Combines Investigation Act](#), R.S.C. 1927, c. 26 with amendments to 1949, 10 Geo. VI, c. 12), they were tried before a judge alone (s. 39) whose judgment now in appeal concludes as follows:

Sans répéter les termes de l'acte d'accusation et des particularités versées au dossier, j'en arrive à la conclusion que la Couronne a fait la preuve nécessaire au soutien dudit acte d'accusation, et des faits allégués dans les particularités, et que les cinq corporations défenderesses; Eddy Match Co. Ltd., Commonwealth Match Co. Ltd., Canada Match Co. Ltd., Federal Match Limited et Valcourt Company Ltd., en regard de la preuve faite, ont commis l'offense prévue à art. 32, para. (1) de la Loi des Enquêtes sur les Coalitions, à savoir le chap. 26 des Statuts Révisés du Canada 1927 et ses amendements.

Je déclare, en conséquence, les dites corporations défenderesses et chacune d'elle coupables de ladite offense, et il est de mon devoir de les condamner selon qu'il est prévu au dit art. 32 le ladite Loi, et je les condamne comme suit:

SENTENCE

La defenderesse EDDY MATCH COMPANY LTD., a raison de l'offense criminelle commise par elle tel que susdit est condamnée a une amende de \$25,000

La defenderesse COMMONWEALTH Co. LTD., pour les memes motifs est condamnée a une amende de \$15,000

La defenderesse CANADA MATCH Co. LTD., pour les memes motifs est condamnée a une amende de \$10,000

La defenderesse FEDERAL MATCH LIMITED, pour les memes motifs est condamnée a une amende de \$10,000

La defenderesse VALCOURT COMPANY LTD., pour les memes motifs est condamnée a une amende de \$25,000

En outre desdites sentences, suivant les pouvoirs qui me sont conférés par la Loi, je condamne les corporations défenderesses susdites à payer les frais ou dépens subis au sujet de la présente poursuite et du jugement de culpabilité présentement prononcé, lesdits frais et dépens devant être payés par les corporations défenderesses dans les proportions suivantes:

EDDY MATCH COMPANY LTD. 25/85

COMMONWEALTH CO. LTD. 15/85

CANADA MATCH CO. LTD. 10/85

FEDERAL MATCH LIMITED 10/85

VALCOURT COMPANY LTD. 25/85

Lesdits frais comprendront une indemnité raisonnable pour perte de temps et advenant qu'il serait impossible aux parties de s'entendre quant à ladite indemnité ou pour toute autre question relative aux dits frais, la Cour réserve à la poursuite de faire application devant moi pour argument et adjudication à ce sujet.

4 Before discussing the reasoning which led to the conclusions above reproduced and the arguments that have been directed against it, it is necessary that the appellants be identified and that their existence be explained.

5 Prior to December 1927, the companies engaged in Canada in the manufacture of wooden matches, were World Match Corporation, controlled by Bryant and May of London; Canadian

Match Co., controlled by Bryant and May and Diamond Match, a foreign corporation; and The E.B. Eddy Co., a Canadian company controlled by interests other than those above mentioned. In December of 1927, appellant Eddy Match was incorporated for the purpose of taking over the business of Canadian Match and World Match and the match business of E.B. Eddy Co. It can be accepted that the amalgamation of the match business of these three companies had been accomplished prior to this date and that the new company, Eddy Match, was organized for the purpose of carrying on the businesses so amalgamated and the issued shares of its capital stock eventually found their way into the hands of Diamond Match Co. and Bryant and May or their nominees. It may also be accepted that when appellant Eddy Match Co. came into existence it was the only company in Canada engaged in the manufacture of wooden matches, exception made of the negligible competition offered by Aurora Match Co.

6 Shortly after Eddy Match went into operation negotiations for the acquisition of Aurora Match were commenced and in 1928 these negotiations were completed. Aurora Match thus eliminated Eddy Match was alone in the field.

7 In 1928 Columbia Match Company of Canada was incorporated. It commenced operations in 1929 and in February of 1932 it went into bankruptcy, its assets being acquired by Falkirk Co.

8 At about this time appellant Commonwealth Match Co. was incorporated and it immediately acquired from Falkirk Co. the assets of Columbia Match. During the period of 1932 to 1947, ownership of the issued shares of Commonwealth was vested in Bryant and May and Diamond Match. In 1947 these shares were transferred to appellant Valcourt with the result that Commonwealth became the wholly owned subsidiary of Valcourt, which in turn was the wholly owned subsidiary of Eddy Match.

9 In 1931, Canada Match Co. was incorporated as an independent manufacturer. It remained in active competition with Eddy Match and Commonwealth until December of 1936, at which time it was acquired by Eddy Match.

10 In 1936, Federal Match Co. Ltd., was incorporated and it operated in active competition until 1940 when it was acquired by Valcourt Co. Ltd.

11 Appellant Valcourt Co. Ltd. had been incorporated in 1937, and throughout the period covered by the charge was the wholly owned subsidiary of Eddy Match Co. In 1937 it acquired from Eddy Match the outstanding shares of Canada Match; in 1940, those of Federal Match, and in 1947, from the nominees of Bryant and May and Diamond Match, those of Commonwealth. This company acted only as a holding company and was never engaged in the production of matches.

12 With these facts in mind, attention may be given to the law involved — The [Combines Investigation Act](#), R.S.C. 1927, c. 26, as it existed when the charge was laid, that is, with amendments up to those of c. 12 of the Statutes of 1949. In particular we are concerned with ss. 2

62 Turning now to the main issue within the field of "detriment", the words of the Act with which we are particularly concerned are those which conclude s. 2(1); "which ... has operated or is likely to operate to the detriment or against the interest of the public ...".

63 Relying on *Weidman v. Shragge* (1912), 46 S.C.R. 1, 2 W.W.R. 330, 20 C.C.C. 117, 2 D.L.R. 734, 10 Can. Abr. 1155; *Container Materials Ltd. v. The King*, [1942] S.C.R. 147, 77 C.C.C. 129, [1942] 1 D.L.R. 529, Abr. Con. 951; *MacEwan v. Toronto General Trusts* (1917), 54 S.C.R. 381, 28 C.C.C. 387, 35 D.L.R. 435, 10 Can. Abr. 1158; *Rex v. Ash Temple Co.*, 8 C.R. 66, [1949] O.R. 315, 93 C.C.C. 267, 1949 Can. Abr. 87, and *Proprietary Articles Trade Association v. Atty.-Gen. for Can.*, [1931] A.C. 310, [1931] 1 W.W.R. 552, 55 C.C.C. 241, [1931] 2 D.L.R. 1, 10 Can. Abr. 1131, 1133, appellants state, and rightly so, that there can be no combine and in consequence, no offence, unless their control was acquired or exercised with resultant detriment, either actual or likely. They then examine that part of the judgment *a quo* which treats the question and finally state, as their minor premise (p. 47): "... that there is no evidence whatever of public detriment during the entire quarter century covered by the charge ..."; and again: "The fact is there was no public detriment". The conclusion of course is that there was no offence.

64 It is the minor premise that I cannot accept and it is to it that I now direct my attention.

65 The appellants concede (p. 49) that "the policy of the law has been stated by the Supreme Court of Canada to be the preservation of free competition." I do not quarrel with this statement but in dealing with a problem such as the present one, and at the risk of making a distinction without a difference, I prefer to take as my starting point the fundamental principle that everyone is entitled to the benefits that flow from free competition. This is what was stated or assumed in *R. v. Elliott* (1905), 9 O.L.R. 648, 9 C.C.C. 505 (Ont. C.A.), 10 Can. Abr. 1063; *Weidman v. Shragge*, *supra*; *Stinson-Reeb Builders Supply Co. v. The King*, [1929] S.C.R. 276, 52 C.C.C. 66, [1929] 3 D.L.R. 331, 10 Can. Abr. 1161 and *Container Materials Ltd. v. The King*, *supra*. From this it follows that anything which limits or restricts this freedom of competition is an encroachment on the public right.

66 By enacting The Combines Investigation Act, Parliament has given evidence of its acceptance of the fundamental principle. At the same time however, it has refused to label as an evil to be avoided, all encroachments on the public right. Only those which cause or are likely to cause detriment are forbidden. But Parliament has not enacted as a condition *sine qua non* that actual detriment be demonstrated. If it had intended to do so, it would not have added the words "or is likely to". These words broaden the field of forbidden encroachments by bringing within that class those whose very nature creates a presumption that they will probably prejudice the public right.

67 What we have here is the activity envisaged by s. 2(4) (b), — the control of a class of business; a control that, as revealed by the evidence, excluded for all practical purposes the possibility of any competition. Such a condition creates a presumption that the public is being deprived of all



the benefits of free competition and this deprivation, being the negation of the public right, is necessarily to the detriment or against the interest of the public.

68 This presumption however may be rebutted and it does not seem unreasonable to suggest that some "controls" might in exceptional circumstances be more advantageous to the public than if the business had been left free. But when faced with facts which disclose the systematic elimination of competition, the presumption of detriment becomes violent. In these circumstances, the burden of showing absence of detriment must surely rest on the shoulders of those against whom the presumption plays. Appellants made no defence and there is nothing in the record which comes to their aid.

69 But in this case there is more than the simple fact that appellants had complete control of the class of business in which they were engaged. There is uncontradicted evidence that the leading actor — Eddy Match — deliberately set out to eliminate competition as it arose; that because of its strength and resources it was able to do so; that each new subsidiary was given its role and played its part in the general plan and finally, that the five appellants, all competition eliminated, were able to give to the public the products that they chose to make available, at the price they chose to fix and through the channels they chose to use. All of this is discussed by the learned trial judge and by the parties under the headings of "Industrial Spying", "Fighting Brands", "Market Loading", "Price Agreements" and "Dealer Contracts".

70 Appellants dispose of this evidence by asserting that "they [the practices] were and are regularly employed in business competition throughout Canada" and by relying on the remarks of Mr. Justice Raney to the effect (*Rex v. Alexander Ltd.*, 57 C.C.C. 346, [1932] 2 D.L.R. 109, 10 Can. Abr. 1165), that unfair dealings (assuming these to be such) are criminal only if "prohibited with penal consequences".

71 Whether these acts are "prohibited with penal consequences" does not concern me. In fact, since the existence of this particular combine is not dependent on the criminality of the practices employed, I am prepared to concede that each of these practices, from this point of view, is indifferent.

72 The importance of these practices lies in the fact that they testify with great eloquence as to the power which appellants could and did exercise, as to their determination to be alone in the field, as to the helpless position of the public and, in short, as to the inevitability of the very evil which the Act seeks to prevent. Thus even if one cannot infer from the fact of complete control that there existed the likelihood of detriment to the public, this inference can and must be drawn from the acts that were done during the acquisition, development and exercise of that control. Making the necessary changes, one might well use the words of Mr. Justice Kerwin (*Container Materials Ltd. v. The King*, *supra*) to sum up this aspect of the case. At p. 159 (S.C.R.) he says:

Found at **Tab 33**,
Volume 4 of
Google's BOA.

1983 CarswellAlta 167
Supreme Court of Canada

Canadian National Transportation Ltd. v. Canada (Attorney General)

1983 CarswellAlta 320, 1983 CarswellAlta 167, [1983] 2 S.C.R. 206, [1984] 1
W.W.R. 193, 10 W.C.B. 357, 28 Alta. L.R. (2d) 97, 38 C.R. (3d) 97, 3 D.L.R.
(4th) 16, 49 A.R. 39, 49 N.R. 241, 76 C.P.R. (2d) 1, 7 C.C.C. (3d) 449, J.E. 83-975

**ATTORNEY GENERAL OF CANADA v. CANADIAN NATIONAL
TRANSPORTATION LTD. et al.; ATTORNEY GENERAL OF CANADA v. CANADIAN
PACIFIC TRANSPORT CO. et al. and ATTORNEY GENERAL for ONTARIO et al.**

Laskin C.J.C., Ritchie, Dickson, Beetz, Estey, McIntyre, and Lamer JJ.

Heard: September 23, 24, 1982

Judgment: October 13, 1983

Docket: 16998

Counsel: *J. J. Robinette, Q.C.*, and *D. H. Christie, Q.C.*, for appellant.
N. D. Mullins, Q.C., and *M. M. Szel*, for respondents Canadian Pacific and Paulley.
E. C. Chiasson, R. W. Lusk and *P. G. Foy*, for respondents Canadian National Transportation
Limited and Canadian National Railway Co.
W. Henkel, Q.C., and *N. D. Steed*, for intervenant Attorney General of Alberta.
J. Cavarzan, Q.C., for intervenant Attorney General of Ontario.
H. Brun, L. Pilette and *J.-F. Dionne*, for intervenant Attorney General of Quebec.
J. H. Evans and *C. Pardons*, for intervenant Attorney General of New Brunswick.
E. R. A. Edwards and *J. J. Arvay*, for intervenant Attorney General of British Columbia.
J. MacPherson, for intervenant Attorney General of Saskatchewan.

Subject: Intellectual Property; Public; Corporate and Commercial; Criminal; Property

Headnote

Statutes --- Interpretation — Extrinsic aids — Legislative history

Trade and Commerce --- Combines and competition legislation — Constitutional issues

**Trade and Commerce --- Combines and competition legislation — Investigation and
prosecution — Institution of proceedings**

Constitutional law — Enumeration in s. 92 — Administration of justice — Federal power over
"criminal procedure" superceding provincial power over "administration of justice" — Federal
Attorney General having authority to prosecute federal offences whether enacted under criminal
law power or other head of power such as trade and commerce.

Trade and commerce — Combines legislation — Constitutionality — Federal power over "criminal procedure" superceding provincial power over "administration of justice" — Federal Attorney General having authority to prosecute offences under Combines Investigation Act whether enacted under federal criminal law power or federal trade and commerce power.

The accused were charged with conspiracy to lessen competition in interprovincial transportation of general merchandise, contrary to the federal Combines Investigation Act. When the prosecutions were conducted by the Attorney General of Canada, the accused sought an order prohibiting the provincial court from proceeding. The application was initially dismissed, then granted on appeal on the basis the offence was enacted under the federal criminal law power pursuant to [s. 91\(27\) of the Constitution Act, 1982](#), with the province having exclusive authority to prosecute by virtue of s. 92(14). The federal Attorney General appealed.

Held:

Appeal allowed.

Per Laskin, C.J.C. (Ritchie, Estey, McIntyre, JJ. concurring):

[Section 92\(14\) of the Constitution Act, 1982](#), granting the provinces jurisdiction over the administration of justice, does not give the provinces exclusive power to prosecute offences created under the federal criminal law power. The federal criminal law power specifically includes procedure, which includes authority over prosecutions. This supercedes the provinces' general authority over administration of justice. It was a matter of convenience that the provinces continued to prosecute criminal offences after Confederation, confirmed by the [Criminal Code](#), but this did not cast any doubt on federal authority to invest and regulate provincial prosecutorial power to enforce the federal criminal law, or detract from its authority under the criminal law power. As such, the federal Attorney General has authority to prosecute offences under the Combines Investigation Act, whether the legislation rests on the criminal law power, as distinct from a [Criminal Code](#) offence, or on the trade and commerce power.

Per Dickson, J. (concurring in result) (Beetz and Lamer, JJ. concurring):

Section 92(14) gives the provinces jurisdiction to administer the criminal justice system, including authority to prefer indictments and supervise the conduct of criminal proceedings. Insofar as [s. 2 of the Criminal Code](#) gives the Attorney General of Canada authority to conduct prosecutions of offences resting solely on the federal criminal law power under s. 91(27), it is ultra vires. However, where the legislation being enforced depends on some other federal head of power, the federal Attorney General may prefer indictments and conduct proceedings. As the Combines Investigation Act is legislation pursuant to the federal trade and commerce power as well as the criminal law power, the federal Attorney General may prosecute its offences.

Table of Authorities

Cases considered:

Aetna Ins. Co. v. R., [1978] 1 S.C.R. 731, 34 C.C.C. (2d) 157, 30 C.P.R. (2d) 193, 75 D.L.R. (3d) 332, 20 N.S.R. (2d) 565, 15 N.R. 117 — referred to

Accordingly, I agree with the trial judge that even if the constitutional validity of the Combines Investigation Act depends on head 27 of s. 91 of the B.N.A. Act, it is within the legislative competence of Parliament as in s. 2 "Attorney General" (b) of the Code and s. 15(2) of the Combines Investigation Act to authorize the Attorney General of Canada to prefer indictments and have the conduct of prosecutions in respect of violations of that Act.

59 I should add that I find it unnecessary in this appeal to consider Martin J.A.'s observations on the peace, order and good government power dealt with by Pigeon J. in *Hauser* nor to expand on the trade and commerce power.

IX

60 Apart from the reasons in this court which I have produced, it is sufficient in my view to rely on the *Pelletier* case, the reasons of Spence J. in *Hauser* and the reasons of the Ontario Court of Appeal in the *Hoffman-LaRoche* case. The reasons and decisions to which I refer lead to the conclusion that this appeal should be allowed, the judgment of the Alberta Court of Appeal set aside and the questions posed for decisions should be answered in the affirmative. I would add that the reasons of Martin J.A. in *Hoffman-LaRoche* are in my view unassailable and, in themselves, would justify responding affirmatively to the federal claim of prosecutorial authority.

61 There will be no order as to costs either to or against the parties or to or against the intervenors.

Dickson J.:

62 Is the Attorney General of Canada constitutionally competent to prefer indictments and conduct proceedings in respect of alleged violations of the *Combines Investigation Act*, R.S.C. 1970, c. C-23, as amended? That is the narrow question raised by this appeal [reported at [1981] 2 W.W.R. 701, 57 C.C.C. (2d) 119, 54 C.P.R. (2d) 189, 119 D.L.R. (3d) 547, 32 A.R. 422, reversed 18 Alta. L.R. (2d) 223, [1982] 2 W.W.R. 673, 27 C.R. (3d) 138, 66 C.C.C. (2d) 241, 63 C.P.R. (2d) 113, 135 D.L.R. (3d) 89, 35 A.R. 132 (C.A.)]. Behind it, however, much broader questions are put in issue, touching on the fundamental principles that govern the division of powers between the federal and provincial authorities in the areas of criminal justice and economic regulation.

Background

63 On 5th November 1979, a federal combines investigation officer swore an information charging the respondents, and numerous other corporations and individuals, with having unlawfully conspired to prevent or lessen unduly competition in the interprovincial transportation of merchandise in shipments weighing up to 10,000 lbs. from points in British Columbia, Saskatchewan and Manitoba, contrary to s. 32(1)(c) [re-en. 1974-75-76, c. 76, s. 14(1)] of the Combines Investigation Act. On 9th September 1980 applications were made to the Court of Queen's Bench of Alberta for orders prohibiting the provincial court from continuing any

and hence s. 15(2) of the Combines Investigation Act and the relevant parts of s. 2 of the Criminal Code are ultra vires.

The Combines Investigation Act as Criminal Law

74 There is a long history of Canadian anti-combines legislation being sustained as criminal law. The original statute, passed in 1889, was entitled An Act for the Prevention and Suppression of Combines in Restraint of Trade, 1889 (Can.), c. 41. The statute was motivated by concern over the emergence in Canada of smaller versions of the huge trusts in the United States, through which a few personalities could control enormous financial empires. The combines problem was seen as one with strong moral overtones, and criminal sanctions were selected as the appropriate means for its control: see McDonald, "Criminality and the Canadian Anti-Combines Laws" (1965), 4 Alta. L. Rev. 67 at pp. 69-71. When the first Canadian Criminal Code was enacted in 1892 [1892 (Can.), c. 29], the prohibitions in the 1889 statute were included therein as s. 520. In 1910 Parliament enacted the Combines Investigation Act, 1910 (Can.), c. 9, which provided investigative machinery and empowered a board appointed by the minister to levy fines against individuals and companies whom the board found guilty of combines offences, and who "continued so to offend" (s. 23). None of these early statutes was challenged in the courts: see Hogg, Constitutional Law of Canada (1977), p. 282, and Hogg and Grover, "The Constitutionality of the Competition Bill", Can. Bus. L. J., Vol. 1 (1975-76), 197 at 202.

75 In 1919 a more ambitious scheme was enacted by the Combines and Fair Prices Act, 1919 (Can.), c. 45, and the Board of Commerce Act 1919, 1919 (Can.), c. 37. These statutes prohibited combinations which in the opinion of the Board of Commerce were detrimental to the public interest, and also included provisions directed at hoarding and unduly profiting from the necessities of life, which were defined as food, clothing and fuel. The board was empowered to determine when undue profits were being made, and could issue cease and desist orders which in effect fixed maximum prices. In *Re Bd. of Commerce Act, 1919 and Combines and Fair Prices Act, 1919*, [1922] 1 A.C. 191, [1922] 1 W.W.R. 20, 60 D.L.R. 513 (P.C.), these statutes were declared unconstitutional. The Privy Council, speaking through Viscount Haldane, rejected the peace, order and good government power on the basis that it was only available to meet emergency situations; the trade and commerce power because it had no independent content and could only be invoked as ancillary to other federal powers; and the criminal law power because it was available only where "the subject matter is one which by its very nature belongs to the domain of criminal jurisprudence" (pp. 198-99).

76 The year after the *Bd. of Commerce* decision Parliament enacted the Combines Investigation Act, 1923, 1923 (Can.), c. 9, which repealed the two 1919 statutes, and replaced them with a more modest scheme that prohibited combines in restraint of trade, but went no further. The new Act gave investigatory powers to a registrar and commissioners, but did not confer authority to issue cease and desist orders. In *Proprietary Articles Trade Assn. v. A.G. Can.*, [1931] A.C. 310, [1931]

1 W.W.R. 552, 55 C.C.C. 241, [1931] 2 D.L.R. 1 ("the *P.A.T.A.* case"), the Privy Council, now speaking through Lord Atkin, repudiated Viscount Haldane's "domain of criminal jurisprudence" theory, saying that federal criminal law jurisdiction was "not confined to what was criminal by the law of England or of any Province in 1867", and that "the power must extend to legislation to make new crimes" (p. 324). Lord Atkin also said that their Lordships wished to "dissociate themselves" from the *Bd. of Commerce* proposition that the trade and commerce power "could be invoked only in furtherance of a general power which Parliament possessed independently of it" (p. 326). Having found the new *Combines Investigation Act* valid under the criminal law power, Lord Atkin did not find it necessary to consider whether it could also be supported under the trade and commerce jurisdiction. He did say, however, that their Lordships wished to "guard themselves from being supposed to lay down that the present legislation could not be supported on that ground" (p. 326).

77 In 1935 the Dominion Trade and Industry Commission Act, 1935 (Can.), c. 59 was enacted. This Act established a new commission which was "charged with the administration of the *Combines Investigation Act*" (s. 13). The commission was also given "responsibility to recommend the prosecution of offences against Acts of the Parliament of Canada ... relating to commodity standards" (s. 15(1)). The commission received investigatory powers relating to both combines and commodity standards (ss. 15(2), 20). Section 14 gave the Governor in Council, on the advice of the commission, power to give advance clearance to agreements among businessmen regulating prices or production in any particular industry when the arrangement was not "detrimental" to the public interest.

78 In *Reference Re Dom. Trade and Indust. Comm. Act*, [1936] S.C.R. 379, 66 C.C.C. 177, [1936] 3 D.L.R. 607, varied on other grounds [1937] A.C. 405, [1937] 1 W.W.R. 333, 67 C.C.C. 342, (sub nom. *A.G. Ont. v. A.G. Can.; Reference re Dom. Trade and Indust. Comm. Act*) [1937] 1 D.L.R. 702 (P.C.), this court upheld the commission's investigatory powers relating to commodity standards under both the criminal law and trade and commerce powers (p. 382), and its investigatory powers in the combines field as criminal law (p. 383). The court held, however, that s. 14, which conferred the advance clearance powers, was ultra vires. Duff C.J.C. said, for the court, that an advance clearance power was not "necessarily incidental" to the criminal law aspect of the statute, and they could not be upheld under the trade and commerce head because it was not "in substance" confined to interprovincial trade (pp. 381-82). The Privy Council upheld the judgment of this court, except on a point not relevant here. The Judicial Committee expressly agreed with the reasoning of Duff C.J.C., saying the investigatory powers sections were "legitimate provisions for ascertaining whether criminal acts have been committed" (p. 416). The decision of this court with respect to the advance clearance powers was not appealed to the Privy Council.

79 Parliament also amended the Criminal Code in 1935 by making it an offence to charge one commercial purchaser higher prices than another, or to sell goods at unreasonably low prices for the purpose of destroying competition: 1935 (Can.), c. 56, s. 9, adding s. 498A to the Criminal Code, R.S.C. 1927, c. 36. This court and the Privy Council both upheld the new section of the

Code as criminal law: *A.G.B.C. v. A.G. Can.*; *Reference Re s. 498A of the Criminal Code*, [1936] S.C.R. 363, 66 C.C.C. 161, [1936] 3 D.L.R. 593, affirmed [1937] A.C. 368, [1937] 1 W.W.R. 317, 67 C.C.C. 193, [1937] 1 D.L.R. 688.

80 In 1951 Parliament prohibited resale price maintenance [1951 (Can.), c. 30, s. 1] and, again, this court upheld the new provision as criminal law: *R. v. Campbell*, [1968] 4 C.C.C. 333n, 58 D.L.R. (2d) 673n, affirming the judgment and reasons of the Ontario Court of Appeal reported at [1964] 2 O.R. 487, [1964] 3 C.C.C. 112, 46 D.L.R. (2d) 83. In 1952 Parliament added new sections to the Combines Investigation Act permitting courts hearing combines charges to make orders prohibiting the continuation of combines, or orders dissolving mergers, trusts or monopolies, such orders to be in addition to any other penalty the court might impose upon conviction: 1952 (Can.), c. 39, s. 3. These sections were upheld by this court under the criminal law power in *Goodyear Tire & Rubber Co. v. R.*, [1956] S.C.R. 303, 114 C.C.C. 380, 26 C.P.R. 1, 2 D.L.R. (2d) 11, affirming [1954] O.R. 377, 18 C.R. 245, 108 C.C.C. 321, 21 C.P.R. 18, [1954] 4 D.L.R. 61, which affirmed with a variation [1953] O.R. 856, 17 C.R. 252, 107 C.C.C. 88, 19 C.P.R. 75.

81 The foregoing survey shows that both this court and the Privy Council have consistently sustained anti-combines legislation as criminal law. The same may be said about the specific section in issue in the first constitutional question. Section 32(1) reads:

32(1) Every one who conspires, combines, agrees or arranges with another person

(a) to limit unduly the facilities for transporting, producing, manufacturing, supplying, storing or dealing in any product,

(b) to prevent, limit or lessen, unduly, the manufacture or production of a product, or to enhance unreasonably the price thereof,

(c) to prevent, or lessen, unduly, competition in the production, manufacture, purchase, barter, sale, storage, rental, transportation or supply of a product, or in the price of insurance upon persons or property, or

(d) to otherwise restrain or injure competition unduly,

is guilty of an indictable offence and is liable to imprisonment for five years or a fine of one million dollars or to both.

This section is the successor of s. 498 of the Criminal Code, 1927, which was sustained as criminal law in the *P.A.T.A.* case. The most recent affirmation is in *A.G. Can. v. Law Soc. of B.C.*; *Jabour v. Law Soc. of B.C.*, [1982] 2 S.C.R. 30, [1982] 5 W.W.R. 289, 19 B.L.R. 234, 37 B.C.L.R. 145, 137 D.L.R. (3d) 1, 66 C.P.R. (2d) 1, 43 N.R. 451 at 498:

Section 32 is criminal legislation, whatever basis other parts of the *C.I.A.* may have constitutionally.

82 Indeed all parties in this appeal agree that s. 32(1)(c) is intra vires as criminal law and I see no reason to disagree.

83 That, however, does not end the matter. There is no reason why an enactment which is valid as coming within one of the federal heads of power in [s. 91 of the Constitution Act, 1867](#), cannot also be valid by virtue of one or more additional federal heads of power. In most constitutional cases involving federal legislation, the issue is whether the impugned enactment is properly within federal or provincial law making authority. Once federal competence has been established under one [s. 91](#) power, it is little to the point whether the enactment might also have been supported under another federal head. In most cases to speculate about such further possible justifications would be to ignore the venerable principle of constitutional interpretation contained in Sir Montague Smith's admonition in *Citizens Ins. Co. of Can. v. Parsons* (1881), 7 App. Cas. 96 at 109 (P.C.), to judges attempting to construe the limits of [ss. 91](#) and [92](#):

In performing the difficult duty, it will be a wise course for those on whom it is thrown to decide each case which arises as best they can, without entering more largely upon an interpretation of the statute than is necessary for the decision of the particular question in hand.

84 It was this admonition, whose object Lord Atkin described at p. 3 [1931] 2 D.L.R. of the *P.A.T.A.* case as being "as far as possible to prevent too rigid declarations of the Court's from interfering with such elasticity as is given it in the written constitution", which restrained the Privy Council in that case from proceeding to consider whether the new [Combines Investigation Act](#) might also be supported under the trade and commerce jurisdiction, once it had been found to be valid criminal law.

85 This same restraint is found in the judgment of Estey J. in the *Jabour* case. Having reiterated the finding that [s. 32 of the Combines Investigation Act](#) is valid criminal law, Estey J. declined, at p. 43 [137 D.L.R. (3d)], to consider the appellant's submission that it could also be validated under the [s. 91\(2\)](#) trade and commerce power on the ground that, given the facts of the case, "the interpretation of [s. 32](#) will of course produce the same answer under Q. 1 whatever its constitutional base may be".

86 In view of this established policy of minimizing unnecessary constitutional pronouncements I attach little significance to the fact that in most cases courts have simply endorsed the *P.A.T.A.* decision that the [Combines Investigation Act](#) could be justified as criminal law. In the present case, however, in contrast to the situation in *Jabour*, I am of the opinion that the interpretation of [s. 32](#) will produce a *different* answer under Q. 1 depending on what its constitutional base may

Found at **Tab 31**,
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BOA.

1992 CarswellNS 15
Supreme Court of Canada

Canada v. Pharmaceutical Society (Nova Scotia)

1992 CarswellNS 15, 1992 CarswellNS 353, [1992] 2 S.C.R. 606, [1992] S.C.J. No. 67, 10 C.R.R. (2d) 34, 114 N.S.R. (2d) 91, 139 N.R. 241, 15 C.R. (4th) 1, 16 W.C.B. (2d) 460, 313 A.P.R. 91, 34 A.C.W.S. (3d) 1092, 43 C.P.R. (3d) 1, 74 C.C.C. (3d) 289, 93 D.L.R. (4th) 36, J.E. 92-1019, EYB 1992-67391

NOVA SCOTIA PHARMACEUTICAL SOCIETY, PHARMACY ASSOCIATION OF NOVA SCOTIA, LAWTONS DRUG STORES LIMITED, WILLIAM H. RICHARDSON, EMPIRE DRUGSTORES LIMITED, WOODLAWN PHARMACY LIMITED, NOLAN PHARMACY LIMITED, CHRISTOPHER D.A. NOLAN, BLACKBURN HOLDINGS LIMITED, WILLIAM G. WILSON, WOODSIDE PHARMACY LIMITED and FRANK FORBES v. R.

ATTORNEY GENERAL FOR ONTARIO and
ATTORNEY GENERAL FOR ALBERTA (Intervenors)

ASSOCIATION QUÉBÉCOISE DES PHARMACIENS PROPRIÉTAIRES, CUMBERLAND DRUGS (MERIVALE) LTD., KANE'S SUPER DRUGMART CORP. LTD., LES ENTREPRISES NORPHARM INC., ESCOMPTE CHEZ LAFORTUNE INC., FAMILI-PRIX INC., LE GROUPE JEAN COUTU (P.J.C.) INC., GROUPE PHARMACEUTIQUE FOCUS INC., LES MAGASINS KOFFLER DE L'EST INC., McMAHON ESSAIM INC., SUPER ESCOMPTE BROUILLET INC., B. MAYRAND INC., SUPERPHARM (MONTRÉAL) LTÉE, UNIPRIX INC., PIERRE BOSSÉ, FRANÇOIS-JEAN COUTU, CLAUDE GAGNON, GUY LANOUE, MICHEL LESIEUR, GUY-MARIE PAPILLON and JEAN-GUY PRUD'HOMME (Intervenors)

Lamer C.J.C., La Forest, L'Heureux-Dubé, Sopinka, **Gonthier**, Cory and Iacobucci JJ.

Heard: December 4, 1991

Judgment: July 9, 1992

Docket: Doc. 22473

Counsel: *Joel Fichaud, Harry Wrathall, Q.C.* and *Catherine Walker*, for appellants.
Michael R. Dambrot, Q.C., Calvin S. Goldman, Q.C. and *John S. Tyhurst*, for the Crown.
M. Philip Tunley and *David B. Butt*, for intervenor Attorney General for Ontario.
Bart Rosborough, for intervenor Attorney General for Alberta.
Yves Bériault and *Madeleine Renaud*, for intervenor Association québécoise des pharmaciens et al.

Reg. 26,823 (1984) Rules of the Supreme Court of Canada, SOR/83-74,

Rule 29(1) [rep. & sub. SOR/88-247, s. 10], (2)

Appeal from a judgment of the Nova Scotia Supreme Court, Appeal Division, 36 C.P.R. (3d) 173, 80 D.L.R. (4th) 206, 64 C.C.C. (3d) 129, 7 C.R.R. (2d) 352, 102 N.S.R. (2d) 222, 26 A.C.W.S. (3d) 663, setting aside a judgment of Roscoe J., 32 C.P.R. (3d) 259, 73 D.L.R. (4th) 500, 59 C.C.C. (3d) 30, 98 N.S.R. (2d) 296, 22 A.C.W.S. (3d) 779, 10 W.C.B. (2d) 578, declaring the provision of s. 32(1)(c) of the Competition Act (Can.) invalid, dismissed (Court File No. 22473).

Appeal from judgment reported at (1991), 64 C.C.C. (3d) 129, 102 N.S.R. (2d) 222, 279 A.P.R. 222, 80 D.L.R. (4th) 206, 36 C.P.R. (3d) 173, 7 C.R.R. (2d) 352 (C.A.), allowing Crown appeal of judgment quashing indictment under *Combines Investigation Act*, reported at (1990), 59 C.C.C. (3d) 30, 73 D.L.R. (4th) 500, 32 C.P.R. (3d) 259, 98 N.S.R. (2d) 296, 263 A.P.R. 296 (T.D.).

The judgment of the court was delivered by Gonthier J.:

I. Facts And Proceedings

1 The 12 appellants were indicted on May 31, 1990, with two counts of conspiracy to prevent or lessen competition unduly, contrary to s. 32(1)(c) of the *Combines Investigation Act*, R.S.C. 1970, c. C-23. Both counts related to the sale and offering for sale of prescription drugs and pharmacists' dispensing services between January 1, 1974 and June 16, 1986, for the first, and between July 1, 1976 and June 16, 1986, for the second. The trial was set to begin in October 1990.

2 On August 21, 1990, the appellants made a motion for an order to quash the indictment, on the basis that ss. 32(1)(c), 32(1.1) and 32(1.3) of the Act violated ss. 7, 11(a) and 11(d) of the *Canadian Charter of Rights and Freedoms* and were therefore invalid. The arguments raised revolved essentially on the issues of vagueness and mens rea. On September 5, 1990, Roscoe J. of the Nova Scotia Supreme Court, Trial Division, allowed the motion and quashed the indictment: (sub nom. *R. v. Nova Scotia Pharmaceutical Society*) (1990), 59 C.C.C. (3d) 30, 73 D.L.R. (4th) 500, 32 C.P.R. (3d) 259, (sub nom. *R. v. Nova Scotia Pharmaceutical Society (No. 2)*) 98 N.S.R. (2d) 296, 263 A.P.R. 296. The respondent appealed to the Nova Scotia Supreme Court, Appeal Division. On April 24, 1991, a unanimous bench (Clarke C.J.N.S., Jones and Hallett JJ.A.) allowed the appeal: (sub nom. *R. v. Pharmaceutical Society (Nova Scotia)*) (1991), 64 C.C.C. (3d) 129, 102 N.S.R. (2d) 222, 279 A.P.R. 222, 80 D.L.R. (4th) 206, 36 C.P.R. (3d) 173, 7 C.R.R. (2d) 352. A notice of appeal was filed in this court on May 22, 1991.

82 In the context of s. 32(1)(c), the process followed and the criteria used to arrive at a determination of "undueness" are questions of law and as such are reviewable by an appellate court. The application of this process and these criteria, that is the full inquiry, often involving complicated economic issues, into whether the impugned agreement was an undue restriction on competition, remains a question of fact. The general rule that appellate courts should be reluctant to venture into a re-examination of the factual conclusions of the trial judge applies with special force in a complex matter such as here.

83 The legal content of s. 32(1)(c), however, is not exhausted by a search for the meaning of unduly. Section 32(1)(c) must not be taken in a vacuum. Its interpretation is conditioned, first of all, by the purposes of the Act. Furthermore, its content is enriched by the rest of the section in which it is found and by the mode of inquiry adopted by courts as they have ruled under it. These are matters of law, pertaining to the determination of undueness under s. 32(1)(c), and as such most relevant. I will look at each in turn.

2. The Act, s. 32(1)(c) and Canadian Public Policy

84 At the outset, it must be noted that the Act is central to Canadian public policy in the economic sector, and that s. 32 is itself one of the pillars of the Act.

85 The history of competition legislation in Canada dates back to 1889, with the *Act for the Prevention and Suppression of Combinations formed in restraint of Trade*, S.C. 1889, c. 41 (hereinafter the *1889 Act*). In fact, the *1889 Act* came into force before the American *Sherman Act*, c. 647, 26 Stat. 209 (1890), codified as amended at 15 U.S.C. §§ 1-7, generally seen as the primogenitor of competition law. The *1889 Act* created in s. 1 the offence of "combining for the purpose of unlawfully hindering competition", in substance the direct ancestor to s. 32(1) of the Act.

86 The *1889 Act* was perhaps the first major foray by Parliament in the realm of economic policy. As B. Dunlop, D. McQueen and M. Trebilcock, *Canadian Competition Policy: A Legal and Economic Analysis* (Toronto: Canada Law Book, 1987), point out at p. 42, the common law of restraint of trade was very much anchored within a private law framework, and was not concerned with broader interests in the proper functioning of the economy. The *1889 Act* introduced these interests in Canadian law (see *Container Materials*, supra, at p. 152, per Duff C.J.C.).

87 The content of the *1889 Act* was progressively enlarged, until it grew into the current Act. In *City National Leasing Ltd. v. General Motors of Canada Ltd.*, [1989] 1 S.C.R. 641, 43 B.L.R. 225, 24 C.P.R. (3d) 417, 58 D.L.R. (4th) 255, 93 N.R. 326, 32 O.A.C. 332, Dickson C.J.C. wrote for the court at p. 676 [S.C.R.]:

From this overview of the *Combines Investigation Act* I have no difficulty in concluding that the Act as a whole embodies a complex scheme of economic regulation. The purpose of the Act is to eliminate activities that reduce competition in the market-place. The entire Act is geared to achieving this objective. The Act identifies and defines anti-competitive conduct. It establishes an investigatory mechanism for revealing prohibited activities and provides an extensive range of criminal and administrative redress against companies engaging in behaviour that tends to reduce competition.

The Act can thus be seen as a central and established feature of Canadian economic policy.

88 Section 32(1)(c) of the Act moreover is its oldest provision. Even today, it remains at the core of the criminal part of the Act. The prohibition of conspiracies in restraint of trade is the epitome of competition law, finding its place in every competition law, from §1 of the *Sherman Act* to art. 85 of the *Treaty establishing the European Economic Community*, [1957, 298 U.N.T.S. 11] (hereinafter *Treaty of Rome*). Section 32(1)(c) of the Act is not just another regulatory provision. It definitely rests on a substratum of values, a finding which must be kept in mind in the course of the vagueness analysis.

89 This court has made numerous remarks on the public policy interests underlying s. 32(1)(c) of the Act. These remarks, found in *Weidman*, *Stinson-Reeb*, *Container Materials*, and *Aetna Insurance*, supra, are perhaps best summarized in this passage from the majority judgment in *Howard Smith*, supra, at p. 411 [S.C.R.]:

The statute proceeds upon the footing that the preventing or lessening of competition is in itself an injury to the public. It is not concerned with public injury or public benefit from any other standpoint.

Considerations such as private gains by the parties to the agreement or counterbalancing efficiency gains by the public lie therefore outside of the inquiry under s. 32(1)(c). Competition is presumed by the Act to be in the public benefit. The only issue is whether the agreement impairs competition to the extent that it will attract liability.

90 The peculiar nature of the inquiry under s. 32(1)(c) of the Act becomes apparent when it is compared with § 1 of the *Sherman Act*. Since the inception of the *Sherman Act*, American antitrust law has developed the two paradigms of adjudication known as the "per se rule" and the "rule of reason". The former attaches consequences to precisely-defined acts, irrespective of surrounding circumstances, whereas the latter is more general and invites in-depth inquiry into the details of the operation. The distinction between the two is not airtight, as leading authors have shown (see P.E. Areeda, *Antitrust Law: An Analysis of Antitrust Principles and Their Application*, vol. 7 (Boston: Little, Brown & Co., 1987), at ¶ 1511, and P.E. Areeda and H. Hovenkamp, *Antitrust Law: An*

Analysis of Antitrust Principles and Their Application (1990 Supplement) (Boston: Little, Brown & Co., 1990).

91 Section 32(1)(c) of the Act lies somewhere on the continuum between a per se rule and a rule of reason. It does allow for discussion of the anti-competitive effects of the agreement, unlike a per se rule, which might dictate that all agreements that lessen competition attract liability. On the other hand, it does not permit a full-blown discussion of the economic advantages and disadvantages of the agreement, like a rule of reason would. Since "unduly" in s. 32(1)(c) leads to a discussion of the seriousness of the competitive effects, but not of all relevant economic matters, one may say that this section creates a partial rule of reason.

92 The public policy objectives of s. 32(1)(c) of the Act already offer a clear idea of what is meant by "unduly" lessening competition, and what kind of inquiry is mandated. In fact, s. 32(1)(c) embodies a general standard, much like art. 1053 of the *Civil Code of Lower Canada* or s. 219 of the *Criminal Code*, for that matter. It represents an intelligible principle, one that carries meaning and that has conceptual force. In all its generality, however, it cannot readily be applied to a factual situation to yield an answer. Few legal norms are so.

93 The accused may actually be favoured by having a clear statement of principle, inasmuch as it contains the "spirit" as well as the letter of the law. Even when considered without the rest of the Act and case law, I would be inclined to say that s. 32(1)(c) of the Act is sufficiently precise to meet the constitutional standard. It outlines an area of risk, agreements that lessen or prevent competition, and imposes some boundaries on enforcement discretion, inasmuch as courts will scrutinize the impact of the agreement on competition to see if it runs against our public policy of free competition.

3. The Content of the Inquiry under s. 32(1)("c") of the Act

94 In addition, s. 32(1)(c) is made even more precise when one considers the content of the inquiry it mandates.

95 Since the few cases that have been considered by this court always involved agreements where the effects on competition were easily ascertainable, this court has never had the opportunity to consider the process whereby the undueness of the restriction on competition is assessed. In the context of this *Charter* inquiry into the alleged vagueness of s. 32(1)(c) of the Act, a survey of the rest of the section, together with lower court decisions and doctrinal writings, will show that adjudication under s. 32(1)(c) follows a definite process that eliminates any vagueness that might remain.

96 First of all, there are two major elements to this inquiry, that is (1) the structure of the market, and (2) the behaviour of the parties to the agreement. As a preliminary step, definition of the relevant market is required. Many decisions have explicitly adopted this approach (*J.W. Mills*

ECONOMIC COUNCIL OF CANADA

Found at **Tab H(9), Volume 8** of
Google's Motion Record.

Interim Report on Competition Policy



July 1969

BRIEF HISTORY AND ASSESSMENT
OF CANADIAN COMPETITION POLICY

In contrast both to the discretionary civil law approach which characterizes competition policies in Europe, and to the combination of civil and criminal law used in the United States, Canadian anticompetitive policy has always been framed in terms of criminal law. The power of the federal government to enact criminal legislation is firmly entrenched in the Constitution and has been upheld by various rulings of the Supreme Court. Among the consequences of the criminal law basis of anticompetitive policy are the requirements that offences be proceeded against whenever they are believed to have been discovered and that the Crown, to win its case, must prove guilt beyond a reasonable doubt. These requirements have hitherto considerably narrowed the scope in Canada for effective competition policy directed towards economic ends.

In tracing the historical evolution of the policy, the discussion here will touch only lightly on developments prior to 1950, the history of that period having been well summarized in the Report of the MacQuarrie Committee. Much of the Chapter will be given over to an account of changes in the legislation since the MacQuarrie Report, while in the concluding section, a brief assessment of the effectiveness of the legislation will be presented. A more detailed history and assessment of Canadian competition policy will appear in a special study commissioned by the Economic Council, to be published at a later date.[1]

Basic Legislative Provisions to 1950

The cornerstone of Canada's present combines legislation was laid by Parliament in 1889 when it passed an Act prohibiting conspiracies and combinations in restraint of trade. The legislation defined as unlawful any agreement to limit unduly facilities for transporting, producing, storing or selling any article, or to restrain commerce in it, or to unreasonably enhance its price. Also forbidden was any agreement to unduly prevent or lessen competition in relation to an article or to the price of insurance "upon persons or property". With some modification, these provisions were imported into the Criminal Code in 1892 as indictable offences,

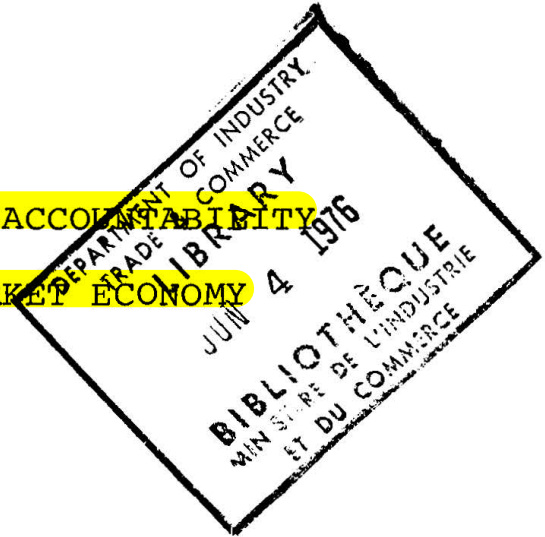
dynamic change and accountability in a canadian market economy

Found at **Tab H(10), Volume 9**
of Google's Motion Record.

Proposals for a Further Revision of Canadian
Competition Policy by an Independent Committee
Appointed by the Minister
of Consumer and Corporate Affairs

DYNAMIC CHANGE AND ACCOUNTABILITY

IN A CANADIAN MARKET ECONOMY



Proposals for the Further Revision of Canadian
Competition Policy by an Independent Committee
Appointed by the Minister of Consumer and Corporate
Affairs

BY

DR. LAWRENCE A. SKEOCH

with

BRUCE C. McDONALD

In Consultation With

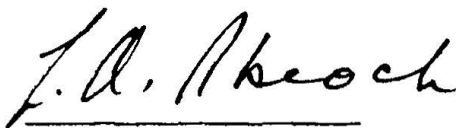
Mr. Michel Bélanger
Mr. Reuben M. Bromstein
Mr. William O. Twaits

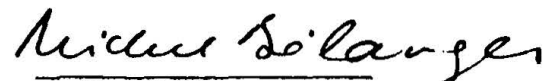
March 31, 1976

Minister of Consumer and
Corporate Affairs
Ottawa/Hull

Dear Sir:

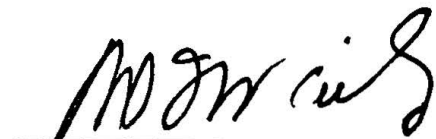
Your Committee, having completed its task of considering the Stage II Revision of the Combines legislation, submits herewith proposals for such further revision.


L.A. Skeoch


M. Bélanger


R. Bromstein


B.C. McDonald


W.O. Traits

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A Note on the Limitations of Using Criminal Law

Since 1889, when Parliament first enacted laws relating to conspiracy to restrain trade, the combines laws have taken the form of criminal prohibitions enforced by criminal penalties following trial according to criminal procedures. Resort to the criminal law was quite understandable in the circumstances of 1889, and the continued emphasis on criminal law since that time was considered desirable in view of certain constitutional law decisions. Virtually exclusive reliance on criminal law, however, has been increasingly and widely recognized as a serious obstacle to effective implementation of competition policy. Nor do many types of combines problems fit comfortably within the traditional function and requirements of criminal law. In result, combines law contains various substantive and procedural compromises that have been neither adequate from the point of view of effective competition policy nor desirable so far as the integrity of the criminal law is concerned. For these reasons, the proposals made in this report reflect the decision evident in the 1975 amendments to move away from exclusive reliance on criminal controls. Some new constitutional law questions may be raised in the process, but that is an inevitable consequence of the attempt to improve the effectiveness with which competition policy is implemented.

One of the central difficulties with using the criminal law in this field is that the function of criminal law and the purpose and capacity of the criminal sanction depend upon a substantive prohibition that is defined sufficiently precisely in advance that a person has fair notice, before engaging in the conduct, that it is against the law and the public interest for him to do so. Ideally a widely accepted moral disapproval of the conduct exists in addition to the specific prohibition. Competition law, however, cannot realistically

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define many undesirable events except in terms of their economic effect or likely economic effect. Mergers, uses of market power, and price differentials, for example, are desirable, inconsequential, or harmful only according to the market context in which they occur.

The growing complexity of the economy, and of economic analysis, has no doubt contributed significantly to the inability to frame many effective specific laws in this field. It has also contributed to the disappearance of much of the moral force underlying the original enactment of combines laws. The point is that there are situations where businessmen do things that, while they should be prohibited, nevertheless do not warrant the ignominy of criminal charge and conviction.

Not only is the exclusive use of criminal law in this field negative and confrontationist in approach and effect, but criminal procedures are slow, costly and procedurally cumbersome. The publicly imposed sanctions for breach of criminal laws are severe and the procedural safeguards to prevent unwarranted conviction are accordingly more stringent than the comparable safeguards in civil actions. In 1960, Parliament acknowledged the inadequacy of relying exclusively upon the regular criminal courts by conferring jurisdiction on the Exchequer Court (now the Federal Court) to try charges laid under the Combines Investigation Act. The constitutional basis claimed for the 1960 legislation was to help achieve the better administration of the laws of Canada. Perhaps it has helped but the Federal Court must still decide combines cases by applying criminal laws and procedures, and this limits the improvement that can be achieved.

The primary shortcoming of overemphasis on criminal law is the economic ineffectiveness of the judgment and remedy. It is too simplistic to conclude a lengthy investigation and hearing of a

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complex industrial situation with an all-or-nothing condemnation on the basis, frequently, of refined jurisprudential notions of agreement and intent that may be largely irrelevant to the businessman and economist. The judgment and remedy are usually (and properly, in the context of criminal law) backward-looking and behaviourally oriented, and pay little concern to fostering desirable market situations. They are, in short, largely unconstructive so far as the economy is concerned.

Criminal law does have a vital role to play in the total enforcement scheme but only in the limited sphere where it can be effective, namely, with respect to conduct that can be defined with a reasonably high degree of precision and that is generally agreed to be contrary to the public interest regardless of its more specific factual context. In those areas of deliberate deviance criminal penalties should be as severe as might be required to stamp out the practice. This may require jail sentences in appropriate cases.

The need to restrict criminal law to matters that can be reasonably precisely defined is underscored by the recent provision for civil damage actions in cases where criminal activity causes private injury, regardless of whether or not a criminal conviction has resulted.